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THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

HEARINGS

BEFORE THE

SPECIAL SUBCOMMITTEE ON
WAR POWERS

OF THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

JULY 13, 14, AUGUST 5, SEPTEMBER 7, 15, 16, 20, 23 AND 29, 1988

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THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

WEDNESDAY, JULY 13, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 9:30 a.m. in room SD-419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senators Pell, Sarbanes, Kerry, Simon, Adams, Moynihan, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, and McConnell.

The CHAIRMAN. The Committee on Foreign Relations will come to order.

Today our committee commences work on a project of real significance, an effort to evaluate and improve the War Powers Resolution of 1973. Congress passed this law 15 years ago in the hope of fostering constructive executive-legislative interaction in the decision to employ U.S. forces abroad.

Unfortunately, this intent has never been fulfilled. Indeed, from the moment of its enactment over President Nixon's veto, the resolution itself has been an object of dispute rather than an instrumentality of cooperation.

This past year's contentious debate over the Resolution's applicability to the U.S. presence in the Persian Gulf has served to underscore the irony that now surrounds this crucial law. For the motive behind the War Powers Resolution was a determination to establish a procedure that would ensure national unity.

The aim was to devise a mechanism, consistent with the Constitution, through which Congress and the President would act together in the momentous decision to commit U.S. forces to hostilities.

Critics of the War Powers Resolution continue to characterize it as an idiosyncratic product of its time, an effort to prevent another Vietnam. But that involves a distortion.

The War Powers Resolution was not intended to prevent the necessary use of American military power, but rather to prevent the commitment of power unaccompanied by careful analysis and the commitment of national will.

The framers of the Constitution intended that Congress be an active participant in the decision to commence hostilities. While the War Powers Resolution in its current form has failed, a way must be found to give modern meaning to constitutional intent.

Pursuant to this purpose, the committee last December authorized the establishment of a Special Subcommittee on War Powers. Today the subcommittee begins hearings that will provide for a full airing of the constitutional dimensions of the question, while considering practicalities as well as principles.

The chairman of the subcommittee is Senator Biden our colleague, who is completing recuperation from surgery and for whom I will sit in until he returns in a few weeks.

These hearings will extend through August and into September, and will involve former and present Government officials, including President Ford and a number of eminent constitutional scholars.

And now the subcommittee is pleased to be able to commence its hearings with testimony from four people who played a role in the genesis of the law we have set ourselves to evaluate.

Chairman Fascell and Congressman Broomfield have since assumed the leadership of the House Foreign Affairs Committee. Senators Eagleton and Mathias have retired and graduated to new careers. All four have records of distinguished service to our country, and the subcommittee is very pleased by their presence today.

I would ask Senator Pressler if he has an opening statement.

[The prepared statement of Senator Pell appears in the appendix.]

OPENING STATEMENT OF SENATOR PRESSLER

Senator **PRESSLER**. Thank you very much.

I am pleased to serve as the ranking member on the Republican side. This is the first, as you pointed out, in a lengthy series of hearings on the War Powers Resolution, often referred to as the War Powers Act. It has been a matter of major concern for the Congress over the past 15 years, and each time there is a new international crisis it is at the forefront. It may well be the subject of debate for the next 15 years.

The administration opposes this legislation on constitutional and practical grounds. I strongly support the administration's position.

Nevertheless, the reason we are meeting here this morning and listening to the testimony of these distinguished witnesses is the result of the continuing political controversy over that Resolution. It is a political statute, pure and simple.

We are inquiring not only into the nature and legality of the War Powers Resolution, but we are also examining the war power itself. Thus, we are exploring the isssue of the constitutional separation of powers at the very time we are celebrating the bicentennial anniversary of the U.S. Constitution.

This is a curious way to celebrate a document that is not only the world's oldest written constitution, but also has made our system of Government the political wonder of the world.

I have long been a critic of the War Powers Resolution. It is unconstitutional in law and politically unwise in fact. It has seriously strained the relationship between the executive branch and the legislative branch at a time and under circumstances when cooperation and not confrontation should be paramount for our own national interest.

I do not criticize, nor do I seek to undermine, the process of congressional oversight. The watchdog function of Congress with respect to the executive branch has been in place since the very first Congress.

The way the Constitution was written and the way it was originally intended was that each branch of Government keep an eye on the others. A cursory reading of the Federalist Papers, the best commentary ever written on the U.S. Constitution, reveals a serious concern by the framers over the potential abuse and misuse of power. James Madison warned specifically about that possibility in Federalist No. 48.

The founding fathers intentionally blurred the edges of the separation of powers doctrine, well realizing that complete separation might bring about stagnation and inflexibility. To quote the former Chief Justice of the United States, Warren Burger, in his majority opinion in the case of *Bowsher* v. *Synar, 1986*:

> That system of division and separation of powers produces conflicts, confusion, and discordance at times. But it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

The debate will be evident in the hearing that we are holding, but the current conflict between the legislative and the executive on who controls foreign policy is quite another matter.

The issue is well stated in the very first paragraph of the recommendations section of the Tower Commission Report of 1987:

> Whereas the ultimate power to formulate domestic policy resides in the Congress, the primary responsibility for the formulation and implementation of national security policy falls on the President.

It then goes on to say:

> It is the President who is the usual source of innovation and responsiveness in this field.

This means quite simply that in foreign policy the President leads. No one to my knowledge has maintained that the President absolutely controls. Congress has the explicit power under the Constitution to declare war. The President has the constitutional explicit power to defend the national security interests of the United States. I will have more to say about the Constitution's intentions and obligations at our next hearing tomorrow afternoon.

Only 2 weeks ago, the Chief Justice of the United States, William Rehnquist, wrote in his majority opinion in *Morrison* v. *Olson* that:

> Time and again we have reaffirmed the importance in our constitutional scheme of the separation of powers into the three coordinate branches.

This is why the Supreme Court has held the one-house veto to be unconstitutional in the *Bowsher* case and in *INS* v. *Chadha, 1983*. Indeed, several Justices in both cases have indicated that a two-house legislative veto is also of dubious constitutionality.

I believe without question that section 5(c) of the War Powers Resolution of 1973, providing for removal of U.S. forces from any theater of conflict, if Congress approves a concurrent resolution to that effect, is a clear violation of the presentment clause of the U.S. Constitution, found in article I, section 7, clause 3.

In conclusion, Mr. Chairman, I welcome these hearings as an opportunity to reacquaint ourselvs with the Constitution and with constitutional theory in this bicentennial anniversary year of the ratification of that great document.

It is particularly important, I believe, to get things straight in this Presidential election year. The great issues of war, peace, and national security should be debated in this Congress and in the public arena. That is what democracy is all about. When we do this, we demonstrate to the world the openness of our system and the strengths of the democratic process.

But debate is one thing. "Constitutional encroachment," as Madison warned, is quite another. I find myself in rare agreement, Mr. Chairman, with the distinguished speaker of the House when he wrote in another context:

> What people really mean when they say "the system is not working" is simply that they are not getting their way.

The Congress is trying too hard to get its way.

Congressman John Marshall declared on the floor of the House of Representatives at the beginning of the last century that "The President is the sole organ of the Nation in its external relations."

The future Chief Justice of the United States spoke clearly then, and his words should be equally clear today. Congress has the power to declare war. It has the power to support, or to withdraw support, from the Armed Forces of the United States.

The President is Commander in Chief, as laid out by the Constitution, and he is charged with defending the national security interests of the United States.

The War Powers Resolution was a legacy of the political turmoil caused by the Vietnam war, a war in which I served and which I still remember. But that war ended almost 15 years ago. It is time to set the ship of state back on course, and to discard the War Powers Act as a faded relic of that contentious era.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Pressler.

Senator Simon.

OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Thank you, Mr. Chairman. I am pleased these hearings are being held and I commend you for your leadership on this.

Just a couple of observations. One is the constitutional provision that we declare war is something that is probably never going to be used again. The formal declaration of war in the world in which we live is probably a thing of the past.

What can substitute for that in part is a genuine bipartisan foreign policy. Unfortunately, that has almost not existed in recent years. I think that has been one of the deficiencies of this administration.

The War Powers Act seems to me to be the sensible provision to provide restraint. But if the War Powers Act cannot be imposed, for example, in the Persian Gulf situation, I do not know where we will ever use the War Powers Act.

It clearly ought to be applicable to that situation. And so I hope out of these hearings we can find some mechanism that can provide the congressional restraint that was intended by those who wrote the Constitution.

And let me just add, Mr. Chairman, I welcome our first two witnesses. I remember being on a trip with Senator Mathias. He was reading a biography of Boswell. How many times have you been on a trip where a Member of Congress has been reading a biography of Boswell? He is a Jeffersonian-type, and we welcome him.

And Senator Eagleton of course has contributed also in a variety of ways. I remember when we had the unfortunate duty to consider an impeachment of a judge, and the best analysis by far was the statement by Senator Eagleton summing up where we were.

He does lack, Mr. Chairman, a sense of humor. But other than that, he has been an outstanding member in this body.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Sarbanes.

OPENING STATEMENT OF SENATOR SARBANES

Senator SARBANES. Thank you very much, Mr. Chairman.

I will not speak to the substance of our hearings at this time, but I simply want to underscore my delight in having two of our former colleagues, Senator Eagleton and Senator Mathias, here today to lead off our set of hearings.

I cannot imagine two better qualified people for us to hear from. The Nation has benefited greatly by their very able and distinguished public service over the years, and in particular their incisive work in this specific area. I look forward to hearing their testimony.

The CHAIRMAN. Thank you very much.

I would add here that this legislation that will be coming before us is before our committee. For example, Senate Joint Resolution 323, which is the War Powers Resolution introduced by Senators Byrd, Nunn, Warner, and Mitchell, and probably there will be other thoughts that we will be considering as we move along.

I would like to apologize, incidentally, to our visitors because this is going to be a rather sporadic, interrupted morning. We have a vote at 10 o'clock and then we have a caucus for Governor Dukakis at 11:45. So, there will be some moving back and forth.

Congressman Broomfield has indicated he will not be able to be with us, but his testimony will be included in the record in full.

And I would also say how much I, speaking as an individual, have missed Senators Eagleton and Mathias, and how much less agreeable a place the Senate is since their departure. And I only wish they were still here.

Senator Eagleton, would you care to lead off?

STATEMENT OF HON. THOMAS F. EAGLETON, FORMER U.S. SENATOR FROM MISSOURI

Senator EAGLETON. Thank you, Mr. Chairman. I am pleased to be invited here, and I ask unanimous consent that my full statement appear in the record as though read.

The CHAIRMAN. Without objection.

Senator **Eagleton**. I will try to summarize it in the interest of the time constraints. I will focus on the issues that are before the committee.

First, let me slightly disagree with Senator Simon. I am not so certain that a time will not be with us in the future—ouch, two negatives—when we will declare war or, at the very least, authorize the sending of American forces into areas where hostilities are either present or imminent.

We may want to have at the top of it "Declaration of War." We may want to say "Gulf of Tonkin Resolution" or "Persian Gulf Resolution." We may not like the phrase "Declaration of War." That might be too upsetting to the American people.

But the substantive thrust will be there.

Second, to Senator Pressler, I agree that it is important that this be raised, in a Presidential year. And as I followed the Presidential debates, never once during the debates were any of the candidates asked as to their position on the War Powers Act—never once.

Senator Simon can correct me if I am wrong, because he participated in many of those debates. The interviewers asked about what you felt about athlete's foot and everything conceivable under the sun, but never once did they ask the future President of the United States, would they obey the War Powers Act.

And I suggest that Senator Pressler for the Republicans and Senator Simon for the Democrats or Senator Sarbanes or Senator Pell, maybe today at the Democratic caucus, ask of the Presidential nominee for the Democrats, Governor Dukakis: "Sir, will you obey the War Powers Act?" And a similar question to Vice President Bush.

I think it would be an important issue.

All right, how did our country get in this mess? And we are in a mess. The War Powers Act as finally enacted was a mess. I am not pretending to be omniscient, but I voted against it. In essence, I voted against my own bill because it was a mess. Two conflicting war power theories went to conference and what emerged was a bastard child.

To Senator Javits, leading the Senate forces, this was going to be his memorial, his greatest bill in history. He went to conference with a bill that followed the Constitution and said the President can act on his own in such areas as self-defense, rescue of endangered nationals, forestalling attacks, et cetera, but absent that, if you were going to send American troops into hostilities, Congress had to authorize it.

That, in essence, was the Senate theory. The House theory, Clem Zablocki's theory, Congressman Fascell's theory, their theory was and is, the President knows best—the unconstitutional theory that the President always knows best—that the Founding Fathers did not know what they were doing when they said warmaking was to be a shared power. Clearly, the Founding Fathers did not want any more George the III's.

Nevertheless, today's House of Representatives thinks in this area you have got to have a George the III. And thus you had this clash of positions in conference and no way to meaningfully compromise. It is not like an appropriation bill, where one side votes $1 billion and the other side votes $2 billion and you cut it right down the middle, $1½ billion. Congress does that all the time.

These two theories were not capable of being compromised. Yet a compromise came out, and what was it? The nonbinding Senate statement of purpose, which is like a Kiwanis Club happy birthday resolution, was included. That was put in in just nice language to satisfy Senate doves like me.

But the operative sections, the sections with the meat, were the House sections, giving the President the unilateral right to wage war for up to 90 days.

Senator Russell once told me, my first months here, that he was not happy about Vietnam. "But," he said, "once the troops are committed the die is cast. The flag is there. You do not vote to bring back the flag when the boys are in the trenches."

And applying that to the conference bill, once the troops are committed for 90 days, either in Lebanon or in the Persian Gulf, you do not vote to take them back.

So, that is the bill that came back. Javits and I had a ferocious debate. We did not talk to each other for 6 months after the debate. Later we kissed and made up.

He felt, yes, we did it the House way, we gave in to this 90-day Presidential war; but "reasonable men will work it out," meaning a reasonable President and a reasonable Congress "will work it out."

I said, "No, Senator, it cannot work. You cannot give the President 90 days to wage unilateral war." And so what has happened is that every President has virtually ignored this act. Presidents hate Congress. Presidents view Congress as the enemy. Now that Gorbachev is our good friend, Congress is a worse enemy than Gorbachev.

I say that of all Presidents. Roosevelt called Congress "sonsofbitches." He ran it together in one word. To Harry Hopkins he would always say, "What did the sonsofbitches do today?"

Every President, Democrat or Republican, has felt that way. No President is going to consult with Congress. No President thinks Congress is worth consulting with. Congress is intrusive, Congress will leak it, Congress will mess it up.

And so we have a War Powers Act that doesn't work. Does Byrd-Warner-Nunn clean it up? No. Byrd-Warner-Nunn-Mitchell is a fig leaf. It's an absolute surrender and says, once again, the President does know best. It's unconstitutional on its face. You are giving to the President, under Byrd-Warner-Nunn, the war power on a platter. You are attempting to do it by statute. You simply can't do that under the Constitution. That's what Byrd-Warner-Nunn seeks to do.

So, my recommendation is either go back to the original Senate-passed bill, or the Senate committee draft bill No. 2 which is a polished-up version thereof. Or let the words of the Founding Fathers speak for themselves. Thank you.

[The prepared statement of Senator Eagleton appears in the appendix.]

The **Chairman**. Thank you very much for your very specific and pungent recommendations and thoughts. Senator Mathias.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., FORMER U.S. SENATOR FROM MARYLAND

Senator MATHIAS. As Senator Pressler has noted in his opening remarks, there has been a constitutional question raised about the War Powers Act. The administration says flatly it thinks the War Powers Act is unconstitutional. I think you can say a lot of things about it as Senator Eagleton has just said. You can say you think it's unsound, bad policy, that you disagree with it, but I do not think you say can it is unconstitutional.

People can say it is reckless because it gives the President power to act on his own initiative for a period of time. I personally think you have to give the President some power to act on his own initiative in cases of invasion of the United States; for example, encroachment on other serious interests to the United States wherever they may be located.

I think you can raise the question of the value of the War Powers Act. I personally have a little higher opinion of it than Senator Eagleton seems to. I think that it was effective in Lebanon. I think there were periods during the Lebanon action in which the administration was sorely tempted to increase the number of forces in the field.

The presence of the War Powers Act, the strengths of the War Powers Act operated to limit that tragedy to the dimensions that it happened, which were large enough, but would have been larger without the War Powers Act.

The very fact that the administration moaned and groaned, both in public and in private about the War Powers Act, about what a restraint it was, is evidence, is confirmation of the fact that the War Powers Act was effective in restraining an enlargement of the tragedy in Lebanon.

What you cannot say about the War Powers Act is that it is unconstitutional. Now Senator Eagleton said he would skip over the words of the Constitution, but I think although I am neither a strict constructionist nor a doctrinaire about original intent, I am enough of an old-fashioned lawyer to think that it is occasionally worthwhile to look at the law. The Constitution is so explicit. In article 1, section 8, and I would draw Senator Pressler's attention to that because he says that he wants to make this a special study during this year, the very first grant of war powers is not to the President. It is to the Congress. It says that Congress shall have power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

In modern parlance that is terrorism. It is saying to the Congress you have the power and of course with the power goes the duty to provide the policy to deal with terrorism.

If you go down into the further provisions of section 8, there is the power to declare war, the ultimate power of policy in matters of war and peace. But there is also the power, and extremely interesting power not much discussed these days, to grant letters of mark and reprisal and to make rules concerning capture on land and water.

Now if that means anything at all, and I think it does mean something, it means that the constitutional convention wanted the

Congress not only to have jurisdiction over the subject of general war, the declaration of war, the existence of the state of war, it also meant questions of limited war. I think the duty of the Congress extends to limited war situations such as Lebanon, such as the Persian Gulf, such as other situations of that sort that will arise in the future.

There is a provision in section 8 which gives the power to raise and support armies to the Congress, to maintain a navy, to make rules for the Government and regulations of the land and naval forces. So, this is much more than simply saying that Congress can authorize recruiting troops. It clearly is intended to have a role in the employment of those troops.

Section 9 of article 1 is the appropriations power. That deals the Congress in on everything that happens in the Government. In article 2 I think you have to reconcile the power of the President to be the Commander in Chief of the Army and the Navy, but that has to be taken together with the provisions of article 1 which provide for the Government of the military forces. If you put that together with the power of the Senate to ratify treaties, you have read comprehensively a very clear statement of the necessity for coordinated power which Senator Eagleton mentioned in his remarks.

The power of confirmation of officers. I remind the committee that includes not only Ambassadors who are examined before their confirmation in this committee, but military officers who are also examined, whose policies, whose views are very properly inquired into by the Senate.

All of this clearly makes it a point that the Constitution wants, mandates, a coordination of congressional and Presidential powers in matters of war and peace.

So, I think the Congress has a clear constitutional power and a clear constitutional duty to act. But the issue before this committee goes beyond a review of the history of the War Powers Act and a confirmation of its constitutionality. The committee must express its views on the purposed amendments to the Act that are genuine efforts to resolve some of the disputes that have arisen concerning it, and to lay to rest the constitutional objections raised against it.

As I read the amendments, however, the approach to the constitutional question is really one of avoidance. By repealing crucial language in the War Powers Act it is possible to reduce the area of conflict between the Executive and the legislative by failing to come to grips with the subject, and I believe that this would advocate a very clear responsibility imposed by the Constitution on the Congress and that that would be wrong.

An alternative would be to merely reduce the time allowed for the President to act on his own initiative to 30 days, which I think, Tom, was the time period originally approved by the Senate in the Senate passed bill.

If this amendment were to be adopted, it propels another vital question to the forefront of the debate and that is 30 days from when? It gets to the heart of the problem when a recalcitrant President will not voluntarily invoke the Act by submitting the report that it requires. The answer to this question should be one of the primary goals that the committee pursues in this series of hearings, the shaping of a solution that would gain Presidential approval, or which would at least survive a Presidential veto is the greatest contribution the committee could make.

I respectfully suggest that there is a duty as well as an opportunity to find the correct coordinated constitutional balance, which I must confess eluded us on our first attempt in drafting this legislation.

There is a caveat that I think has to be added in addressing the subject. The questions that hedge the basic issues of war and peace are among the most painful and fateful of all the dilemmas that human beings must confront. They are the questions that try our souls and that test our character, and the inevitably touch the raw edge of human nature and stimulate pride, envy, anger, and other less admirable emotions. There is no guarantee that any totally painless, effortless formula can be devised to lift such a burden from the shoulders of mankind.

By analogy I have always been skeptical about the attempts to devise mathematical equations that would automatically produce balanced budgets without either blame or sacrifice on the part of governors or governed.

The essential ingredients to success and political affairs are courage and commonsense on the part of men and women in trouble entrusted with power, and if they are missing there are no set of rules or guidelines, however clever or ingenious they may be, that will serve to save the state. Thank you, Mr. Chairman.

[The prepared statement of Senator Mathias appears in the appendix.]

Senator **Sarbanes** [presiding]. Thank you very much, Senator Mathias. I would observe to the members of the committee that a rollcall vote is now underway. Senator Pell went early in hopes of returning in time to continue the hearing without a break.

We are pleased that Congressman Fascell, the chairman of the House Foreign Affairs Committee, has joined us at the witness table, and we now look forward to hearing his statement. Before you begin, Congressman Fascell, because I have to depart for the vote, I just want to make a note for the record in light of Senator Eagleton's comments. I think it is fair for him to point out that the question of adherence to the War Powers Resolution was not an issue put to the candidates in the course of the debate, but I understand that Governor Dukakis has indicated on more than one occasion that he would observe the War Powers Resolution. I have before me a statement as prepared for delivery in Derry, NH, on February 14, 1988.

I will just quote a few lines from it.

> The next President must understand that the basis of America's strength lies in the American character. And that nowhere is the American character more clearly reflected than in our Constitution. The next President must share the task of governing this country not with gunrunners and mercenaries, but with the leaders of a Congress elected by the American people. For Congress is empowered by our laws and by our Constitution with the right to participate in the foreign policy decisions of our Government.

And a paragraph later he goes on to say:

> I will observe the War Powers Resolution * * *

And then elaborates on that a little bit. I thought it was important to clarify that for the record.

Senator **Eagleton**. Thank you.

Senator **Sarbanes**. Congressman Fascell, we would be happy to hear from you.

STATEMENT BY HON. DANTE B. FASCELL, U.S. REPRESENTATIVE FROM FLORIDA

Mr. **Fascell**. I have a detailed statement with attachments which I would like to put in the record at this point and then proceed extemporaneously for a minute or two.

Senator **Sarbanes**. Without objection, the entire statement will be included in the record.

Mr. **Fascell**. I am pleased to have the privilege to appear with my distinguished colleagues on this panel on the Special Subcommittee on War Powers and to say it is obvious we consider it a very important work that you are undertaking.

I just want to emphasize a few points. The key question is, does the War Powers Act work? Mr. Chairman, you just have proven that it does. The Presidential nominee of the Democratic party says he will follow the War Powers Act. I dare say that is probably the first time a President will make that statement, and it is about time.

Regardless of what one may think of the Act or its efficacy or its constitutionality, the President has to balance off a lot of constitutional powers, not the least of which is the responsibility to faithfully execute the law. This is the law of the land. It was passed over the President's veto. He has a right to question it, of course, and we always have that confrontation between the Executive and the legislative branch on these issues. I would hope that it never gets to the Supreme Court for determination. I do not think that is what the Founding Fathers had in mind in the separation of powers and the enumeration of powers in the Constitution.

I think they had in mind exactly what has been happening in the last couple hundred years or so. One of the powers that they were expressly, seriously, very much concerned about—and which we are today, because we have not solved the problem and I am not sure it is solvable in the neat package sense, either quantitatively, qualitatively, numerically, or constitutionally, because I think it was solved by the Founding Fathers—is how does this country go to war? Who makes the commitment of the sovereignty, the might, the dignity of this Nation, and who commits its men and women to the privilege of dying for the right?

I do not think the Constitution is obscure on that point at all. We have shared responsibility pure and simple. We all lived through those days and they seemed interminable. One party or the other, and I won't say which one, although I happen to be a member of the Democratic party, was constantly flaunted and beat around the head and body with the proposition that a strong President would take the country to war without Congress declaring the war as the Constitution provided.

I must say that we all danced around that problem for a long time. And it is true. A strong President can grab the reins, can do the things that he wants to do. Congress can rubberstamp, can accept tacitly, can argue about it. The American people basically can either accept or deny, but if we wanted to test the constitutionality of the issue, the only way we could do it are two real ways and they do not change. One is impeach the President, and the other is to cut off the money.

Both of those are very difficult tools to use, although they have been used. Because of the gray areas that developed right from the very beginning of our Nation on the question of how you go to war and how you share the responsibility for this major decision of any people, we adopted procedures if you will and they seem logical as long as they are acceptable.

Now if they are not, then you have a problem. The President has the right to protect American lives. We have accepted—although it is not written anywhere—that he can go to war for that purpose without the Congress acting, or has the right as Commander in Chief to protect the troops at any time in self defense. Whether it is considered an act of war or not is immaterial. You have the right to defend yourself. So, you shoot to defend yourself. Certainly an act of war.

If you invade another country, regardless of the reason you invade it, it is an act of war and that raises the question, where was the Congress on this? Obviously you can either approve it ahead of time or you can ratify it tacitly, or you can ratify it explicitly after the fact and we have done both. We and the Congress have done both.

Does that satisfy everything? The answer is no it does not satisfy everything. The President has an awesome responsibility, but I submit to you, Mr. Chairman, we have an awesome responsibility, too, and we ought not to duck it because we say that the law we passed in some way is not absolutely perfect. I dare say that I do not know of any law that is, although I would be ready to hang my hat on the Constitution which is as good as anything any of us have ever seen.

I think that the War Powers Act has worked, Mr. Chairman. That is the whole point. Here you have a major contender for the Presidency of the United States saying he will abide by the law. Hallelujah. We need everybody to make that kind of a statement, and if we do not like the law, then let us set about changing it in a democratic process. And here I am not suggesting an amendment to the Constitution. I don't think we ought to tamper with that.

What did we do here with War Powers? Let us look at where we were before we had the War Powers Act. The Gulf of Tonkin Resolution was that a declaration of war? It certainly was, Mr. Chairman. It had everything in that resolution to empower the President under the Constitution except the formal words, "We do hereby declare war, the people of the United States."

If we could have figured out who we were declaring war against, I dare say we would have written it in that resolution, and that is not the only resolution in which Congress has acted to carry out its constitutional responsibility to empower the President to take hostile action against another country. We wrote it into the Cuba resolution. We have written it in other resolutions, but we were dealing with that problem plus the problem of consultation. Have we had consultation? The answer is "Yes." Can you improve consultation? The answer is "Yes." Did you have more consultation after the War Powers Act than you had before? I think we can make a good case for "Yes."

The reports that are required is a form of consultation. It was an effort in the War Powers Act to institutionalize the process by which the President and the Congress interact on the decisionmaking power, or the decision that was already taken.

What do we have? So far as I know, on the 18 reports that have been submitted every President denies they were submitted pursuant to the War Powers Act. It is not "pursuant to"—I have forgotten the exact language they use—but they don't invoke the War Powers Act because they don't want the trigger to run. But the report is there. We at least got that far.

We have seen disengagement, a withdrawal of American troops from hostilities within the 60 days obviating the need, therefore, for specific statutory authorization.

We have seen specific statutory authorization where the President and the Congress came together, whether it was pursuant to the War Powers Act, or to avoid the War Powers Act, or just simply to come together because it was the smart thing to do. We did come together. So, you had specific authorization in the Lebanon case, and I dare say you might not have had that if the War Powers Act had not been on the books.

What is the real question? The real question is we are not dealing here in the constitutional vacuum. We are not dealing here in some legalistic abstract discussion about the powers of the Constitution. We have a real constitutional question and scholars will argue forever about the respective powers of the President, implied and expressed, the delegated powers to the Congress, implied and expressed, and the precedents that have grown up over 200 years. All of that is legitimate.

What is the practical effect? The practical effect is that whether the President likes the War Powers Act or not he is always thinking about it. It is right there. I should submit this report. I do not want to do it pursuant to the War Powers Act because that will trigger the safety days, but I better submit the report anyway. Why? Because it is politic, and it also is not a clear violation of my constitutional responsibility to faithfully execute the law because I am going to argue that the law is unconstitutional.

You say well this evasive process proves that the War Powers Act is inconsequential. It is meaningless and, therefore, should be repealed. I take exactly the opposite view. The practical impact of it is that we have forced upon the consciousness of the administration the whole question that the President cannot totally disregard it. He has to pay some political consequence. The issue is not just constitutional. The issue is not simply a question of whether the law is executed. The issue is basically, as our Founding Fathers saw it, is a political issue, and that political issue is that you cannot take this country to war for very long without the full broad base support in the Congress of the United States, and without the full and broad base support of the American people. The War Powers Act gives us the opportunity to raise those issues every time that happens.

We all know from a basic fundamental point, Mr. Chairman, that no law by itself will change the Constitution. We didn't try to do that in the War Powers Act. We were very careful not to do it. The reason I did not support my distinguished colleague's specific enumeration in the original Senate version is because I did not want to foul up what I figured was a broad-based grant of authority under the Constitution, and I did not want to make it specific in some way, even though I go with the proposition you cannot amend the Constitution so it would not have made any difference anyway.

I just thought for esthetics and clarity we ought not to enumerate the specific exceptions, and I still don't think we ought to do that. I think it would be a mistake. Let us fight it out where it belongs to be fought out, right here in the Congress of the United States.

Let us use for the basis of that discussion and that struggle an additional tool which we did not have up until the War Powers Act was enacted and that is the War Powers Act. Give us the additional handle by which we can question the actions of the President. Give us another statute if you will, because the tendency in the past was either simply go along or try to take on one of the major fights that you have to take on in a constitutional confrontation which is to either impeach a President or cut off his money as we did in Vietnam.

The trigger is still there, Mr. Chairman, members of the committee. The incursion into Cambodia was an act of war on another country that wasn't covered under anything, and I am not sure even under any exception could you have included that. It certainly got to me. I said if I am going to be in the Congress, I want the right to exercise my responsibility as a member of this body representing the American people who have a right to discuss and argue and have a vote on the question of whether the United States of America is going to war against any country. And so the War Powers Act came into being and I was delighted to be one of the early sponsors in the House on the War Powers Act.

I think it is wise to look at amendments. Nothing is ever perfect. I think we need to be very careful about what we do and how we do it. I think the one thing we need to do is improve our consultation. We have all fussed and fumed about the fact that we in the Congress, the House and the Senate, ought to have a better opportunity on the policy decisions that lead to the question of whether or not you are going to be in hostilities, war, or whatever we want to call it.

We have had trouble with that. For a long time I have been plugging for the concept that we institutionalized the leadership of the House and the Senate, the ranking and major members of the appropriate committees, Appropriations, Armed Services, Intelligence, Foreign Affairs, Foreign Relations, 18 people at the most, to consult on a regular basis with high administration officials—maybe NSC, maybe others, it depends—and that we do that not on a crisis basis, but before we ever get to the crises.

We all know for the virtue of our experience here and certainly downtown, you can see the crises almost coming. We know for sure every day when you wake up there is another one someplace else. We can review those on a regular basis. We should do that. We should talk. We should understand the options. We in the Congress ought to have some input, not that we are going to tell the President what to do but he has the benefit of that advice. There is a lot of counsel in this body over a long period of years that would be useful to a President that goes beyond the NSC, beyond the Cabinet so that we are not confronted with the crash landings, leaving Congress to join in and pick up the pieces. Get in there in advance, have a consultative process that discusses options, potential crises, allow for input, and give the President that advice. He ultimately makes the decision.

I think the country would be far better off. We would have solved one of our major problems and we do not need to do that legislatively. I think maybe that would be a mistake. I think the President, any President, has to reach out his arms to the Congress of the United States and say, "I am working with you, especially in this area, but on all areas, but especially on the question of war and I want a bipartisan foreign policy."

That is the only way it is ever going to be forged, and the secret of that is early, consistent consultation on the problems that confront the country. Not all the wisdom in the world resides in either the executive branch or the Congress.

The Founding Fathers saw it as a partnership and a partnership it still is today, even though it is at arm's length, Mr. Chairman.

I welcome the hearings that you are having on the War Powers Act. I think it is extremely useful to review both the history, the application and the future of the War Powers Act, but I am against repealing it. I am against getting too specific with respect to enumeration of powers, for example, to try to legislate the exceptions that have grown up. I am more for leaving it in the political arena and let us debate it and fight it out in an orderly process. Thank you very much, Mr. Chairman.

[Prepared statement of Representative Fascell appears in the appendix.]

The CHAIRMAN [presiding]. Thank you very much indeed, Congressman Fascell. I think the phrase President Reagan used was consistent with the War Powers Act.

Mr. FASCELL. Thank you. I could not think of that word, "consistent," Mr. Chairman. It has eluded me for a few years.

[Laughter.]

The CHAIRMAN. I would suggest that we have an 8-minute limit because we are going to have to quit, as I said earlier, a little before 11:45. In addition to that, we want to go into a business session when we get a quorum, 10 bodies. We may not get it, in which case we will go on with this hearing.

I have one basic question. Thus to go back 15 years and ask Congressman Fascell and the Senators why is it that in the conference the House version prevailed?

Senator EAGLETON. I was not a conferee, but I daily talked with Senator Javits. Frequently he said, "I will never give up on this issue." The House at one time had a 120-day unilateral warmaking for the President. The House basically believes in unilateral Presidential warmaking, with all due respect, Chairman Fascell.

Javits said, "I will never give up on this issue." One day he came back from conference and there was no communication from Senator Javits. My staff said this is the first day we have not gotten a phone call from Javits' staff person. I said that was curious.

Later we were informed that Senator Javits had agreed to this 60-plus-30-equals-90 unilateral warmaking gimmick. That is when Senator Javits and I fell out. Why did the Senate cave? Senator Javits of the Senate conferees was the only one genuinely interested in the details of the bill. Ed Muskie on the Democratic side handled it, thought it was an interesting sort of a thing, but it was Javits' game. The details were left to Javits.

It is peculiar that a minority Republican Senator would so dominate such a policy determination, but Senator Javits was a very dominating personality, a brilliant man.

Representatives Zablocki and Fascell would not surrender. They were entrenched, and in order to get a bill called the War Powers Act their will would prevail. Bear in mind this was the only time in history we could have gotten such a bill because we were at the end of that horrible war in Vietnam and because there was in office a beleaguered President that we can clobber.

I went to my friend Gaylord Nelson and I said, "Gaylord, you can't vote for this 90-day unilateral warmaking. It is probably unconstitutional." He said, "Tom, I love the Constitution, but I hate Nixon more." [Laughter.]

We were rolling over Nixon. This was the one time in history the Congress could prevail. But, sadly, what we got under the heading war powers is this fiasco where there has been no consultation with and no participation by the Congress. There only has been notification. Margaret Thatcher knows more about what we are going to do anywhere in the world than Congress does. She knows everything in advance. Congress knows nothing. Congress was notified after the fact that President Reagan had bombed Lybia. You were told when it was all over.

In the Lebanon case, wasn't that beautiful. Congress gave President Reagan 18 months to wage war. Congress didn't want to keep its hands on that. Congress gave him 18 months. It was only a few weeks later that the mad bomber went through the gates and then the President made a political decision to withdraw troops.

Congress did not want to keep close reign on that war. I remember sitting in the cloakroom. A couple of my colleagues said, "Jesus, Reagan's fingerprints are all over it. Let's not get ours all over it."

The CHAIRMAN. My recollection is that an amendment of mine calling for a withdrawal in a 6-month period was passed in the committee.

Senator EAGLETON. Committee, but I don't think it was passed on the floor.

The CHAIRMAN. I'm sorry. I have been corrected. It was defeated.

Senator EAGLETON. Ultimately, we got a bill because they were strong and powerful and adamant on the House side and the Senate caved.

Mr. FASCELL. Would the gentleman yield and just add the word "persuasive"?

Senator MATHIAS. It is not precisely responsive to your question but when the Lebanon case came up I agree with Chairman Fascell. The War Powers Act was important in Lebanon, and it was important because of the features of the War Powers Act which prevented the enlargement of the commitment and that is where the shoe fell on the Lebanon action. It did prevent the escalation of Lebanon, which I am convinced would have taken place except for the War Powers Act.

Senator ADAMS. I do not want to interrupt you, but there are five of us who are here that voted for that War Powers Resolution at that time, three sitting there, you and me. And I cannot remember what my other colleagues did.

I just want to say, I have had some bad experiences with that Resolution this year, but we have got to have a process that works. The process right now is a choice between pulling people out in the 48 hours as a Commander in Chief or declarations of war that do not happen any more.

The Congress is supposed to decide whether or not this Nation goes to war. But, we listened to Johnson for years and we never called that a war. And when I go on the floor and say that there are hostilities in the Persian Gulf and it is voted down by 35 votes, while combat operations are being conducted.

I have an awful hard time explaining that.

Thank you, Mr. Chairman.

The CHAIRMAN. Your time will come shortly.

I yield 8 minutes to Senator Kassebaum.

Senator KASSEBAUM. And I will yield first to Senator Evans. He was here before I was.

The CHAIRMAN. Senator Evans.

Senator EVANS. First, it is a delight to see the two of you. My temptation is to ask the distinguished Senator, the former Senators from Missouri and Maryland, if there truly is life after the Senate. But it is obvious from looking at both of you that there is indeed a pleasant life after the Senate.

Senator Mathias, I think in your testimony—and unfortunately, we were interrupted, as we so often are, by votes on the floor—you said it was clear that the War Powers Act was constitutional, if I am not mistaken. Would that include the concurrent resolution element of the War Powers Act, which some have suggested clearly falls within the *Chadha* decision?

Senator MATHIAS. I think you can raise a question about that because of the subsequent decisions of the Supreme Court. But I think the main thrust of the War Powers Act is clearly constitutional.

I think, as Chairman Fascell has very eloquently said, what the Constitution mandates is congressional policymaking. And whether it is the general power to declare war, whether it is a limited war power under the letters of marque provision, or whether it is terrorism under felonies and piracies on the high seas, these are specific delegated powers given to the Congress.

And it simply boggles the mind that people can raise constitutional questions about the power of Congress to legislate in this field.

Now, the details I think obviously are subject to some adjustment, some refinement. But the main thrust I have no doubt about.

Senator EVANS. But is that not the key element of the War Powers Act that gives Congress in essence a final say? The rest of it is notification, and beyond that what do you really have that gives Congress a true voice?

Senator **Mathias**. I think what the War Powers Act is intended to do, and I think there is more ways than one to do this, and that was the reason I proposed that the series of hearings examine that very question and look at the provisions of the Act and try to work out a more acceptable provision for enforcing the provisions.

But I think you can lay it down as law which the President is subject to that he is required to take certain steps and to enter into certain consultations. And that is the important part, and I think that is what Chairman Fascell has emphasized.

And what we are doing is drawing the President into consultations and resulting in a coordinating policy, which is the whole object of the Constitution.

Senator **Evans**. Would you say to the degree an act were to be modified and any element of it were to include as the final power of the Congress to influence Presidential action something akin to the concurrent resolution, in your view in order to make it clearly constitutional would it have to be in the nature of a joint resolution submitted to the President for his veto and subjected to a veto override?

Senator **Mathias**. That is the crucial question. If you go to the joint resolution route, then you are really talking about a two-thirds majority in the Congress, two-thirds majority in each House, because you have to have the ability to override.

You are going to call before this committee a whole array of constitutional scholars and constitutional lawyers. I hope that you will ask them these very questions, because I think that is the crucial decision that needs to be made at this time.

Senator **Evans**. Is that not the nature of all of the acts Congress passes? They in essence have to have a two-thirds majority if the President insists?

Senator **Mathias**. But there are, as in the Lebanon case, other features to the War Powers Act that ought not to be overlooked. This question of escalation is a very important one. That does not require any further congressional action.

That is a prohibition on the President, and the administration took it seriously. I think in the Lebanon situation they went to the brink. I think they, by having the *New Jersey* shell the coast and other things of that sort, they did escalate in effect. But they did not take the ultimate step, which would have increased the tragedy, of putting more troops on the beach there.

And I think we can thank the War Powers Act for that fact.

Senator **Evans**. Senator Eagleton, unfortunately, as I came part way through your testimony, was it your suggestion that we repeal the War Powers Act?

Senator **Eagleton**. I say some things tongue in cheek. I am trying to dramatize how hopeless the Act has been under a whole series of Presidents, Democratic and Republican. I am now told that a President Dukakis will obey it. I presume a President Bush will not.

So, we will have to see how that is resolved at the polls.

The War Powers Act has not accomplished what these fine gentlemen think it has. In fact, it has engendered disrespect for the law. To me it is akin to prohibition. The President runs around ignoring it, sending up his little notes about a war saying, "Dear Chairman Fascell, by the way we are in a war in the Persian Gulf, but not under the War Powers Act, hope you follow it in the Washington Post, we will keep you posted."

That is about the way it goes. That is disrespect for the law.

Senator EVANS. I understand. I think I have some sympathy for that view.

If you were to wipe out the War Powers Act as it now stands, and I am sure you have no quarrel at all with the concept that Congress does have a role to play in declaration of war or entering into hostility——

Senator EAGLETON. If we were to wipe it out—I repeat I was saying it sort of tongue in cheek. If we were to wipe it out, that would be construed as legislative history that we were giving it all back to the President.

Senator EVANS. But if we were to wipe it out, would you substitute then for it some other elements, and what would they be?

Senator EAGLETON. I recommend the Senate Foreign Relations Committee draft NO. 2 of July 1977, which is the original Senate war powers bill, as significantly refined by this committee 10 years ago.

It basically gets back to that which Chairman Fascell does not like. It does enumerate the constitutional powers that the President has. I see nothing wrong with saying what he has and not giving him any more.

Senator EVANS. Chairman Fascell, why not?

Mr. FASCELL. You can define a word in the Constitution, I suppose, any way you want to. The Constitution says "war" and if you legislate a definition, have you improved the situation in any way? I think not.

I think the Founding Fathers left that right where it is supposed to be in the political arena, not the judicial arena. And the concept was not to give the sole power to the President. That was never the concept.

So, I do not see why we are fuming and fussing about that. Now, you want to change the Constitution, that is different. Submit it to the American people and let them make the decision as to whether or not the President should have the full power at any time, under any conditions, under certain conditions, to take this country into war and just bypass the Congress of the United States.

That is the real issue. That is a practical one. And we have found a somewhat practical solution to a difficult problem. We have tried to institutionalize and legislate the gray area without being too specific.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I am glad that our former colleague Tom Eagleton has withdrawn a little bit from that repeal. I think that would send absolutely the wrong message.

The question is how do you make the War Powers Act really effective, because there is no question it was designed specifically for the kind of situation we are in right now in the Persian Gulf. And if it is not meaningful there, you can almost forget it.

I am just starting to read the original Senate bill. Included in the language of the original Senate bill is this language: "That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States."

I think that is pretty healthy language that we ought to be getting back into the War Powers Act.

What would be—and I ask this of all three of you—what would be wrong with authorizing the President to use American troops for 72 hours? Because I do agree with Senator Mathias' point that emergencies arise where the President is going to have to use this authority—72 hours and then there has to be consultation; then there has to be an automatic vote by the Congress—shall the War Powers Act be invoked.

And then if the President does not comply within a specified period of time, all funds are cut off. I am just brainstorming here.

How would you put some teeth into this thing?

Senator EAGLETON. Is the vote by concurrent resolution or by joint resolution? We are back to the *Chadha* question. The two-thirds vote thing under your hypothetical, that is a sticky wicket.

How do you force a President to do what a law says, that is consult? And "consult" is not a mysterious word. It is in Webster's dictionary, "to seek the advice of, or to counsel with" or whatever.

It is not a very mysterious word. And how do you force the President, (a) to consult, and (b) when he is in the hostilities to trigger the substantive sections of the law.

Everybody knows we are in a war in the Persian Gulf. But how do you force a President to obey the law? He takes that oath to faithfully execute the laws. We all took a similar oath. But he will not obey it.

And you can write all the language you want, Senator Simon, saying he should obey the law, but if he won't obey it, where are you?

Senator SIMON. What if we provide that all funds are going to be cut off?

Senator EAGLETON. If you have automatic funds cutoff, you are going to have to vote it. Is it vetoable? It would have to be. If it is, then we have the two-thirds vote barrier.

Senator SIMON. If there is a funds cutoff, then it takes a favorable vote of Congress to provide funds.

Senator EAGLETON. That is one of the issues that is raised with the present act.

Senator MATHIAS. Mr. Chairman, I think this gets back to Senator Evans question on *Chadha*. I think 72 hours personally is too short a time. As I said earlier, I would go for 30 days. But then what happens at the 30-day point?

Here is where there is some doubt and why I suggest this committee make a serious study with the constitutional scholars that you are going to call before you. The *Chadha* decision refers to the revocation of a delegation of power to the President.

That is not precisely the case in the War Powers Act. The War Powers Act does not delegate any power to the President. Therefore, it is not clear that the *Chadha* decision does invalidate the

War Powers Act, because the War Powers Act is talking about the affirmative support of Congress which is necessary for a declaration of war, and that could be viewed as a very different subject.

I think it could be one of the real contributions that this series of hearings makes to the whole subject, and one of the serious purposes.

Senator EAGLETON. How do you force the President to trigger the clock, whether it is a 90-day clock, a 30-day clock, or a 72-hour clock? What are the mechanics of making him turn it on?

Mr. FASCELL. Congress adopts a resolution.

Senator SIMON. Somehow it seems to me there has to be a very clearcut kind of decision by Congress.

Mr. FASCELL. Can I address that for just a moment on a practical kind of aspect? Suppose you have an automatic cutoff. Which funds are you talking about? Previously appropriated funds available to the President, or funds that have not been appropriated yet?

Now, if you are talking about previously appropriated funds, which is the logical thing that we would be talking about, and the President decides to use them anyway, you have just got another constitutional question. If the President is committed to this, it is just one more law that he must faithfully execute.

You see, you have not added anything, because the only way you are going to reach that President is for the Congress subsequently not to give him any more money, to pass a resolution taking the money back. And I do not know how you do that, but I have heard it has been done.

Some people have advocated, for example, withdrawing the pipeline from the Department of Defense. I do not advocate that. I think it would be a mistake, to start from scratch with appropriations.

Or the Congress just simply passes a resolution with respect to the action. We have that capability right now with the Persian Gulf. If it is "an undeclared war," Congress has the right, the power, the authority, maybe even the responsibility, to go out and declare the war if it wants to, or say it is not a war and withdraw our support.

Now, we have not done that. Whatever right the President has exercised, whether it is under the Constitution or outside the Constitution, is really immaterial. The fact is that he has used his power to do what we are doing for purposes that he thinks are absolutely essential for the security of the country.

Senator SIMON. If I may take 30 more seconds here, Mr. Chairman. I think what we come up with has to be just crystal clear. When, Senator Mathias, you talked about the Constitution, every once in a while it is good to go back and read it. And it really is clear that Congress was given this power.

And it is interesting, if I may add this note, the Constitution was written by a nonlawyer, James Madison. And I think one of the reasons we have a Constitution that has survived so well and so long is it was written by someone who did not get into all kinds of nitpicking details.

The CHAIRMAN. Thank you very much.

Senator Pressler.

Senator PRESSLER. Thank you, Mr. Chairman.

We are very fortunate to have these three eloquent witnesses. I am more in agreement with the results, the end result that Senator Eagleton suggests, although perhaps for different reasons, because I think we should either repeal the Act or have it declared unconstitutional.

I would like to address a question to Senator Mathias, if I may. Earlier he cited section 10 of the first article of the Constitution regarding punishing piracies. Now, how did the President and the Congress manage to deal with punishing pirates without the War Powers Act?

Senator MATHIAS. What I am saying is, Senator Pressler, that I think by conveying, by mandating the Congress the authority to deal with piracy, which we would call terrorism in modern terms, or by giving Congress the power to lay down the policy for limited warfare, by issuing letters of marque and reprisal, making rules for captures on land and water, the Congress has the power, and with the power I think goes the duty, to make policy in these areas—precisely what was done in the War Powers Act, to make policy, to say how are we going to do something, to lay out the blueprint for how we approach these difficult international situations which may be below the level of general war, but which involve the United States in hostilities of some form.

That is the power and that is the duty of Congress, and I think that is what the Congress attempted to do in the War Powers Act. Maybe it was not done perfectly, and every human act is subject to some perfection with experience. And this is the point at which I think you should apply that experience.

Senator PRESSLER. I see. So, you see the War Powers Act following the piracy clause?

Senator MATHIAS. That and the other provisions of the Constitution. You have to read the Constitution en bloc. You just cannot take a particular part. But it all goes together to lay out a pattern by which the Congress is given the power and the duty to provide the policy in these situations.

Senator PRESSLER. I am in very respectful disagreement with your contention that, because it is listed first—of course, the first clause lists the Congress' powers, and the second clause the President's, and the third the courts—it is more important.

I would not put the same weight on that. Now, let me——

The CHAIRMAN. If you will forgive me, I must interrupt because there has been an objection to the business meeting after 11 o'clock. So, we have 5 minutes.

Senator PRESSLER. Right at the beginning of my killer question.

[Recess.]

Senator PRESSLER. I might address this to all three of you, to anyone who wants to take it.

In the presentment clause of the Constitution, it says that a resolution must be signed by the President. Do any of the three of you want to comment on that point?

Under the War Powers Act, a resolution theoretically would not have to be signed by the President. There would be no veto. Is there any other type of legislation that would be analogous to that?

Senator EAGLETON. I do not know of one.

Senator PRESSLER. Does this not fly in the face of the Constitution, then, that the President does not have the opportunity to exercise his right of disapproval?

Senator EAGLETON. Professors from whom you will hear later make a strong argument that the *Chadha* case does not apply to the War Powers Act.

I would rather you hear it from them than me.

Senator PRESSLER. I think it is important.

Senator BOSCHWITZ. May I, with your permission, Mr. Chairman, proceed for 30 seconds about Mr. Bergold?

The CHAIRMAN. OK.

Senator BOSCHWITZ. I want to get back to the Agriculture Committee.

The CHAIRMAN. Right.

Senator BOSCHWITZ. Mr. Chairman, I just want to make clear that I have put a hold on Mr. Bergold, who is to be the Ambassador to the Kingdom of Morocco. And it is not on a substantive basis, it is not on a policy basis. It is just on the basis of a number of reports that I have received about administrative ability and so forth.

We think we can check these out. It is not my desire to hold him up. I would hope that we can look at him together with staff from your side, Mr. Chairman, and we will do so expeditiously.

Senator SARBANES. Mr. Chairman, could I speak to that? There appear to be only vague shadows and rumors out there, and if someone has any concrete information they ought to come forward with it.

Senator BOSCHWITZ. I understand.

Senator SARBANES. Bring them to the committee. We are having trouble finding anyone willing to actually put something on record.

Now, I do not know how long we are going to hold up the nomination on this basis, but if there is something we should know about, we should get someone to bring it forward.

Senator BOSCHWITZ. We will do that.

Senator SARBANES. Following the previous discussion I had with the Senator, we tried to do that. We cannot allow people to hold up a nomination by whispering in the shadows without presenting anything for the record if we are going to be fair to these nominees.

Senator BOSCHWITZ. I think that we have made some progress, and the Senator from Maryland knows that these matters are not always so clearcut to bring forward. So, if he will be patient, and I know that he will be cooperative, we will be able to bring this to a speedy conclusion.

I do not know the gentleman, so I have no personal animus or anything else on this matter. I just am reflecting what I think have been some responsible criticisms, and so that is why I make the statement.

I thank the chairman.

Senator SARBANES. I just want to say to the Senator that, following our previous discussion, we tried to elicit whatever these allegations are and as yet no one has actually come forward to put them before us. It is hard to deal with them under that circumstance.

Senator BOSCHWITZ. The Senator has said that and, as I have responded, it is sometimes difficult to get things that are said confidentially, to get them out in the open. And if we cannot, we will not continue our hold, and then we will just proceed. And if there is no substance to them, we are certainly not going to stand in the way of this gentleman.

And we encountered a little problem, very frankly, from the other side of the aisle initially, and now that has been clarified and we can move forward more rapidly.

The CHAIRMAN. Thank you very much.

Senator Pressler.

Senator PRESSLER. I may have some questions on the constitutionality issue. I think we have covered that to some extent. But let me ask each of the three of you your specific legislative recommendations. As I understand it, at the end of these hearings we will be taking up the Byrd-Warner-Nunn legislation, and I know that Senator Eagleton has stated a position.

What do each of the three of you recommend? If you have already stated your recommendations in your opening hearing, I apologize. I was out voting during your testimony, Congressman. Does each of you have a specific legislative amendment that you would suggest to the War Powers Act?

Mr. FASCELL. I have none.

Senator PRESSLER. You would leave it the same and enforce it?

Mr. FASCELL. Yes. I think we have done what we set out to do with war powers. You know, it is the practical side of it that I am looking at. I love the constitutional arguments and I could argue, I suppose, as well with lawyers all over about that.

And I think it is important, so I do not mean to demean the necessity for the review and the discussion. But the practical aspects of what we are looking at is that in Grenada on the 59th day the President, for whatever reason, withdrew our forces. That is what I am talking about.

And I agree with Senator Mathias.

Senator PRESSLER. You think it is working?

Mr. FASCELL. Well, nothing is perfect. But the Founding Fathers saw this arm's-length necessity in our system on the powers of the President and the responsibilities of the Congress. And I am not about to improve on that system.

And if you start out with the simple assumption that there is no law that can amend the Constitution except in the prescribed course of events, then I think you have less to worry about.

But I do agree with Senator Mathias, here the question of delegation does not arise, as it did in the *Chadha* case. So, there is a very real reason to be able to say that Congress, with regard to its own powers, can decide in what form it will deal with its own powers, and maybe hold up against the presentment clause of the Constitution. I do not know.

I have no quarrel, however, with the idea that Congress can act any time it wants to as long as it follows the constitutional process. If we do not like what is going on in the Persian Gulf, all somebody has to do is get enough votes to pass a resolution or a joint resolution and send it to the President and test the process.

We are in the political domain. I do not see why we should send this matter to the Supreme Court, for example, to have them decide on what is fundamentally a political process and a political decision.

Senator **Pressler**. Senator Eagleton, would you have us repeal the Act and start over?

Senator **Eagleton**. No, not really; that was mostly as an attention grabber, Senator.

On page 7 I say:

> I would go back to the original Senate war powers bill, the one that went to conference, but it has been refined by the Senate Foreign Relations Committee in draft No. 2 of July 1977.

That would be the framework. Its political chances of passing, zilch.

Senator **Mathias**. The most I would do is reduce the time period to 30 days, which was the period which the chairman will recall was originally mandated in the Senate bill, 30 days.

Senator **Pressler**. You would reduce the time period, which is now 60 days, to 30?

Senator **Mathias**. I would further address myself to the Evans question and do what we can to remove constitutional doubt about the concurrent resolution process, because it is not clear that the *Chadha* decision applies here. And I think if we could in the course of these hearings, if you could resolve any doubts that exist in that respect, I think it would be a helpful thing.

That is all.

The **Chairman**. Thank you very much indeed.

We welcome Congressman Broomfield and we are very glad you could be with us. Your statement will be inserted in full in the record, and if there are any remarks you would like to make we would be glad to hear them.

STATEMENT OF HON. WILLIAM S. BROOMFIELD, U.S. REPRESENTATIVE FROM MISSOURI

Mr. **Broomfield**. Thank you very much, Mr. Chairman.

I apologize for being late. We had a caucus going on. I had something to say on a very important matter there.

I am sure that most of these areas have been covered and, as you indicated, my complete statement will be made a part of the record.

I take a strong position that I believe that the automatic troop withdrawal requirement of the War Powers Resolution should be eliminated completely. I know—I guess someone just mentioned 30 days. But I think that the total should be, in other words, completely eliminated. It has not worked under the number of different Presidents, both Republican and Democrat.

I agree that the congressional role in this area is properly exercised through a joint resolution. I also agree that consideration should be given and established for an expedited procedure. I think that is extremely important and probably one of the best ideas so far in the so-called reform of the War Powers Resolution.

On the other hand, I want to indicate serious doubts about the workability of the consultive mechanism, the permanent consultive group that would be established by this bill. Consultation can be meaningful only to the extent that it is flexible. And this could be lost through establishment, I believe, of the way this would be set up as a permanent consultative group.

In conclusion just want to compliment the committee. I think this is an important function, not only for your committee but for our committee on the House side. I think that it is extremely important that reform is made to the War Powers Resolution because of its ineffectiveness over the past few years.

I would be glad to answer any questions.

[The prepared statement of Representative Broomfield appears in the appendix.]

The CHAIRMAN. Thank you very much indeed.

Senator Sarbanes.

Senator SARBANES. Thank you very much, Mr. Chairman.

I would like to put to the panel this question. I take it Senator Mathias believes there are certain instances in which the President would need to act on his own accord in committing forces—to repel an attack on the soil of the United States, for example—where he would not have time to come to the Congress to get a declaration of war.

Is there agreement among the panel that there are certain very limited situations of that sort in which the President would have to act without waiting for Congress? Does everyone agree with that proposition?

Mr. FASCELL. Would you repeat that?

Senator SARBANES. Is there agreement in the panel that there are certain very limited situations, such as an attack on U.S. soil, in which the President would need to be able to act without having a prior declaration of war by the Congress?

Mr. FASCELL. Absolutely.

Senator EAGLETON. It is much broader than that. It is not limited to U.S. soil. It would include Americans abroad that might be attacked. We have 6,000 bases around the world. We have endangered nationals abroad. The President can go to help or rescue them.

By the way, that is what the President was pretending to do in Grenada. He was pretending to rescue, but he only rescued half the medical students. You remember he left the other half unrescued for about 72 hours.

But anyway, the President has much greater authority.

Senator SARBANES. I take it then, that we are in agreement that there is a limited set of circumstances under which the President by necessity has to act, and that we perceive a constitutional authority for doing so.

Senator EAGLETON. Of course.

Mr. FASCELL. I agree with that, but I have to ask a question simply for the record, in rhetorical style: Does that change the definition of "war" in the Constitution?

I am not looking for an answer.

Senator SARBANES. Now, my next question is, What is the view of the panel members about situations that would clearly fall outside those limited circumstances?

Should the President then be able to act without a prior authorization from the Congress?

Senator Eagleton. There is one that is in the bill that I referred to that was the most controversial amongst Senators Stennis, Javits, and myself. The Presidential right to forestall enemy attack. It gets into first strike.

Assume the Canadians have gone mad and they are there on the border, poised to attack Detroit. And the President knows that they are there, and the CIA, for once, has accurate intelligence.

And the President says yhey are going to come in from Toronto. And the President then says, "I can forestall that attack, because they are going to overwhelm Detroit." And we put that in.

Senator Sarbanes. I want to get out beyond that. I want to try to find out whether there is a difference among——

Senator Eagleton. Anywhere else, time allowing, it is shared power. Now, what is "time allowing"? "Time allowing" is at least to talk to Senators Byrd and Dole before you talk to Margaret Thatcher. He has got at least enough time to do that.

And, in the Persian Gulf, Senator—Phil Donahue was discussing it, and took a vote on his TV show, as to whether we ought to go into the Persian Gulf. That should have been before this committee and the Armed Services Committee, and it should have been before Chairman Fascell's committee. There was no secret that we were thinking about going to the Persian Gulf. We thought about it for weeks. Phil Donahue gave his opinion. He gave his advice, but Congress was not asked for its advice.

Senator Sarbanes. What about the other members of the panel on that question?

Mr. Fascell. I am not ready to support the concept, and I have never been, of enumerating, "exceptions" that would allow the President to act beyond his constitutional authority, whatever that is.

Now he either has it, or he does not have it. And I do not know that Congress can legislate it. I do not think we can. I think that is fundamental.

The Founding Fathers, in my judgment, saw this as a shared responsibility, and a shared power, and that is the way it ought to be.

Senator Sarbanes. Is it your view that——

Mr. Fascell. If we accepted, Senator, if we, the people accept it as properly within the President's constitutional power, or we see it as an acceptable exception, so be it.

But, you know, is that deciding the constitutional definition? Is that deciding the limits of power? I do not think so. And I do not know that we ought to get into that.

That is the reason that I have never been for the enumeration of the specific cases in which a President could commit the Armed Forces of this country to an action or a hostility or imminent actions or war. Those are all political questions.

Senator Mathias. I would think, Senator, that the War Powers Act resolves some of the constitutional difficulties by providing a time period in which the President can act on his own initiative.

It is assumed that he is going to act in cases where there is a vital interest to the United States that is being effected. It is hard to define, and I tend to agree with Chairman Fascell. It is hard to define the number, the character of these attacks on American interests or threats to American interests, because they can change with circumstances, change with generations, and I think the War Powers Act is right in being silent in any specific definitions.

But, whether you are saying the President is acting out of any inherent constitutional right of his own, or whether you are saying that the Congress has the power and the duty to define the policies by which we address limited warfare or terrorism or other circumstances, by providing this initial period, you simply finesse that question. And I think that is one of the desirable features of the War Powers Act.

Senator **Sarbanes**. Well, of course, once the President makes the commitment, the question of compelling a withdrawal is extraordinarily difficult. The decision has been pretty well made.

The real question is, might it not be a more fruitful approach to say, if effect, that there are certain instances, narrowly defined, under which it is clearly necessary for the President to respond. Obviously there would be some difficulty in defining that area.

But beyond that, the President would have to obtain a prior authorization before he could make the commitment.

What I am trying to find out is whether the members of the panel think the President ought to be able to make a commitment in any circumstance, and then put Congress in the position of trying to compel a withdrawal, either by triggering the War Powers Act of by cuting off appropriations, after the fact.

Or whether perhaps beyond this narrow range of events that we talked about, the President should have to obtain a prior authorization from the Congress in order to commit forces.

Senator **Eagleton**. Senator Sarbanes, you are posing the issue that the Congress faced 15 years ago. You are espousing the Senate version of the bill and you are absolutely correct, whether it is 30 or 15 days. Once the troops are out there, being shot at, the decision is made. Congress is supposed to be in on the takeoff, before they go to the gulf or before they go to Lebanon.

You are posing the Senate bill. Congressman Fascell is still, quite obviously, supporting the House bill. That is the difference of opinion on the subject matter.

Mr. **Fascell**. Mr. Chairman, may I address myself to that for a moment? I think that is an important question. Senator, obviously we are dealing with things as far as what is in the list and what is off the list. You want to draw some scenarios. Do you leave something out or do you include it?

Who makes that decision? Is that a political decision? Libya—was that war or not war? What exception does that fit under? Salami technique; we are in the Persian Gulf, we have been in the Persian Gulf, militarily. We expand our interests in the Persian Gulf by adding more military might.

Is that an act of war? I do not know who made the decision that this was an undeclared war. Well, whoever made it might be, in a practical sense; correct.

Senator **Sarbanes**. The question is whether and what kind of a commitment you are going to allow without congressional involvement in the decision.

Congressional involvement does not mean—and I think this ought to be understood, because people do not always understand it—that there will not be a commitment of forces, because the congressional decision in conjunction with the Executive may, in fact, be to make the commitment. It may be, not to make the commitment.

All it would ensure is that making the commitment would be joint decision representing the common judgment of the Executive and the legislative branch, before the commitment takes place. Once the commitment takes place, to try to undo it is very difficult, because the decision has been loaded, so to speak.

Mr. **Fascell**. Mr. Chairman, for clarity of the record, I have to add a comment on that one. I do not know that the Constitution says, explicitly, but I think it is clear enough, that the Founding Fathers expected, and I think that it flows from the language, that prior approval of the Congress was required to go to war.

But it does not say anywhere in the Constitution that the Congress cannot ratify after the fact.

The **Chairman**. Thank you very much.

Senator **Sarbanes**. Can we hear from Senator Mathias?

Senator **Mathias**. Obviously, it is better to have prior authorization. Nobody would disagree with that. The reason I would suggest reducing the time to 30 days is because that prevents the President from digging in. If the President knows that his day of reckoning is within 30 days, he is not going to dig in as deeply and make a commitment as deep as he would otherwise.

The **Chairman**. Thank you.

Senator **Kassebaum**. Thank you Mr. Chairman. Let me just say, I think it is a very interesting discussion, and I suppose I am struck with Chairman Fascell's comments on how you define "war." We certainly declared war after the fact at Pearl Harbor. And there was not doubt in anyone's mind that hostilities had taken place.

And I would like to go back and, Senator Eagleton, you said be in on the takeoff. And this is really, I suppose, one of our frustrations, and it evolved from Vietnam. It stemmed from the frustration of not being consulted.

But that Vietnam, and it goes way back actually to President Eisenhower in the early inception of decisions made that involved a step by step in what took place.

I have always felt that we overlooked the great power that Congress has in the power of the purse. And at some point if we did not agree with what was taking place, we just do not vote to spend the money to carry out the action. Is that not something that keeps us engaged? And we can, through that power, demand the consultation that is necessary.

Now, some of you were here as we moved into Vietnam, and raised questions. But would anybody have, and how many, questioned at that point whether hostilities—whether we were engaged in hostilities.

Certainly it seemed to me that would have been very clear. But, would we have invoked the War Powers Resolution at that point? And at what point?

Mr. **Fascell**. The questions you have raised are all practical and valid questions. I do not know what we would have done if the War Powers Act had been in place at that point, but I know what we did. That is by a salami technique of necessity, let us put it necessity—I am not being derogatory here at all—we got into a war.

Now, did Congress ever declare war? No. Well, how did we do all of this? Through the power of the purse. I can remember when President Johnson first came on the scene with regard to this problem. One of the first things he did was to drag all of the Congress down to the White House and say, "I need $700 million supplemental. And the reason I need that is because we have got to put more men and more equipment in the field."

And we were all there, Appropriations, Armed Services, Foreign Affairs, and leadership and the whole world was there. And we got the full dog and pony show. And when we came back, we voted to approve the $700 million supplemental. But with all the other Presidents, we had given them what they wanted.

Congress had acted. No question about that. So that is ratification of the fact, and as an act of the Congress, we shared the responsibility.

Now, in the legal sense, when did we get around to declaring war? With the Gulf of Tonkin resolution. Absolutely. And we had the full authority of the Congress of the United States, carrying out a responsibility.

And, as I said earlier, we gave the President all the power he needed. The only thing we left out of there was, we do hereby declare war. So, it was a step-by-step process of getting into war that we were struggling with, and then along came Cambodia, which is an entirely new country, and bingo.

And the answer there was hot pursuit or something. But here we were, at war with another country. And we still have a tough problem with that, and we still have a tough problem with Libya.

But Libya was totally supported. Nobody cut off any money. The Congress did not pass any resolutions. The Congress acted, and we did not declare war. And I do not know that it fits any of the exceptions, either, that have been enumerated.

So, this is the problem we are struggling with. It still goes back to shared responsibility. Commonsense involvement, broad base of support and knowledge in the Congress. And the President has to take the lead on that.

Senator KASSEBAUM. Or, and may I just add, if, as has been presented I think, and Senator Adams has brought this up on the Persian Gulf situation, as long as it is the law of the land, however, we should abide by it.

Now, there are some of us who would question whether, indeed, it should be the law of the land, but maybe this is, of course, what we are struggling with at this point. Can it be improved or, should as Senator Eagleton said, perhaps facetiously but I think a good question. Either we abide by it or we recognize that it is somewhat a legalistic web that serves no useful function, and we should make that decision.

Senator EAGLETON. May I make this comment? Had there been a War Powers Act, let us say that it had been passed in the forties. Most certainly President Kennedy would have had to trigger it if he were going to honorably enforce it, and more than likely, President Eisenhower. But most certainly President Kennedy.

The Congress became partners in Johnson's war. The Gulf of Tonkin Resolution was everything that Chairman Fascell said it was. It was a declaration of war, it just did not use those nasty words. It was a blank check to engage in military operations wherever he sought in Southeast Asia.

Chairman Fascell has a problem understanding what Libya is, under Senator Sarbanes' question. Very clearly, Libya should have invoked the War Powers Act. When you send those planes off to bomb, and you know they are going to shoot and be shot at, they are going to be engaged, then there is the imminent likelihood of hostilities.

There also was time on Libya to talk with key people in Congress. My God, it was on the front page of newspapers. I think it was the Wall Street Journal, "Reagan About To Bomb Libya." People said, "When is he going to do it?" And the word around here was, as soon as he can find which tent Mu'ammar is in. That is the only thing that made it in any way problematical.

Everybody in town knew we were going to bomb Libya. Yet there was no consultation, no nothing; just go off and do it.

Mr. **Broomfield**. I disagree with that completely. A number of us here were included at the White House when the decision was being made as far as the bombing.

And I think there was adequate consultation, and I certainly disagree that it was known in advance that we were going to do this for some time. The senior Members of the Congress, the leadership, were down there, Fascell and I were both there, and I think it was a proper way.

I would like to get back—I think this idea of trying to put more restrictions on how the President operates——

Senator **Kerry**. Were you not down there on Friday or Saturday?

Mr. **Broomfield**. We were down there about 2 or 3 hours before. I thought it was Friday.

Senator **Kerry**. Right before the bombing.

Mr. **Broomfield**. Yes.

Senator **Kerry**. Three hours.

Mr. **Broomfield**. Yes, that is right.

Mr. **Fascell**. Senator, I was there, too, and the answer was, the planes were more than halfway there. Now, if anybody wants to change your mind or you have some objection, please tell us.

Mr. **Broomfield**. But there was not any.

Mr. **Fascell**. I am sorry, there was an objection. I said, I can understand why we have to do this, but what about the War Powers Act? What about the Congress? And that was the end of that discussion. It stopped right there. I did raise the question at that meeting about the War Powers Act or the Constitution or whatever.

The **Chairman**. That is correct. I was there, too.

Senator **Kassebaum**. Before my time runs out, I want to ask one question. I assume that everybody testifying at this point has spoken, somewhat obliquely and somewhat directly, not in support of the Byrd-Nunn-Warner bill.

Senator **Mathias**. I would directly oppose the repeal features of the Byrd amendment. I think it repeals very crucial language that presently is in the Act, and I think that would be mistake.

Senator **Eagleton**. I spoke in opposition to Byrd-Nunn-Warner.

Mr. **Fascell**. I like the point about the consultative thing, but I do not think that we ought to legislate that. I think it ought to be an understanding and an arrangement between the Chief Executive and the leadership of the Congress.

Mr. **Broomfield**. I certainly agree. It should not be put in concrete. It should be flexible and give the President an opportunity to discuss it.

The **Chairman**. Thank you very much, indeed. Senator Kerry.

Senator **Kerry**. Thank you very much. I have just been called to go to the floor. I do have some questions, but I will pursue them privately. I just want to thank the members of this panel and particularly our good friends Senator Mathias and Senator Eagleton. It has been not only one of the more interesting ones, but one of the more entertaining ones. Mr. Chairman, with unanimous consent, I would like my time to be used by Senator Adams.

The **Chairman**. Senator Adams being one of the leading advocates on the Senate floor of the exercise of the war powers amendment.

Senator **Adams**. Senator Kerry, I want to thank you for your courtesy. Thank you Mr. Chairman.

I think the War Powers Act is constitutional. I think the concurrent resolution and joint resolution, are both constitutional.

I would like to make four or five points from a practical and a theoretical point. If the Congress of the United States passed a resolution under article 1, section 8, and I quote, "to declare war," I do not think the President could veto it.

And I will go right back to the constitutional convention. Congress was given the power because they did not want to have a king. Kings make war, and making war is both declaring it and carrying it out. And it was amply clear by everybody at the constitutional convention that they wanted to have the Congress and not the President to put the Treasury and the lives of the American people on the line.

And I will just quote, for example, Eldridge Geery who was not a Liberal: "He never expected to hear in a Republic a motion to empower the Executive talons to declare war."

And George Mason said, with regard to the war powers of the Executive, "not to be trusted with it." You never want to give the power to begin a war to those who are to conduct the war. And I feel this very strongly.

Second point, and I appreciate it very much, Senator Kassebaum, this is the law of the land, and the law of the land should be carried out. And we all know, because we were there and we voted for it. It was to prevent not just a quick action but a sustained war.

We are going to be in the Persian Gulf a long, long time. We have been there a long time, and we will be there a longer time. And what we do there, if it is war, declared or undeclared, the Treasury of the United States pours into it, lives pour into it, incidents pour into it.

Therefore the Congress should either vote for it, or vote against it. Now I want to be practical with you, Tom, because I was trying to get a vote, and in the Senate there is ability to frustrate votes, as we well know. On December 4, we entered into a unanimous request for this Congress only that the question of privileged status of the measure, once decided by the parliamentarian as privileged upon its introduction under the War Powers Resolution, shall be submitted directly to the Senate.

The point of order put ot the Senate is, "the measure is not privileged under the War Powers Act." It shall be decided by the yeas and nays after 4 hours of debate, equally divided and controlled by the majority and minority leaders or their designees. The point of order shall not be considered to establish a precedent for determination of future cases. That is how we finally got to the floor on the simple question, Mr. Chairman, of whether or not there were hostilities in the Persian Gulf.

We got voted down. But I have been a legislator a long time. I accept when the Senate or the House votes we are in or we are out. But I do not want to see us give up and have a shift to the Executive, of the power to declare war, the power to make rules for Government and regulation of the land and naval forces, which says to me that we could say whether or not a captain shot or did not shoot, in the gulf; or to provide for calling forth the militia; or to provide for organizing, arming, and disciplining the militia; or to make the laws of the Union.

We tend to ignore the words of the Constitution until they are brought to our attention. It is just like when we had the impeachment matter. Nobody knew what a high crime and misdemeanor was, because it was written—you do not have to look at a lot of cases, you read the law. And the power to declare war or not to declare war is in the Congress. And all I want the Congress to do is to follow its oath under the Constitution and under the law. And you are all here to help us decide if amending this Resolution will help achieve that goal.

I have certain questions from a practical and a theoretical viewpoint. I would like to see the nonvetoable Resolution go to the Supreme Court. I do not think *Chadha* applies, but I am prepared to have it go to the Supreme Court. *Chadha* does not apply because we are referring to a constitutional power. It is not a bill.

I would like to see us act on it. Our problem is once you are into a major engagement and you try to use money alone, everybody says you are cutting off the money for our boys in the field. I think the Act has some flaws in it, but I don't want to see us give up the right to say that the power is automatically cut off in 60 days.

I want to ask you whether this kind of a proposition is potential? One, that there be a required vote within 48 hours. The only reason that I say 48 hours—you may want a different period—is that this is the takeoff, as you referred to, Senator Eagleton. We usually never hear up here about what is going on until we read it in the newspaper or somebody comes up to the Hill and says what you have already read in the front page of the paper and confirms it. I am willing to say at the beginning that 48 hours would handle the problem of an invasion, an explosion, a going in and getting people. Automatic vote at 48 hours.

Then what is the enforcement mechanism? You either have to use the courts, or you've got to use money, or there is something else. I don't want to give up this act and the law because, as Senator Mathias said, it is the only means we have at this point. I have been in the administration. I have served as a Cabinet officer. If you don't have a process for getting at the administration, you can't use the constitutional power, and I would say that to Chairman Fascell. I agree with you but if you don't have a process up here, you can't get to a vote and you can't get to court, or you can't get to money. Now tell me if I am wrong and tell me how else you would do it.

I would want the 48 hour vote so you are still on the issue. Second, an enforcement mechanism, either cut off of money or immediate appeal or whatever you say.

Senator **Eagleton**. First, who triggers the 48 hours?

Senator **Adams**. It has to be triggered by the Congress. In other words, the leadership must do it or a person goes on the floor.

Senator **Eagleton**. Leadership starts the clock running. Second, required vote on what? Let's use the Persian Gulf as an example. Does it require a vote that the President may engage in such operations as he sees fit all over the Persian Gulf for such time as he sees fit? What is the issue that is going to be voted on?

Senator **Adams**. Drafted by the leadership of the two bodies to present to him.

Senator **Eagleton**. So, it could be narrowed in geography and in time, with a time limit?

Senator **Adams**. Yes.

Senator **Eagleton**. Six months, 9 months?

Senator **Adams**. No Gulf of Tonkin.

Senator **Eagleton**. That is sensible to me. If I may, because I think it is an important issue, let me disagree with one part of your opening statement. You said Congress can determine whether the captain shoots or doesn't shoot. This is more than a minuscule matter. I disagree with you very strongly on that.

Senator **Adams**. What about the provision that says that in the Constitution that—this is the Congress, article 1, section 8—you make the rules for the Government and the regulation of the land and naval forces.

Senator **Eagleton**. I juxtapose that to the Commander in Chief clause, and in that area the Commander in Chief sets the tactics. Congress can set the time, the scope. Congress can put countries can limit the miles. Congress could say stay out of Cambodia. Congress can say a year. But the Commander in Chief sets the rules of engagement. That is the way I read it.

Mr. **Fascell**. I quite agree with you, Senator. I would not want to see us be a rubberstamp for the Executive on the question of going to war or being dragged into hostilities because we cannot define the hostility. Therefore, we come back to the same questions. Do you have the votes?

We saw in the Vietnam war cutting off the money for all the reasons you cited as well as many others, it took a long time in a country divided with all kinds of difficulties in order to ultimately get to the point where the money could be cut off and the war brought to an end.

So, we are fundamentally stuck with the political process. There is no way to get around that. The Founding Fathers saw that, they understood it. I agree with you they did it purposefully, obviously. The record is clear from the very beginning of——

Senator **Adams**. Chairman Fascell, you can get a resolution up on the floor with leadership in the Rules Committee in the House; can't you?

Mr. **Fascell**. We can get a resolution up on the floor, yes. There is a way of doing that besides discharge petition.

Senator **Adams**. But here if you have a determined minority, and it doesn't have to be large, we never get the issue to the floor.

Mr. **Fascell**. I understand what you are saying. I have enough trouble without trying to change the rules of the Senate. There are a lot of other rules that you gentlemen, ladies have to operate under that I have some difficulty with.

Requiring a vote by the Congress is to require us to do what we are suppose to be doing. Why do you have to pass a law to require us to do what we are suppose to be doing? You pass a law because you are trying to get the Executive to do something that he ought to be doing, not us. We make that decision one way or another. We either act or we don't act.

Now if we support the President tacitly, that is support, period. We want to hide behind that. Can we devise a process, which is what you are thinking of, that automatically forces the Congress to vote on the issue? The answer is anytime you think you've got the votes you can take it up. If you haven't, you can't get it done. There is no way that I can think of. You might be able to legislate the process where you can expedite the consideration of a resolution pursuant to a certain statute that says within a certain time and give yourself the expedited right to do that.

That might be something that you want to think about. Otherwise, we can act now, anytime we get ready. There is nothing to stop us.

The **Chairman**. I would like to interrupt to say in 5 minutes we are supposed to be receiving Governor Dukakis.

Senator **Mathias**. Mr. Chairman, can I add one word? I think Senator Adams has made a very strong point about the veto. The declaration of war is not subject to veto. The declaration of war is complete when the Congress acts. The President doesn't sign the declaration of war.

I was present in the House of Representatives on December 8, 1941, when the Congress voted to declare war. I was not on the floor. I was in the gallery at the time. But that was the complete act when that occurred, and that really bears on the *Chadha* question I think very strongly.

I would disagree, however, that it is a good idea to force a vote in 48 hours. I also was here when the Gulf of Tonkin Resolution was passed, and if we had voted on that—we did vote on that in 48 hours. We did it on the basis of false information. We did it with the surge of emotion and patriotism. Talk about supporting the boys in the field. That was one of those occasions.

Mr. **Fascell**. And it was 48 hours, I might say.

Senator **Mathias**. And it was too soon. If it had been a week, it might have been a much more questioning kind of procedure. I would raise the question about 48 hours and mandate the time period on purely practical grounds.

Senator **Adams**. Mr. Chairman, I ask unanimous consent that my full statement, opening statement, may appear in the record.

The CHAIRMAN. Without objection, it will be done.

[Prepared statement of Senator Adams appears in the appendix.]

The CHAIRMAN. I thank the witnesses very, very much indeed for their courtesy and being with us. We are adjourned.

[Whereupon, at 11:43 a.m., the subcommittee was adjourned, to reconvene at 2:05 p.m., July 14, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

THURSDAY, JULY 14, 1988

U.S. Senate,
Special Subcommittee on War Powers
of the Committee on Foreign Relations,
Washington, DC.

The special subcommittee met at 2:05 p.m., in room 419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the special subcommittee) presiding.

Present: Senators Pell, Pressler, and Sarbanes.

The **Chairman**. The Committee on Foreign Relations will come to order.

The Special Subcommittee on War Powers resumes its hearings this afternoon with testimony from one of America's most distinguished professors of history, Arthur Schlesinger. Professor Schlesinger is the author of many learned works, several of which bear directly on this issue of interest to our subcommittee. Among these are the "Imperial Presidency," the publication of which perhaps not entirely coincidentally was just about simultaneous with the enactment of the War Powers Resolution of 1973.

Following Dr. Schlesinger's testimony, the subcommittee will hear from Prof. Forrest McDonald, professor of history at the University of Alabama, and also the author of a number of works bearing on the subcommittee's topic of concern, and also an old acquaintance of mine when he moderated a debate the first time I ran for office in 1960 at Brown University for which I thank you again for taking the time to do. It seems like yesterday, but it was 30 years ago almost.

So, we are pleased to have two such scholars here today.

Senator **Pressler**. Mr. Chairman.

The **Chairman**. Senator Pressler.

Opening Statement of Senator Pressler

Senator **Pressler**. Mr. Chairman, I too join in the welcoming of these two distinguished historians. Their numerous publications and their wideranging scholarship bear witness to the vitality and relevance of the history profession.

It is especially fitting that on this day, so rich in historical symbolism and meaning, that we turn our attention to history, to the history of the Constitution and the history of our Republic and the history of the governing process. By examining our historical origins and our subsequent national experience, we are, in effect, celebrating the bicentennial of the greatest of all political documents—the Constitution of the United States.

The business of the War Powers Act is something that I think goes to the heart of relationships in our Government. I have said that I would like to see the War Powers Act repealed, and I think it's unconstitutional. But, nevertheless, I think in reality it will probably be amended as a result of these hearings.

In their belief in the need for a separation of powers between the three branches of Government, the Founding Fathers relied on the vision of the celebrated French philosopher Montesquieu. As Justice Louis Brandeis observed in *Myers* v. *the United States,* the separation of powers according to Montesquieu translated into security for the people and was accepted as such by the Founders. Not surprisingly, a modern day Supreme Court in *Buckley* v. *Valeo* one-half century later emphasized the intent of the Framers that the powers of the three great branches of the National Government be largely separated from one another.

The war power did not derive from emanations or penumbras, but from the minds of very practical men inside a hot, locked room in Philadelphia on August 17, 1787. They carefully delineated making war from declaring war, a distinction that has confounded many ever since. Making war translates in modern day language into defending the national security interests of the United States. Declaring war is exactly what that term implies: a formal statement of hostilities which, in turn, triggers a whole series of international legal duties and obligations. A declaration of war, as the French came to say after July 14, 1789, involves a nation in arms utilizing its major resources and seeking the often elusive goal of military victory over an opposing enemy. That is why Rufus King at the Constitutional Convention referred to making war as an executive function.

A noted American jurist and legal scholar in a famous essay published at the turn of the last century observed that history and law were inevitably bound up with one another. Nowhere is this more apparent than in the significant Supreme Court case of *Bas* v. *Tingy,* 1801, decided 1 year after Congressman John Marshall's much quoted statement about the President being the sole organ of American foreign relations. In that case, a unanimous court indicated that the United States could become involved in hostilities without a declaration of war. Members of that court were contemporaries of the Founders and two of the first sitting Justices, John Rutledge and James Wilson, were themselves Constitutional Convention participants. Surely this court knew the intention of the Founders in such matters. They had lived their own history.

With the respect to the Commander in Chief power, historian Clinton Rossiter, author of a landmark text entitled "The American Presidency," has asserted that "the President's power to command the [armed] forces swells out of all proportion to his other powers." In a revised edition published at the end of the Eisenhower era, Rossiter lamented: "Congressmen are more likely to needle the President with inactivity and timidity than to accuse him of acting too swiftly and arbitrarily." How things have changed.

If I remember correctly, Professor Schlesinger was one of the sharpest critics of President Eisenhower as a do-nothing President in foreign policy. We still are stirred by the dramatic words of President John F. Kennedy's inaugural address when he pledged to go anywhere and to pay any price in the cause of freedom and democracy. After Kennedy's tragic assassination, the leaders of his party seemed to have applied a cost-benefit analysis to Presidential powers in the arena of U.S. foreign policy.

In the 200 years of this Republic, the United States has been involved in approximately 200 military conflicts, beginning on the high seas in 1789 and continuing in 1988 in the Persian Gulf. War has officially been declared a half dozen times throughout American history. In the nine decades preceding the Constitutional Convention, the countries of the Western world fought in 38 wars and only 1 of them was declared. At the close of the Argentina conference in 1940, President Franklin D. Roosevelt confided to his soon-to-be British ally that he intended to wage war and not to declare it. This is exactly the distinction made by the Framers that hot summer day in Philadelphia when they distinguished between making war and declaring war.

Yesterday morning, Mr. Chairman, during our first war powers hearing, House Foreign Affairs Committee Chairman Dante Fascell asked how do you define "war." The long history of constitutional practice provides the best answers available. The Founders were well aware of the need for national security. That was one of the reasons the Philadelphia convention was originally summoned. Could it be that the men of Philadelphia did not spend much time on the precise distinction between war and hostilities because they knew the difference and had no need to debate it at length?

Mr. Chairman, I do not intend to trace the history of the Republic as it relates to the great issues of war and peace. I will leave that to our eminent witnesses whom we are honored to have here. But I think we ought to recognize that 200 years of state practice have had some legal meaning for the operation of our constitutional system. I don't agree with General von Clausewitz that war is merely diplomacy by other means. I do think, however, that the national interest sometimes mandates the use of armed force or the threat of armed force. And I do not think that a congressional foreign policy is vastly superior to an executive branch foreign policy. As Secretary of State George Shultz has repeatedly said, 535 Secretaries of State are 534 too many.

Professor Rossiter cogently observed more than a quarter century ago: "The Presidency of the future will grow out of the Presidency of the present." We cannot afford to make the future hostage to our present whims. History may or may not teach, but it provides certain examples. It also demonstrates that wrong choices have bad results.

The War Powers Resolution of 1973 was a wrong choice by the Congress. Let us undo the minor constitutional damage that has already been done before the greater political harm befalls us.

Mr. Chairman, I would conclude by saying that this morning I was on a call-in TV show, and someone asked me to predict what would happen to our hearings and the legislation if a Democratic President were elected together with a Democratic Congress. And I predicted it would probably die until the next time we have a Republican President and a Democratic Congress or vice versa because really it is a wrestling match between the two parties. But I hope because of this wrestling we do not do more constitutional damage than we have already done.

Mr. Chairman, I look forward to hearing from our distinguished witnesses.

The CHAIRMAN. Senator Sarbanes.

Senator SARBANES. Mr. Chairman, I have no statement. I know we may be voting shortly, and I'm very anxious that we should have the opportunity to hear from our two distinguished witnesses that are here today. I'm quite prepared to proceed to their statements.

The CHAIRMAN. Thank you.

Mr. Schlesinger, if you would lead off please.

STATEMENT OF ARTHUR M. SCHLESINGER, ALBERT SCHWEITZER PROFESSOR, CITY UNIVERSITY OF NEW YORK, NEW YORK, NY

Mr. SCHLESINGER. Mr. Chairman, I am honored by the invitation to appear before this subcommittee and pleased to share this table with Forrest McDonald, one of our noted scholars of the Constitution.

The topic under your consideration goes to the very heart of the conundrum of democracy: How to reconcile democratic control of the warmaking power with the imperious requirements of foreign policy. My qualifications, such as they are, for addressing this problem are that it is one that I have had to study for half a century as a historian and also one that I have periodically encountered over nearly half a century as an occasional government official.

I have here a statement which I will submit in extenso for the record, but which I will abbreviate for the purposes of this presentation. The opening parts deal with the actual intentions of the Framers of the Constitution with regard to the warmaking power.

The Constitutional Convention had no stouter champion of Executive power than Alexander Hamilton, but even Hamilton vigorously rejected the notion that foreign policy was the personal prerogative of the President. "The history of human conduct," Hamilton wrote in the 75th Federalist, "does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of the President of the United States." Abraham Lincoln accurately expressed the purpose of the Framers with regard to the warmaking power when he wrote 60 years later that "they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

The Framers, in short, envisaged a partnership between Congress and the President in the conduct of foreign affairs with Congress, and particularly the Senate, as the senior partner. Hamilton's comment on the treatymaking power applies to the broad legislative-executive balance with regard to foreign policy: "The joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them."

One would think that this historical recital might impress an administration devoted to what the late attorney general has called "the jurisprudence of original intention" and thereby settle some of the arguments that assail us today. For no one can doubt that the original intent of the Framers was to assure Congress the major role in the formulation of foreign policy and above all to deny Presidents the power to make war on their own. Yet the present administration somehow manages to champion a theory of inherent Presidential prerogative in foreign affairs that would have appalled the Founding Fathers.

This theory of Presidential supremacy has only crystallized in recent times. While early Presidents did not hesitate to use armed force without congressional authorization to protect American lives, property, and interests, they used it typically against pirates, brigands, revolutionaries, and tribes rather than against sovereign states. And as Judge Sofaer wrote in his notable work, "War, Foreign Affairs and Constitutional Power," "At no time did the Executive claim inherent power to initiate military action."

Nor indeed did Lincoln in 1861 or Franklin Roosevelt in 1941 claim that power. They undertook warlike and plainly unconstitutional actions because they believed that the life of the Nation was at stake and that their actions responded, in Lincoln's words, to "a popular demand and a public necessity." They rested their case not on assertions of constitutionally valid unilateral Presidential power, but rather on versions of John Locke's old doctrine of emergency prerogative beyond the Constitution.

The claim of inherent Presidential power to send troops into ongoing or potential combat began with President Truman in 1950. It rests doctrinally on an extravagant interpretation of the Commander in Chief clause as a grant of independent substantive power, an interpretation rejected by the Framers and never sustained by the Supreme Court. It rests also on a misreading of the court's 1936 decision in the *Curtiss-Wright* case. That case did not, as some argue, vindicate the idea of inherent and unilateral Presidential power to go to war. It didn't even involve the warmaking power. It involved the commerce power, and what it did was to sanction Presidential action within a framework laid down by the Congress. As Justice Jackson subsequently wrote, *Curtiss-Wright* "involved not the question of the President's right to act without congressional authority, but the question of his right to act under and in accord with an act of Congress."

The transfer of foreign policy warmaking power from Congress to the Executive results most of all from our situation in the world. The Republic has become a superpower. It has lived now for half a century in a state of chronic international crisis, real, imagined, and contrived. Under the pressure of incessant crisis, Congress has gladly relinquished many of its constitutional powers to the Presidency. Perhaps it has done so because the congressional record of error between the wars—from the rejection of the Versailles Treaty to the rigid neutrality legislation of the 1930's—had produced an institutional inferiority complex. Perhaps Members of Congress are intimidated by Executive claims of superior knowledge and wisdom. Perhaps they simply prefer to dodge responsibility and turn national decisions over to the President. For whatever reason, Congress has let constitutional powers slip away and Presidents now claim the warmaking power as their personal property.

It is too bad that this should be the case, for history, I believe, abundantly confirms Hamilton's proposition that the best security lies in partnership between the two branches rather than in separate possession of the warmaking power by either one of them. Neither branch, after all, is infallible. Each can benefit from the experience and counsel of the other.

It is a delusion, sedulously encouraged by the executive branch, that Presidents are necessarily wiser or even better informed than Congress. Sometimes they are; sometimes they aren't. Franklin Roosevelt was better informed than William E. Borah or Burton K. Wheeler and the isolationist leaders of the 1930's. But which body made more sense about the Vietnam war 20 years ago, the National Security Council or the majority of this particular committee? Which body makes more sense about Central America and the Persian Gulf today? As the distinguished minority leader, Senator Dole, put it the other day: "I have learned over the years that occasionally there is some wisdom in Congress. It is not all vested in the White House or those who advise the President."

The War Powers Resolution of 1973 represented a high-minded and ingenious attempt to tap congressional wisdom and to reestablish the constitutional partnership as envisaged by the Founding Fathers. You are all familiar with the terms of that Resolution. I speak as one who was skeptical from the start about the efficacy of the War Powers Resolution. The Resolution, it seemed to me, began by ceding the President what he had heretofore lacked; that is, statutory authority to go to war without congressional consent. Before the passage of the Resolution, unilateral Presidential war represented Executive usurpation. Now unilateral Presidential war becomes, at least for the first 90 days, an entirely legal action.

Practically speaking the Resolution's machinery of restraint seemed to me a hoax. Most wars are popular in their first 90 days. People rally round the flag. The President who orders military action can overwhelm Congress and public opinion with his own rendition of the facts and his own interpretation of the crisis. Given the President's superior ability to define the emergency, to control the flow of information and to appeal to the Nation, it would take an unwontedly bold Congress to reject a Presidential request for the continuation of hostilities or to recall the fighting forces over Presidential opposition.

My skepticism in retrospect was not deep enough for I naively assumed that Presidents would at least go through the motions of honoring or humoring the Act and seek to turn it to their own purposes. In fact, as we all know, Presidents have simply ignored the Act except for occasional and perfunctory quasicompliance with the reporting requirements. Textual ambiguities in defining those requirements have left uncertain the point at which the 60-day clock starts ticking and thereby the hope that the Resolution would be self-activating and automatic in its operation. And the Supreme Court, when it declared the legislative veto unconstitutional in *Chadha,* presumably annulled the congressional power to terminate hostilities through concurrent resolution. Thereafter, not a shadow of sanction remains to enforce or even to encourage Presidential compliance.

Looking back, one sees that the Resolution counted too much on good faith cooperation by Presidents. This was not an altogether unreasonable hope. Presidents in their own self-interest should regard the requirement of congressional collaboration in foreign affairs not as a challenge to be evaded nor as a burden from which to be delivered, but as an opportunity to be embraced, the heaven-sent opportunity to give their policies a solid basis in consent. Congressional criticism alerts the President to flaws in his policy. Congressional support strengthens his hand, increases his authority, and diffuses his responsibility. As our wisest diplomat of the century, Averell Harriman, once put it, "No foreign policy will stick unless the American people are behind it. And unless Congress understands it, the American people aren't going to understand it."

But Presidents, like other people, do not always understand their own self-interest, nor can we write statutes on the kindly assumption that good and cooperative men will always reside in the White House. As the Supreme Court once said in a celebrated decision, the Republic has "no right to expect that it will always have wise and humane rules, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." Even nonwicked Presidents may be driven to diminish a congressional role by their own foreign policy obsessions or by the ambitions and delusions of their advisers.

Can the Resolution be amended in ways that will more effectively restore to Congress its constitutional role in decisions of peace and war and do so even in the teeth of recalcitrant Presidents? I respect the thought and care that have clearly gone into Senate Joint Resolution 323. But I must confess my fear that the revisions therein proposed would only make matters worse.

The proposed amendments redefine the consultation requirement to limit congressional consultation, initially at least, to an elite group of six persons: the speaker of the House, the president pro tem of the Senate, the majority and minority leaders of both Houses. With Presidential permission, the group can enlarge itself by adding 12 more chairmen and ranking minority members of key committees, leaving the rest of Congress, if I understand the proposal, a collection of second-class citizens. Limiting consultation to the senior leadership of the House and Senate—that is, to legislators who historically have been most vulnerable to seductions of statesmanship and most inclined to defer to Presidents—might well place one more weapon into the hands of a strong President. As Gouverneur Morris remarked when the Constitutional Convention considered a proposal to surround the President by a council of state, the President, Gouverneur Morris said, "by persuading his Council to concur in his wrong measures would acquire their protection for them."

Under the current resolution, termination of American involvement in hostilities takes place automatically after 60 days unless Congress votes to continue the action. The proposed amendments under resolution 323 would further shift the balance of power toward the Executive by placing the burden of positive action on Congress which would now be required to terminate military action by joint resolution. Such a resolution, moreover, would qualify for expedited procedures only if endorsed by a majority of the consultative elite. And as a joint resolution, it would be subject to Presidential veto. Under this system, in short, the President, so long as he retains the support of one-third plus one of either House, would be free to pursue his unilateral war as long as he wishes.

The resolution 323 amendments offer one useful idea: the denial of funds for military operations undertaken in violation of laws passed pursuant to the War Powers Resolution. The provision permitting Members of Congress to seek injunctive relief on grounds of Presidential noncompliance seems to me a pious hope. In practice, it would almost certainly founder on a judicial retreat to the political questions doctrine.

Are there better ways to breathe new life into the War Powers Resolution? Some distinguished Senators and ex-Senators argue for a revival of the original Senate version of the Resolution. That version specified and thereby limited the emergency situations in which the President could commit Armed Forces to hostilities without congressional authorization. In all situations, except for three defined, the President would be required to seek congressional authority before committing U.S. forces. In fact, the Senate's expansion of this to include not only repelling armed attacks, but to forestall the threat of such attacks, opened a dangerous loophole offering Presidents legal authority to send American troops in the direction of battle whenever they found in their own personal and unchecked judgment a direct and imminent threat of attack against American forces of citizens.

In any event, the House version triumphed in conference, and while it wisely eliminated the forestall clause, it also failed to define, as the Senate bill had done, the President's powers in legally binding language. The result, as Senator Eagleton said at the time, "provided legal basis for the President's broad claims of inherent power to initiate war."

Would we be better off today if the Senate version had prevailed? The supposition is that President Reagan would have had to seek congressional approval before sending the Navy into the Persian Gulf. But suppose that instead of complying with the Act, the President treated the Senate version with the same contempt that all Presidents have treated the existing version. Suppose he claimed that his role as Commander in Chief gave him the constitutional power to deploy armed force as he thought best for the Republic. Historians might point out that this is a gross and extravagant misconstruction of the Commander in Chief clause. But what recourse would Congress have against an uncooperative President? What court would find the issue justiciable? The Senate version in practice would probably be as impotent as the existing War Powers Resolution.

To be effective, congressional participation must precede any large-scale deployment of force overseas. For deployment may set in motion the march to hostilities; and by the time the War Powers Resolution is triggered, it may be too late for Congress to halt the march. Consider our present dilemma in the Persian Gulf. Many

Members of Congress are baffled by the Navy's mission in the gulf and doubt that the administration has thought through its policy in its fullest implications. Had they been appropriately consulted, they would have demanded clarification and, had suitable clarification not been forthcoming, they might well have opposed the commitment. But the commitment, once made, creates a new situation. Once the forces are there, legislators who might have challenged the policy at the start become the prisoners of a fait accompli. The consequences of congressional repudiation of an ill-judged policy may be, or at least some so contend, as grave as the consequences of the policy itself.

The Resolution does not effectively constrain Presidential deployment of armed forces outside the United States. Indeed, the Resolution offers Congress no real role until after armed force is already committed. Can Congress assert control over overseas deployment of American armed force in peacetime? The constitutional status of this question is obscure. Elihu Root, the elder Henry Cabot Lodge, the elder Robert Taft, and Stuart Symington all thought Congress has the power to forbid sending at least the Army outside the country in peacetime. William Howard Taft, William E. Borah, Calvin Coolidge, Dean Acheson, and Barry Goldwater thought not. Legal scholars have been equally at odds. W.W. Willoughby believed that the President's power to send troops abroad was a "discretionary right vested in him, and, therefore, not subject to congressional control." Alexander Bickel, on the other hand, believed that the power of Congress "to govern the international deployment of forces is really beyond question." Quincy Wright agreed with Willoughby, Raoul Berger, with Bickel, and the great E.S. Corwin argued one side at one time, the opposite side at another.

Nor does history clarify the issue. Congress has generally let Presidents deploy armed forces overseas but has occasionally asserted a power to control such deployment. All this suggests that, like the warmaking power itself, deployment is a shared power falling into what Justice Jackson called "a zone of twilight" in which Presidents and Congress have concurrent authority. In this zone Marshall's old rule in *Little* v. *Bareme* customarily prevails: the President can act unless Congress acts; if Congress acts, its legislation would supersede an otherwise valid order of the President.

The zone of twilight, in other words, is something Congress can enter at will, but whether Congress should, as a matter of prudence, try to exert detailed control over peacetime deployments is another question. The movement of ships, planes, and men can be a valuable adjunct to diplomacy. So long as Presidents do not move force provocatively or in the service of policies disapproved by Congress, there is a strongest argument for preserving a measure of Presidential discretion. But when it comes to large-scale and long-term troop dispositions, there is an equally strong argument for getting explicit congressional approval.

Is there a conceivable mechanism that would force unwilling Presidents to seek congressional authorization for deployments that threaten to annul Congress' constitutional power to decide questions of peace and war? Such a bill, to be effective, would require a sanction. The obvious congressional sanction is the appropriations power.

One can envisage a war powers bill with three major elements. The first would be an obligation laid upon Presidents whenever they send armed force into or near situations involving or threatening hostilities, to report at once to Congress with full information, explanation, and justification.

The second would be an obligation laid upon Presidents to seek formal congressional consent when the commitment of armed force involved exceeds specified limits in duration and magnitude. The real object of the War Powers Resolution was to prevent another Vietnam, not to prevent hit-and-run rescue missions of a traditional sort.

The third element would be an automatic denial of funds for military action, beyond funds required for purposes of disengagement, if either of the first two provisions is violated.

I wonder, though, whether such a bill would be worth the trouble. The one thing that would compel Presidents to attend to Congress is the appropriations power, and Congress does not need a war powers bill to invoke this power. The missing element in the equation has always been the political will to use powers Congress already has. In a sense, the War Powers Resolution was embraced as a congressional alibi—as a self-activating and automatic mechanism that would save Members of Congress from making specific judgments on the substance of policy. I note in recent days that wrangles over the applicability of the Resolution to this or that situation tend to supersede an examination of the wisdom of folly of one or another Executive course.

Legal propriety is not the only test of the validity of military actions. Preoccupation with defending the machinery or validity of the War Powers Resolution may impoverish debate on the merits of the policy.

Judges, it seems to me, may well have a point in regarding the war powers issue as in the end a political question. Our Constitution is a flexible and resilient charter. Only devotees of original intent can read it as a rigid document set in granite. And if they really believe in original intent, they must reject contemporary heresies about Presidential supremacy on decisions of peace and war. On reading the Constitution, I stand with Woodrow Wilson who observed that the Constitution is "the vehicle of a nation's life" and that its meaning is determined "not by the original intentions of those who drew the paper, but by the exigencies and new aspects of life itself."

It may well be that the exact allocation of authority, as laid down by the Framers for a minor 18th century state, do not meet the needs of a 20th century superpower. But underneath that particular allocation lies a deeper principle. With regard to foreign affairs in general and to the warmaking power in particular, the Constitution commands above all a partnership between the legislative and executive branches. The terms of the partnership vary according to the pressures, political and geopolitical, of the day. That is the way it should be in a democracy. But the partnership must endure.

The vital problems of foreign policy belong in the political arena. They must be argued out before Congress and the electorate. The salient question, the question to which Congress must above all address itself if it is to regain lost powers, must be whether the policies proposed make any sense. Neither branch of Government has a divine right to prevail over the other. Congress must understand that it cannot conduct day-to-day foreign policy. The President must understand that no foreign policy can last that is not founded on popular understanding and congressional consent, and that only a fool in the White House would take unto himself exclusively the fateful decision to enter or risk war. When we find means of making the partnership real, we remain faithful to the deeper intentions of the framers. Perhaps some new version of a War Powers Resolution may strengthen the partnership. Perhaps constant arguments over the proper allocation of war powers may unprofitably divert congressional attention and leverage from the substance of policy.

In the end the nature of the legislative-executive balance will be more a political than a legal question. "If the people ever let command of the war power fall into irresponsible and unscrupulous hands," Justice Jackson reminded us in *Korematsu,* "the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."

Thank you.

[The prepared statement of Mr. Schlesinger appears in the appendix.]

Senator **SARBANES** [presiding]. Thank you very much, Mr. Schlesinger, for an extremely thoughtful statement.

Gentlemen, I regret that I will have to adjourn the hearing for a few minutes because there's a rollcall vote in progress. My colleagues went early, but have not returned, and if I don't depart, I'm liable to miss the vote. So, with all due apologies, Professor McDonald, if you will be patient for a few moments, I think——

Mr. **SCHLESINGER**. Democracy must prevail.

Senator **SARBANES**. The voting on the floor prevails, yes. So, I declare the meeting in recess for a few minutes.

[Recess.]

The **CHAIRMAN** [presiding]. The Committee on Foreign Relations will come to order again. I apologize to our witnesses for the rollcall vote that occurred. We may have to be interrupted again. I hope not.

Had you finished?

Mr. **SCHLESINGER**. I had finished.

The **CHAIRMAN**. You had finished. Great. Then if Dr. McDonald would begin.

Mr. **SCHLESINGER**. He will be back.

The **CHAIRMAN**. He is temporarily away. He will be right back.

[Pause.]

The **CHAIRMAN**. If there are any other guests who have books they would like autographed by Mr. Schlesinger, this is an opportunity to jump on his good nature. [Laughter.]

Now the Chair is glad to recognize Professor McDonald. Dr. McDonald, please proceed if you will. Your full statement, I would add, will be inserted in the record as written, and the same applies to Mr. Schlesinger.

STATEMENT OF DR. FORREST MC DONALD, DISTINGUISHED RESEARCH PROFESSOR OF HISTORY, UNIVERSITY OF ALABAMA, TUSCALOOSA, AL

Dr. McDONALD. I did not prepare a written statement except something else that is in the record.

Professor Schlesinger as always is a hard act to follow. But I think that at least I can demonstrate that there is sometimes as much disagreement among historians as there is among Senators.

the War Powers Resolution has generated a huge body of historical literature, some of it very good, some of it not so good. But the most striking thing about it, as I have reviewed it in these last few weeks—and I've read most of it—is curiously the lack of historical perspective. I think the same observation applies to what Professor Schlesinger just said. Let me supply two aspects of the historical background of the whole question of the power of the Executive in matters of foreign affairs.

First off, the British background. History had shown for 500, 600 years prior to the meeting of the Constitutional Convention, that the executive power and the legislative power are inherently antagonistic, inherently adversarial. They cannot be cooperative. They cannot be shared. From Magna Carta in the early 13th century until the glorious revolution of 1688–89, England was in turmoil continuously because of the adversarial relationship between the crown and the parliament. It went on and on and on. There were civil wars. There were dynastic wars. There were regicides. There was perpetual turbulence.

The British hit upon an ingenious solution to the problem, and it's the only solution to the problem that I can see. In the wake of the glorious revolution they merged the various branches of government. Government in England after 1689 was not by Crown and parliament; it was by Crown in parliament, conceived of as the Crown, the Lords spiritual and temporal, and the Commons. And they had the power.

During the course of the 18th century, the British refined this solution by making what they called the government, what we would call the administration, a branch of the legislative. The ministry has to be members of parliament and responsible to parliament.

Now, in the colonies and in the United States of America, for various reasons, just as the British were resolving this age-old problem, we opted for an institutionalized opposite answer to it, going back to the original thing. Partly this arose from colonial experience, the fact that the colonial Governors, all except those in Rhode Island and Connecticut, were appointed from London, and were regarded by the people living in America as agents of some sort of foreign power. The legislatures were elected by the people locally, and the adversarial relationship became habit. It was second nature. It had more than a century of history by the time of the American Revolution.

In addition to that, there was the matter of what has been called the country party ideology in Great Britain and adopted in the United States, which held that the ministerial system and this government by crown in parliament was a perversion of the ancient constitution, and that only by restoring the ancient constitution with its real or imagined separation of powers could there be true liberty. The Americans were convinced that corruption and tyranny had taken over in England. This was the nature of things as of 1776.

In 1776 when independence was declared, we tried to make do without any executive authority. The Governors of the States had no powers for the most part, and there was no executive arm of the Continental Congress. By 1787 most thinking Americans had come to believe that you cannot have a reasonable government without Executive power. Most of them were committed to the Montesquieuan principle that the executive power has to be independent of the legislative power, and they were ready to do something about it.

Nonetheless, the tradition of fearing executive authority was so strong that in the Constitutional Convention of 1787, fully one-quarter, possibly as many as 40 percent, of the delegates wanted to opt for a multiple, a plural, executive. A majority prevailed in favor of a single executive probably for one reason and one reason alone: George Washington was there. And every American knew that George Washington could be trusted. Only because George Washington existed, only because George Washington could be trusted, were they willing to create a separate Executive at all.

But another part of this historical context is the microhistorical context, not macro, and that is this. During the course of the Constitutional Convention, a very serious problem plagued the delegates and that was how are you going to choose the President. For the most part, the attitude was that the Congress has got to elect the President, but if the Congress elects the President, if he is reelectable, then he is just a toady of the Congress. He's a creature of the Congress. If he is not reelectable, you have to make his term long enough so that it would be dangerous. What are you going to do?

Various means were suggested. We think automatically of a popular election. But if you consider transportation and communication at the time, it was not practicable. So, throughout the convention, they kept trying various other means, but kept coming back to election by Congress. Now, this is going to be congressional government.

The people on the Committee of Detail, which framed really the first draft of the Constitution and presented it to the convention on August 6, 1787, were so unhappy with this method of electing the President, that they didn't want to give the President any powers. If you look at the Committee of Detail draft reported on August 6, you will see that the power to appoint judges, the power to appoint foreign ministers, the power to negotiate and settle treaties, make treaties, was exclusively lodged in the Senate of the United States, nothing in the President.

But then on September 4—or was it the September 6—early in September, a catchall committee of all the States, headed by a delegate from New Jersey named David Brearley, reported a cockamamie scheme for choosing the President and that was essentially the electoral college as we know it. I say a cockamamie scheme. When it was presented, everybody said this is a cockamamie scheme. But as they discussed it for the next couple of days, they realized that this took care of all the objections that had been raised to every other means of electing the President. We could, in other words, have a separate President, and it would be safe.

In the very course of the Resolutions which presented this cockamamie scheme, several powers that had previously been lodged in the Senate were suddenly shuffled back over into the President or to be shared with the President. And in the course of the next few days—remember the convention was almost over for practical purposes, and everybody is in a hurry to get home. During the course of that next few days, bang, as quickly as they could, they shuffled powers over to the Presidency, leaving a foot in the senatorial camp in some powers, leaving a foot in Congress as a whole for some powers, but essentially making the President as independent as they could in the circumstances.

Certain powers that had always been regarded in England as royal powers, royal prerogative, such as the coining of money or the creation of courts or various things, were clearly left to Congress. But when we got to the all-important or the very crucial power of the conduct of foreign relations, well, the fact of the matter is that the Framers, for all their care and all their wisdom, were fairly slipshod craftsmen. They were in a hurry to go home, the result being article 2 of the Constitution, which says the executive powers shall be vested in the President, and the Commander in Chief power, and faithfully execute the laws power, but otherwise leaving some of the traditionally executive powers in the hands of the legislators.

Now, the point of all this is that the normal rules for construing constitutionality can't apply. That is to say, normally you look to the Constitution first. What does it say? Well, the Constitution is ambiguous. It can be interpreted in any of several ways. No. 2, if the law or the Constitution is ambiguous, you go to the legislative history. The legislative history is ambiguous, the point being that once that happens, you have got to go to what has been practiced.

Now, practice over the centuries began with George Washington. Washington in 1789 had decided that he was going to try to have a cooperative relationship with the Senate. Remember Rhode Island had not yet ratified, so there were only 24 Senators at this point. This is September 1789.

One day, one Friday, Washington sent a note over to the Senate saying that he and Secretary of War, Henry Knox, were going to come over and advise and consent with the Senate about some Indian treaties. They went in on Saturday morning. There were carriages outside making all kinds of noise. Nobody could hear. It was a hot day. The various propositions were advanced to the Senators, and Vice President John Adams said, "Well, do you advise and consent to proposition No. 1." The Senate considered itself a deliberative body. That's what it is good at. And because it was good at that, it wanted to deliberate. The President wanted advice. He got mad. His face grew as red his hair, and he said, "Well, I'll come back on Monday." He came back on Monday, and the same kind of thing happened. And he vowed he would never attend the Senate again. It simply was not practical.

After that, all strong Presidents and most Presidents across the board tended to follow Washington's lead, which was to seek advice afterward, at the same time they were seeking consent. Informal advice as you go along from Senators you trust or Senators whose judgment you respect and so on Washington did seek, but otherwise not. And virtually all Presidents followed his example.

Now, President Jefferson is really the most intriguing of the precedent setters because in a lot of ways he thought that Washington's example was monarchical and it needed to be more democratized or at least republicanized. Indeed, in 1787 when he first saw the Constitution, he didn't like the idea of the Executive because he said it was too powerful and responsible to virtually no one, a bad edition of a Polish king. That's 1787.

In 1810, after 8 years in the Presidency, he wrote the following.

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law would be to lose the law itself with life, liberty, property and all those who are enjoying them with us, thus absurdly sacrificing the end to the means.

Do you have to go, Senator Pell? Was that a vote call?

The CHAIRMAN. I'm all right. Thank you.

Dr. McDONALD. I don't know how much time I have left, but just in very brief compass, these are the precedent-setters, Washington and Jefferson.

Now, all the way through—Senator Pressler mentioned—this committee knows. It gathered the figures. There were over 200 armed deployments of American troops abroad during the 180 years prior to the adoption of the War Powers Resolution, sometimes with congressional authorization, sometimes not; sometimes picayune affairs, sometimes not. Presidents Madison and Monroe sent the Navy to the Caribbean for 6 years running without congressional authorization. President Pierce, in 1854 I guess it was, got a word that a bunch of rioters in a little town in Nicaragua called Greytown had stoned the American consulate there. He sent the Navy down. He leveled the town. Admiral Perry was sent to invade Japan. No declaration of war, no congressional authorization, no nothing. He stayed there for a couple of years, had 2,000 men under arms out of a total armed force at that time of about 50,000. In 1900 I suppose it was, President McKinley sent 5,000 troops to aid in the suppression of the Boxer Rebellion. And 1901 to 1904, President Teddy Roosevelt sent 136,000 people to the Philippines to crush an insurrection, and so on. This is not something new. This is not something invented by President Harry S Truman. Now, when you have this long record of unbroken precedent, that becomes a part of the Constitution.

I will close by quoting Justice Felix Frankfurter, a Justice whom the more I study him, the more I admire him. Here's Justice Frankfurter.

> A systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also

sworn to uphold the Constitution making, as it were, such exercise of power part of the structure of our Government may be treated as a gloss upon Executive power vested in the President by section 1 of article 2.

Thank you.

[The article by Dr. McDonald appears in the appendix.]

The CHAIRMAN. Thank you very much indeed, Dr. McDonald.

As you gather, we are going into this subject with a good deal of thoroughness and trying to get the historical perspective that you gentlemen give us, and really trying to make up our minds whether we should leave things as they are, whether we ought to knock out the present War Powers Resolution, whether we ought to move ahead with the Byrd-Nunn-Warner resolution. And we have a very open mind. I think the whole subcommittee has an open mind in this. But to just digest, I would be very interested in being sure I understand correctly what the views of each one of you are.

You, Mr. Schlesinger, as I understand it, if you were in our shoes here, would leave things as they are and leave it to the political process to decide. Is that correct?

Mr. SCHLESINGER. Well, I think that the present War Powers Resolution is a failure. I think that any war powers bill which relies upon good-faith cooperation by the President is doomed to failure because Presidents have their own reasons, their own interests, their own illusions. I think that a war powers bill, to be effective, must contain means of compelling Presidents to act. The best means of doing that would be through the appropriations power. And it is conceivable that you might have a War Powers Resolution hinged on the magnitude and duration of military commitment and governed by the automatic denial of funds in certain circumstances. That seems to me the one valuable suggestion of the Senate Joint Resolution 323 amendments.

But I wonder whether the whole problem of having a War Powers Resolution does not in itself distract attention from the main issue—because Congress is going to spend time arguing about the applicability of the Resolution instead of arguing about the wisdom of the policy. I might say parenthetically that I have no doubt about the constitutionality of the Resolution. So much of the argument about the Persian Gulf has been unprofitably devoted to the question of whether or not the War Powers Resolution applies, when it should be triggered and so on when what we ought to be thinking about is whether the policy itself makes any sense. So, I'm not sure that having a War Powers Resolution has improved our capacity to control Presidents in their warmaking aspirations or to bring about a sounder foreign policy.

The CHAIRMAN. I would ask the timekeeper to bring in the 10-minute rule, and I've used up 3 of my minutes already.

Then, in essence, you would not repeal the present one, or you would?

Mr. SCHLESINGER. I don't think it does much good. I opposed it, as you may remember, when it first was proposed. Nothing has happened in the 15 years we have had it that has persuaded me that it adds very much.

The CHAIRMAN. Dr. McDonald, what would you do? Would you repeal it? Would you leave it as is? Would you follow the proposal of Senator Byrd and company or bring in a fourth alternative?

Dr. McDonald. I agree with Professor Schlesinger that it hasn't worked. I think I would go a bit farther and say that in the nature of things, it cannot work. The very point about the Persian Gulf policy, which I think is kind of cuckoo-monkey myself, but the fact of the nature of the debate about it illustrates very vividly why the Congress can't do it. Congress is a deliberative body, and it's a bargaining body, and it's a great big unwieldy thing. And it does some things beautifully. Among the things it does not do beautifully is to make quick decisions, to decide upon the appropriate amount of force to be applied to a given situation, to be flexible and so on. It's just not in the nature of the beast. So, I would agree that it ought to be repealed on grounds of ineffectuality.

I would also argue, as I did, that it's unconstitutional.

I agree also that appropriations seems to be the most effective route, but it is not an infallible route for two reasons. One is that the President takes an oath of office to enforce the law. He is the only one who has to take that very complicated oath to "preserve, protect, and defend the Constitution." Part of his obligation in enforcing the law and part of his powers in foreign affairs come from the fact that treaties are laws as well. And the adjudication on this is complex, but treaties by and large take precedence over ordinary legislation. If he is obliged by the law of a treaty to send some troops to Southeast Asia or whatever, he has to do it. He has taken an oath.

Mr. Schlesinger. It's true. Most treaties, however, have a provision, as the NATO treaty does, saying that any decision to go to war must be done according to internal constitutional process. So, treaties cannot abolish the need to get consent to war.

Dr. McDonald. No, but that's the more practical thing. You have to have congressional support and therefore popular support to support any kind of long-term operation.

But there is one other little thing, and that is that Presidents being what they are and having their exalted notion of who they are and what their duties are and things like that, are likely to do it anyway. Remember the very famous story in 1908 when Teddy Roosevelt wanted to send the Great White Fleet, as it was called, around the world to let the Japanese and others of our "little brown brothers" around the world know how many muscles we had. And Congress specifically considered it and refused to vote the funds. Roosevelt gave the orders as Commander in Chief to the admiral and said "Go. If you get in the middle of the Pacific Ocean and you run out of gas, they'll come up with some money."

So, I'm thinking in terms of effectual checks. I am not sure how effectual these checks would be.

The Chairman. I think you both have concurred in the feeling that the approach is through the appropriations process. But from a political viewpoint—and I remember this at the time of the Vietnam war—it doesn't really work because you can't knock out the appropriations who are men there under fire, and you can't say, "Well, we'll take your guns away from you, your ammunition away from you." It has to be in the authorization process I think that the Congress should exert itself.

Professor Schlesinger.

Mr. SCHLESINGER. That's a very sound point. Even Abraham Lincoln, who as a Congressman from Illinois regarded the Mexican War as unconstitutional, voted supplies for the troops because both for political and humane reasons you can't abandon them.

The thing which seems to me worth exploration by your subcommittee is the question of governing overseas troop or naval deployment in advance. There has been a long argument about this. The more venerable among us can remember the so-called great debate of 1951 when Harry Truman wanted to send four divisions to NATO, and Senator Robert A. Taft said this could not be done constitutionally without congressional consent. Finally a compromise of some sort was worked out. Truman got his divisions, but Congress made some assertion of its power to govern such deployment.

We should have had a substantive debate over whether the Navy should have been sent into the Persian Gulf. I'm not arguing that the Congress should lie down and let the Executive do whatever he wants. I'm arguing for a circumstance that will lead Congress to address the merits of a policy rather than to argue about whether a certain mechanism applies to a particular situation.

The CHAIRMAN. Thank you very much. My time has pretty well expired.

Dr. McDONALD. Could I, Mr. Chairman, make a brief suggestion apropos of what Professor Schlesinger just said?

The CHAIRMAN. Certainly.

Dr. McDONALD. It might be worth while to put some legislative assistant to work reviewing—I suppose it was before this committee, but it could have been some other committee—the debates in the early 1950's over the Bricker amendment, just to explore the record. It may be that at that time some suggestions were made that were brought up that might prove extremely valuable in the present context.

The CHAIRMAN. Thank you very much. I look forward to following up on that in my next question.

Senator Pressler.

Senator PRESSLER. Thank you very much.

Let me ask both of our distinguished witnesses a question that is broad in scope. In fact, aren't most of the Presidents who are classified as great by American historians people who have exercised considerable authority with respect to the use of American Armed Forces? Now, Presidents such as Franklin Pierce, James Buchanan, and Calvin Coolidge did not do this and are usually not in those ranks.

Mr. SCHLESINGER. Oh, yes. Go ahead.

Senator PRESSLER. Right or wrong, this is the ranking by the liberal historians. But you can take this and digest it.

Also, I would say to Professor Schlesinger, for whom I have a great admiration—I love to read your books—you were a great biographer and admirer I think of Franklin Roosevelt and an employee of John F. Kennedy, as I recall, unless I'm mistaken. Both of those Presidents were very vigorous Presidents in the use of Presidential authority I believe, or that's the way they come across to me. Whereas Eisenhower took a more, it would seem to me, passive role in some areas, although I think he was one of our great Presidents.

The point I'm trying to reach here is this. Is it not true that those Presidents whom some classify as the greatest in our history have taken the greatest liberty in terms of acting and then letting Congress know later, especially focusing on John F. Kennedy.

Mr. SCHLESINGER. I would say that you have to make a distinction here between what I would call the emergency prerogative doctrine of John Locke and assertions of inherent Presidential authority. Professor McDonald read a quotation from Jefferson in which he argued that in certain circumstances, when the life of the Nation was at stake, a President might well move beyond, transcend, so to speak, or ignore the law.

Yes. Here's the statement of Locke's emergency prerogative.

> It is fit that the laws themselves in some cases give way to the executive power rather than to this fundamental law of nature and government. That is the right to self-preservation and self-defense.

Now, this is emergency prerogative. It is not a constitutional power. It's an ultimate resort beyond the Constitution. People like Raoul Berger, for example, a constitutional fundamentalist, would deny that emergency prerogative has any constitutional basis. Still you can find traces of it in the Federalist Papers as an ultimate resort when the life of the Nation was at stake. It was that doctrine which justified what Lincoln did in 1861 and what Roosevelt did in 1941. But they did not regard these things as routine, normal, inherent powers of the Presidency. Emergency prerogative would be a very different thing.

Lincoln in his case did certain things and delayed calling Congress into session. Most of the actions he took were retroactively ratified by Congress.

In 1940, when France was falling, the French asked for American military assistance. Roosevelt sent a message to the French Prime Minister saying "We will continue sending arms and ammunitions, but this does not imply any military commitments. Only Congress can make those commitments."

But in 1941 he did things in the North Atlantic which were not authorized by Congress, doing them presumably in the light of emergency prerogative. He did not claim them as the exercise of normal Presidential powers. Nor did Theodore Roosevelt when he sent troops to the Philippines make any kind of doctrinal justification of it. In fact, the Philippines were an American possession so that the whole problem was very different constitutionally from sending troops into foreign countries.

I think the great change came in 1950 when Senator Taft believed that we could not constitutionally commit troops to Korea without a joint resolution and offered to support such a resolution if Truman would request it. Truman was persuaded by his Secretary of State, a distinguished lawyer, a former law clerk to Justice Brandeis, that the President had the inherent power to send troops into combat and did not need congressional authorization. I think that was the first time that going to war was claimed as an inherent Presidential power.

All this literature about the 200 times in which Presidents did this or that concerned mostly extremely trivial things, rescuing

Americans from pirates or something. It was produced to justify the 1950 decision.

Dr. **McDonald**. In the first place, the doctrine of inherent powers is not a new one. You'll find it in the writings of Alexander Hamilton in 1782. You'll find it in the writings of James Wilson in 1785. You'll find it in the writings of Oliver Ellsworth in 1786 and a continuum thereafter.

Mr. **Schlesinger**. In connection with warmaking.

Dr. **McDonald**. In connection with the making of war.

Now, as to the question of whether Presidents have depended upon genuine emergencies and so on—and back to your original question—yes, the strong ones have intervened and so have the weak ones. They all have.

As to the question of whether it has got to be of dire national emergency, no. The President has got to defend the United States of America.

Now, who decides what is necessary in defending the United States of America? You don't, as they said in the 17th century, wait until Hannibal and his elephants are at the gates of the city. You go out wherever you perceive a danger, wherever you perceive an interest of the United States.

In 1915 when Woodrow Wilson sent the United States Army to Veracruz and occupied a portion of Mexico for quite some time, what was the nature of the national emergency involved? Here's the nature of the national emergency. The U.S. Navy vessel had sailed into Tampico. Some sailors got drunk ashore, and they went in and they went to an area of town which had been marked by the mayor or governor or whatever as being off limits to sailors. They were arrested, thrown in jail, put back on the ship. The commander of the ship demanded a 21-gun salute in apology. The local officials said, "No, I'll give you 14 maybe, but that's the tops." [Laughter.]

In response to that, Woodrow Wilson ordered the U.S. Army to invade Veracruz, occupied it for the better part of a year, ran it, governed it, and said, "All right, now maybe you fellows will shape up." Woodrow Wilson perceived the danger that way.

What was the provocation when Calvin Coolidge sent the Marines to Nicaragua in the 1920's? About the same.

What was the provocation when Woodrow Wilson sent the United States Army under Black Jack Pershing in 1916 to chase all of over northern Mexico looking for Poncho Villa? About the same. No genuine national emergency.

The President perceives that this is in the interest of the United States; this is not in the interest of the United States. This is dangerous to the United States; this is not. And they exercise their power. They have exercised the power from the beginning, and they're going to exercise it until the end or until we get a parliamentary system of government.

Senator **Pressler**. Mr. Schlesinger, would you deal with the Kennedy administration in terms of fitting in with your theory?

Mr. **Schlesinger**. The Kennedy administration. What we did, mistakenly in my view, was to increase the number of American military advisors in Vietnam from about 700 to 15,000. That was done, of course, at the invitation of the South Vietnamese Government. No American combat units were sent to Vietnam until 1965. Military assistance programs have been a routine thing. They did not involve, in theory, American participation in war.

Senator PRESSLER. What about the Cuban——

Mr. SCHLESINGER. Cuban missile crisis?

Senator PRESSLER [continuing]. Or the invasion or the Bay of Pigs.

Mr. SCHLESINGER. Oh, the Bay of Pigs. The Bay of Pigs, of course, was a CIA operation inherited from a previous administration, and President Kennedy stipulated from the beginning that there should be no involvement of U.S. personnel at all in the actual process of invasion.

But I think covert operations present a particular problem, and I think that's another thing your subcommittee will want to take into account. The capacity of covert operations to get us into military situations which may explode and acquire other dimensions is something to which I hope your committee will address itself.

The CHAIRMAN. Thank you very much, Senator Pressler.

Following up your thought about the Bricker amendment, I can remember the discussions about that at the time. And shortly afterward there was a period when many wise men, Rossiter, Senator Fulbright, Mr. Schlesinger, others, came to believe that the Congress was pretty negative, intrusive, and uninformed and was an obstacle to the conduct of American foreign policy.

Professor Schlesinger, you've changed your mind on that. Professor Fulbright changed his. What caused the change in view? Do you think it's simply if the political party—which one is sympathetic, which in your case and mine is the Democratic Party, is in power, then we are more permissive than when it's out of power? How would you analyze it?

Mr. SCHLESINGER. You're quite right. Senator Taft felt that President Truman needed some congressional authorization to go into Korea. I criticized his view which led Edward S. Corwin, the great Princeton constitutional scholar, to write a letter to the New York Times denouncing Henry Steele Commager and me as high-flying Presidential prerogative men. In retrospect Corwin was right; in retrospect, it seems to me, Taft was right. And I think Henry Commager would also agree in retrospect.

Why did we change our minds? I suppose the Vietnam war. The Vietnam war made us see the hazards of Presidential warmaking and the importance of having some check on unilateral Presidential power to get us into situations like that. Vietnam made us much more sensitive to constitutional standards, a sensitivity the absence of which, as I look back, was inexcusable on the part of an American historian.

The CHAIRMAN. Thank you.

Would you in a more third-person way have any thoughts, Dr. McDonald, along this line?

Dr. McDONALD. Well, it seems to me that if you take the long view again, the reason the Framers vested any kind of checks on the power of the President in these matters was fear of what a standing army, as they called it, would do to domestic liberties. That was their concern.

Now, if you take the whole range of the 200 years of unilateral Presidential warmaking on a grand scale, small scale or whatever scale, I can't think of a single time—I can think of a number of times I would have disagreed with the policy. I would have thought it was stupid. But I can't think of a single time in which anything resembling a jeopardy to American liberties was concerned, No. 1.

No. 2, Professor Schlesinger's about-face in the matter, which has long intrigued me—the Bricker amendment discussions were a part of the whole reaction not merely to Harry Truman and the Korean war and so on, but also to the supposed excesses of Franklin Roosevelt on the part of Republicans at the time. The same folks who brought you the 22d amendment, the two-term amendment, which in my judgment was a colossal mistake because it makes lameducks out of every President during his second term, were the folks who were going to bring us the Bricker amendment.

The Bricker amendment, by the way, was defeated not because Professor Schlesinger was against it, but because Eisenhower had just gotten elected and everybody said, "Oh, well." And Eisenhower said "You can trust me," and so they trusted him, and here we are.

But with the exception of two instances, I can't think any times in which this power has really caused much damage overseas even. One exception is the Philippine insurrection. We got out there. We were in over our head. It was not something we could handle. It was just too big, too far away, and it was stupid.

And the other was Vietnam. But in Vietnam, the trouble, the damage, the great damage, came after Congress had interfered in the business. Once the North Vietnamese knew that there was no way the President of the United States was going to come back in there, they'll sign anything. As soon as they signed it, foom, there goes South Vietnam and, wow, look at the dominoes fall, and look at the incredible bloodshed. There was unbelievable bloodshed.

The CHAIRMAN. Thank you very much.

There is one perhaps more varied question I'd like to ask. It has always interested me in seeing two such distinguished historians. I can't resist it.

I wrote a book about 20 years ago, and one of the themes of it was that no nation is going to honor a treaty if by doing so it hurts its own national interests. That's when they hire lawyers to reinterpret it or figure a way around it. And can either of you gentlemen recall an instance when a nation has honored a treaty against its national interests with perhaps the exception of Great Britain in World War I with its alliance with Belgium and in World War II with Poland? Except for those instances, can either of you recall such an instance?

Dr. McDONALD. Sure. I think two. Yes, I can think of two, one of which you might regard as flippant, but the other one I think you won't.

In the question of the Louisiana Territory. In 1800, September 30, 1800, the Government of France signed with the Government of—I may have the dates reversed now—Spain a treaty of retrocession giving the whole Louisiana Territory back from Spain to France. On the next day, or the days are reversed, the United States of America signed the Convention of 1800 with France terminating the quasiwar which had been going on for 3 years. And the United States honored the obligation of its treaties not knowing about the secret treaty of San Ildefonso, the Franco-Spanish treaty, with the consequence that in 1802 Napoleon started to move in and take over Louisiana. We were still honoring the damned treaty.

At this point when Jefferson began to get information, leaks to this effect, that Napoleon had designs on Louisiana, he began to have sober second thoughts. Whether he would, in fact, have gone back on the Convention of 1800 and did what he threatened to do which was "the United States must marry itself to the British fleet and nation" and go to war against France in spite of the treaty, whether he would have done it is a big if. We don't know.

The fact was that things developed in Europe. Things developed in the West Indies. So, Napoleon said to heck with it and offered to sell us the Louisiana Territory. So, we got out of it. But until that point we had been acting as if we would honor the treaty irrespective.

And then the one that you might regard as flippant is that we have honored the treaty that created the United Nations and I think has been in this in violation of the national interest in connection with the United Nations.

The CHAIRMAN. Could you talk a little more distinctly?

Dr. MCDONALD. We signed a treaty in 1945 agreeing to join the United Nations.

The CHAIRMAN. Right.

Dr. MCDONALD. I think that has not always worked out in our self-interest. Nonetheless, we have honored it.

The CHAIRMAN. We haven't always honored it either.

Dr. MCDONALD. That is true. We have a lot, though, when it was not to our advantage to do so.

The CHAIRMAN. Mr. Schlesinger.

Mr. SCHLESINGER. Well, I suppose there are always people who find some treaties not to our interest but nonetheless, the Government will continue to respect the treaties—like the SALT I treaty.

But basically I suppose your thesis is correct that, if a treaty is distinctly detrimental—I mean, not arguably detrimental, but convincingly detrimental—to the interests of a country, the country will find some way of getting out of it.

Dr. MCDONALD. May I add another note to that?

The CHAIRMAN. Dr. McDonald.

Dr. MCDONALD. In 1778 the Congress signed two treaties, a commercial treaty and a treaty of perpetual alliance with the Kingdom of France. And it was very advantageous to us. When the French Revolution came along and then they beheaded Louis XVI and declared it a republic and declared war against the whole world and so on, at that point it became highly disadvantageous to the United States to have this treaty of alliance though it was a defensive treaty. And we hedged and we hemmed and we hawed and so on. And the very Convention of 1800, and indeed the quasiwar of 1798 to 1800 that I mentioned earlier, arose from the fact that we had this horribly awkward treaty. And a part of the Convention of 1800, in fact, was to make sure that henceforth no treaties would be perpetual. They had forgotten in 1778 to put a limit on that. We did try everything to avoid any horrible embarrassments from that treaty, but we did at the same time honor the treaty during the 1790's.

But, like Professor Schlesinger, I would agree in principle and in general with your generalization.

The **Chairman**. Thank you very much.

Now, I think you both questioned the value of the War Powers Resolution because it diverts attention from policy to the process. But what would be the signal sent if we repealed it? Mr. Schlesinger, what would be your thought?

Mr. **Schlesinger**. The reason why I hesitate to advocate repeal, though, as I say, I initially was opposed to the Resolution, is that this might be taken as a signal for an unchecked, free Presidential hand. Therefore, I would rather replace the Resolution by something which would continue to have some admonitory effect on the executive branch. It seems to me that something in the area of monitoring overseas military deployments, conjoined with sanctions through the appropriations power, might provide an alternative mechanism. I would talk about the replacement rather than the repeal.

In many regards, except for the forestall business, the old Senate version is preferable to the House version. But as I argued in my opening statement, I don't think either would make a great deal of difference from the point of view of restraining Presidents; whereas something on troop deployment, combined with the use of the appropriations power, might do that.

This should not be construed by Congress as an invitation to try to control troop deployments, but I think that the Marshall doctrine, *Little* v. *Bareme*—if the Congress doesn't act, the President can; if the Congress does act, the President must respect the action—and the kind of analysis that Justice Jackson made in the steel seizure case provides an opportunity for Congress to act when deployments exceed a certain magnitude in size, a certain limitation in time, and invite a certain magnitude of risk.

The **Chairman**. Thank you very much.

Dr. McDonald.

Dr. **McDonald**. My reading, Mr. Chairman, would be as follows. No. 1, it would depend on when the repeal took place. If it took place before November, it would be read as a signal, "we Democrats are very confident we're going to win the Presidency."

The other is if repeal were to take place after that time—I could be very wrong as I sometimes overrate the intelligence and judgment of the American people—but I think they would take it as an act of statesmanship on the part of the Senate. "This doesn't work. We botched things, and we are responsible, intelligent human beings. We will put as many controls and checks to make sure that the Presidency behaves in a responsible fashion as we can, but it didn't work this way. Sorry, gentlemen, we were mistaken." And I think you would get the applause of the American people if you did that.

The **Chairman**. Thank you very much. And I thank both of you gentlemen for coming down at some inconvenience to yourselves and being with us. Your statements and answers to questions will play a very real role in our own decision in this matter. Thank you.

The committee is now adjourned.

[Whereupon, at 3:33 p.m., the special subcommittee was adjourned, to reconvene at 10:03 a.m., August 5, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

FRIDAY, AUGUST 5, 1988

U.S. Senate,
Special Subcommittee on War Powers
of the Committee on Foreign Relations,
Washington, DC.

The subcommittee met at 10:03 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the full committee) presiding.

Present: Senators Pell, Adams, Helms, Kassebaum, Pressler, Murkowski, and McConnell.

The Chairman. The Special Subcommittee on War Powers of the Committee on Foreign Relations will come to order. Today we resume hearings on legislating improvements in existing law.

The subcommittee is very pleased to have testimony from two particularly distinguished witnesses, Senator Tower and Congressman Crane, whose experiences are vast.

As is the committee's practice in the conduct of an important series of hearings such as this, the day has been allocated for witnesses selected by the minority, and today's hearing represents adherence to that custom, although additional witnesses selected by the minority will also be appearing during other hearings in this series.

We are very pleased to have both Senator Tower and Congressman Crane with us. Would you both please come up to the witness table.

I would call upon Senator Pressler, the ranking minority member of the subcommittee, for any remarks that he might care to make.

Senator Pressler. I would yield to Senator Helms.

Senator Helms. You are the subcommittee's ranking member, so please go right ahead.

Senator Pressler. I thank my senior member very much.

Mr. Chairman, I, too, welcome Senator Tower here and Congressman Crane.

Senator Tower is living proof that there is life after the Senate. He also reminds us of the need to keep in touch with those former Members of Congress whose experiences can prove invaluable to us and who can have a great deal of wisdom to impart to us.

I, likewise, welcome my friend and former colleague, Congressman Crane. We greatly benefit from visits by Members of the

House, and I know that we will benefit from your testimony this morning.

We do not always get the opportunity to share thoughts and experiences with our colleagues from the other side of the Hill, and hearings are one mechanism by which we can do so. Needless to say, I also look forward to both of your testimonies.

It is, indeed, fortunate that you both are here this morning to engage in one of the most pleasurable experiences of public life, elected officials who have fought the good fight on a critical issue, who lost that fight, and who later return to a significant public forum where it can be said, accurately, "we told you so."

I believe that you were right 15 years ago in opposing the War Powers Resolution and that you are right today in continuing to oppose that misguided piece of legislation.

We often lack historical perspective on Capitol Hill due to the rush of events and to the demands of time and place in dealing with these events. This morning, you both bring us a sense of history. What is even more important, you also bring to us commonsense by your testimony on the origin of what I consider to be a highly politicized statute, and on the history of the application of that statute, or the lack of application, to foreign crises and challenges.

Being in the minority is sometimes a lonely and thankless task. But being able to say "I was right" is at least some compensation for the frustrations of minority existence.

I hope you will be able to redress the problems engendered by the War Powers Resolution after its passage, as well as the consequences of congressional intrusion in and micromanagement of foreign affairs.

Another subject which I hope you will both touch upon is the composition of the original war powers bills. They differed in some major respects, not only between the House and Senate versions, but also between those bills and the final conference versions.

Why were some of the harsher elements reduced or omitted in favor of the ambiguous language found in several sections of the final statute?

In conclusion, Mr. Chairman, I think that the testimony today represents an important contribution to our inquiry into the validity of the existing War Powers Resolution. Obviously, the very fact that we are holding these hearings shows that something is wrong somewhere. In my opinion, and in the views of our distinguished witnesses today, as I understand them, the "something wrong" is the very idea of the War Powers Resolution.

I believe it is unconstitutional. I believe that any attempt to strengthen it will also be unconstitutional. It may someday jeopardize our national security interest if it does not already do so.

Therefore, the testimony of our able colleagues today is particularly important.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Helms.

Senator HELMS. Mr. Chairman, I am going to forgo my statement, even though I have one prepared.

I will simply say that our two visitors this morning are, to me, great and distinguished Americans and they are very special friends of mine. I have worked with both of them in various capacities.

What statement I have I will make in the form of questions, with a questionmark at the end of them.

Thank you, Mr. Chairman.

The **Chairman**. Thank you very much, Senator Helms.

Let's start with Senator Tower and then we will hear from Congressman Crane. Then we will go to our questions.

STATEMENT OF HON. JOHN G. TOWER, A FORMER U.S. SENATOR FROM TEXAS AND FORMER CHAIRMAN, SENATE COMMITTEE ON ARMED SERVICES

Senator **Tower**. Thank you, Mr. Chairman and members of the Committee. It is a pleasure to be back with my old colleagues and to think through a very important issue with them.

During the 1970's, we, in the Congress, initiated and enacted extensive legislation restricting the President in the performance of his responsibilities in national security and foreign affairs. These actions reflected the erosion of congressional confidence in the Executive resulting from the Vietnam war and precipitated a struggle for control of American foreign policy which, tragically, continues to this day. It is a struggle in which Congress, by the late 1980's, has to some extent triumphed—with unfavorable consequences for American foreign policy.

I believed in the 1970's, and believe now, that much of the legislation of that period was ill conceived. The thrust of this legislation was to limit the President's options on a range of foreign policy issues: To restrict his ability to dispatch troops abroad in a crisis, and to proscribe his authority in arms sales, trade, human rights, foreign assistance, and intelligence operations.

It has proved the cornerstone of a trend toward confrontational congressional-Executive relations over foreign policy which, if not corrected, will leave the Nation increasingly unable to meet the complex and critical challenges that face it in the coming decade.

Now, as then, I single out the War Powers Resolution for special attention, as it is probably the most damaging of the 1970's legislation, although we have yet to experience a crisis where its effects are fully felt.

The War Powers Act grew out of Congress' frustration with the war in Vietnam and its desire to prevent such a situation from ever happening again. Although President Nixon vetoed the Act, terming it "unconstitutional," his veto was overridden 2 weeks later by the House and Senate.

The War Powers Act jeopardizes the President's ability to respond quickly, forcefully, and, if necessary, in secret, to protect American interests abroad. It may in some cases even invite crises.

Although the Act does not specify whether the report to Congress must be unclassified, there remains the possibility that a confidential report would become public knowledge. In many cases, the more urgent the requirement that a decision remain confidential, the greater the pressures for disclosure.

By notifying the Congress of the size, disposition, and objectives of U.S. forces dispatched in a crisis, we run the risk that the report may get into the public domain, thus removing any element of surprise U.S. forces may have enjoyed and eliminating any uncertainties the adversary might have as to U.S. plans.

In addition to the questionable wisdom of the reporting and consulting requirements of the Act, there are also doubts as to whether the legislative veto it contains is constitutional.

Section 5 of the Act allows Congress the right to terminate any use of force at any time that has not been specifically authorized by a declaration of war or similar legislation, by a concurrent resolution passed by a simple majority of both Houses.

This legislative veto would appear to be in violation of article 1, section 7, of the Constitution.

This presentation clause clearly stipulates that an act can become law only if it is passed by a majority of both Houses followed by the President's assent, or by two-thirds vote in each Chamber to override the President's veto.

In reconsidering the War Powers Act, it is useful to reexamine it and its causes in a more dispassionate light than that of the period. Its genesis was in the divided and confused congressional response to the Vietnam war that grew out of a changing domestic political environment. As opposition grew to continued U.S. involvement in Southeast Asia and as the Watergate crisis began to dominate contemporary thinking about the Presidency, many of my colleagues in Congress came to view the war in Vietnam as a product of an "imperial Presidency" that they believed had usurped the power of Congress.

The truth, I believe, is quite different. Blame for Vietnam can be laid at many doors: a series of American Presidents, and those in the civilian leadership, who advocated gradual escalation and limited rules of engagement.

Nor was Congress blameless. From the beginning, Congress repeatedly expressed its support for the prosecution of the war and provided the necessary funding. That Congress ultimately denied the appropriations needed to sustain our commitments and enforce the Paris accords only reinforces the view expressed by many, including Senator William Fulbright, who asserted: "It was not a lack of power which prevented the Congress from ending the war in Indochina, but a lack of will."

With waning public support for the war, Congress and the media looked to a single explanation—for a scapegoat who could be held accountable for an unpopular war. Blame for the war in Vietnam thus was attributed to the usurpation of power by the President. Eventually, Congress reversed itself and belatedly attempted to use its appropriations authority to end the war. However, its timing was questionable and congressional intervention made a settlement all the more difficult to achieve and, ultimately, impossible to enforce.

The view that the Vietnam war discredited forever Executive control of foreign policy was an emotional reaction, driven by the passion of the moment. Because of it, Congress embarked on a course to limit not only President Nixon's flexibility, but also that of future Presidents. The lasting effect was that Congress institutionalized its differences with the President by legislating permanent solutions to a temporary problem.

The authority to conduct external relations should not vacillate between Congress and the President as a result of failed or unpopular initiatives. Yet this is just how the War Powers Act has been applied.

Comparison of congressional reaction to the 1975 *Mayaguez* rescue and the 1980 attempt to rescue the Iran hostages demonstrates clearly that congressional support or criticism correlates more closely with the success or failure of an operation than with the degree of congressional involvement in the decisionmaking process or formal Presidential compliance with the War Powers Act.

The *Mayaguez* action, while violating not only the Act but several statutory provisions regarding the use of armed force off the shores of Cambodia, was praised unanimously by this committee for acting within the framework of the Resolution. In the latter case, President Carter was denounced by, among others, the then-chairman and ranking minority member of this committee for violating the Resolution.

Last, and most importantly, the War Powers Resolution fails to fulfill the intent of its authors—that is, to ensure "that the collective judgment of both the Congress and the President will apply to the introduction of U.S. Armed Forces into hostilities."

Rather than fostering cooperation and bipartisanship in decisions to commit U.S. forces, the Resolution instead has served to pit Congress and the President against one another precisely at the time that national unity is needed to deal with a potential crisis. This was demonstrated in 1982, with the criticism on procedural grounds of the deployment of U.S. Marines to Beirut and, more recently, with the reflagging of the Kuwaiti tankers.

The Congress, if it has the will, can effectively carry out its responsibilities under the Constitution without the War Powers Act. With the Resolution and other legislation of the same era, it is not at all clear that any President could implement foreign policy with the energy and effectiveness anticipated by the Founding Fathers and required in the modern age. Moreover, many of these legislative restrictions on the powers of the Presidency may be unconstitutional, as well as unwise.

Whether the criticisms are legal or simply practical, the conclusion remains the same. A proper balance of power between the President and the Congress should and must be restored.

Thank you, Mr. Chairman.

The **Chairman**. Thank you very much, Senator Tower.

Congressman Crane, we would like to hear from you at this time.

STATEMENT OF HON. PHILIP M. CRANE, A REPRESENTATIVE IN CONGRESS FROM THE TWELFTH DISTRICT OF ILLINOIS

Mr. **Crane**. Thank you, Mr. Chairman.

I do not have a prepared statement because I was under the impression that we were here to reflect on our understandings of what transpired here in Congress 15 years ago; what led up to the War Powers Act and what we anticipated we might accomplish. I feel I may be traveling under false colors because our distinguished ranking minority member on this subcommittee, Senator Pressler, I think credited me with having voted against the War Powers Act.

I voted for it, Larry.

I did so for a very important reason. My background is history, and one of the areas I used to love to teach was constitutional history. I had the opportunity to go through that drill every year with young people taking history courses.

I have the privilege of serving on the Bicentennial Commission, which I played a role in creating. While, generally speaking, I am not supportive of the concept of commissions, it struck me that this was one opportunity to provide for a national history lesson that, hopefully, will capture the imagination of young people and give them a better understanding of some of the debates and some of the perceptions and understandings that the Founding Fathers had when they convened in Philadelphia 201 years ago.

You can find repeated references by the Founding Fathers of the importance of the branch of our National Government in which I serve, the House of Representatives, which was made the most powerful branch of all that we have here in Washington—with all due respect to the distinguished gentlemen that I am before.

The Founding Fathers viewed the House as the democratic component of our National Government. Yours is the aristocratic component. The executive branch represents the monarchical component. It is government in the hands of the many, government in the hands of the few, and government in the hands of the one.

They looked at the three known systems of government and concluded all were flawed. They did not want to repose total power in any branch, so what do you do, given the dilemma?

They put a mix together with the assumption that they would confer certain powers on each one of those branches and they would put them in a state of tension with one another.

We have, unquestionably, the most inefficient government created by the mind of man. It was intended to be inefficient, the assumption being that the more inefficient the government was, the less capable it would be of inflicting assaults on our personal liberties.

But they recognized, too, that the one major offense that triggered the conflict with Great Britain and led to independence was the issue of taxation.

Now they attacked King George because George was a convenient target when you are going to demagog. But, the truth of the matter is, after the glorious Revolution, the powers of the King had really been virtually stripped to nothing. Parliament at that time was an aristocratic body, principally made up of the powerful landholders. They were the ones who were inflicting the tax burdens and that was the issue, perhaps the foremost issue, that triggered the Revolution.

So, in examining what powers they would confer on what branches of government, they determined that they would put the greatest powers in "the people's body," the one that is democratically elected. One hundred percent of us can be "had at," if you will, every 2 years. And yet, you folks in the Senate can provide a brake on the excesses of popular passion run amok.

We can only have at Senators every 2 years, and then only at one-third of them. As a result, the Founding Fathers felt that this would prevent the aberrations of a given mode of thinking at a given time, but, on the other hand, if it were a sustaining grievance that, within 6 years, they could have at all of you folks, too, and remove the entire Senate. And if that were the case, then indeed it probably was a valid grievance and it was worth changing the composition of the Senate thus.

They granted the Executive authority to the President, government in the hands of the one, with the view that he would execute faithfully the policy decisions made by the Congress of the United States, which represented the people and the States respectively. They felt that that was his limited function.

Now, in article 1, section 8, the powers were conferred upon Congress, House and Senate combined, to declare war. That is a responsibility that should be vested as overwhelmingly as possible in the people's hands, and they felt that no individual could have as good a perception of what the people were thinking as collectively what the U.S. Senate and the House combined could perceive.

As a result, these vital decisions were intended to be decisions reserved exclusively unto us. Thus, not only did they give us the power to declare war, but they gave us the power to raise the money to finance a war. They gave us all of the policymaking prerogatives.

As I say, the body that can be most immediately vulnerable to a change in public sentiment, the House, was the body that was given the absolute responsibility to originate all tax bills; but all general appropriations historically have always originated in the House. This was to keep taxing and spending closest to the people.

Article 1, section 8, not only grants Congress the power to declare war, but to raise and support armies, to provide and maintain a navy, to make rules for the Government in regulation of the land and naval forces, and to provide for calling forth the militia to repel invasion.

In short, this is not a function of the Executive. It is a function of Congress.

It struck me, going back to the heated debates that we had in 1973, at the time of the War Powers Act, that the reason for the frustration that was reflected in passage of that act was that we had gone through an unprecedented experience twice in the post-World War II era, and that was fighting major wars without a declaration of war.

That, frankly, troubled me. I think President Truman's decision to go into Korea was a right one, in retrospect, but I remember feeling violently offended by the fact that he would commit American troops on a massive basis in what was unquestionably a war without getting a declaration of war from Congress. That was my sentiment at the time.

As I say, in retrospect, I am glad he made the decision to do it. But it was, nevertheless, a dangerous precedent, and it led to something that was unique to the American experience, fighting a war with an underdeveloped country to a draw.

We did not win the Korean war. We got a status quo antebellum out of it. We preserved the independence of South Korea. But, once having made the commitment to go to war, it struck me that we should have insisted upon winning the war, creating a unified Korea, North and South, and teaching adventurers like the Communists that, if you want to play that kind of game, it is going to cost you.

It seems to me, further, that, had we done that, there never would have been a Vietnam war. I think they would have said there is a precedent: If you trigger an American response, you are going to pay for it.

We had the capability of making them pay for it.

Now, we got, in the Gulf of Tonkin Resolution, what was interpreted as a quasideclaration, but still not a declaration of war. In addition to that, we micromanaged that conflict in Washington, DC, after having made the decision that we were going to commit American troops and shed American blood in behalf of the ideals that we believe. We never lost a battle on the ground in Vietnam—not a single one—and yet we lost the war. We lost the war because it was a limited, protracted conflict. The American people had difficulty seeing why we were there, increasingly seeing why we were there because it was apparent that we were not trying to win it. We were trying to go back to the status quo antebellum, as we did at the time of the Korean war.

I think it is difficult to explain to a parent why his child should shed his blood, even in behalf of those high ideals, when you don't have the full force of your Government behind pursuing that conflict to the speediest possible conclusion.

We had ill-defined aims. As a result, we began to suffer an erosion of public confidence. The erosion of public confidence was subsequently reflected in the composition of Congress, and the Congress, in turn, reflecting that erosion, began to cut back funding, and finally guaranteed that North Vietnam, after we got out, was assured of victory.

I think it is the frustration of that experience that caused people to say "We have to come up with a better mechanism. We should not be fighting wars without a declaration and without a unified American people behind us supporting that decision. And if they aren't worth winning, they aren't worth fighting."

That is a decision for us, as politicians and policymakers, to make up front.

My dad, who is a physician, likens our conduct of that war to making a decision after your doctor has diagnosed you as needing an appendectomy then saying, "All right, it's my decision to make, Doc, and I say go ahead and do it. But give me a local anesthetic, because I want to look over your shoulder and tell you how to perform the operation."

We have specialists in the military that we have trained. We can give them guidelines. For example, my understanding was that President Johnson asked the Joint Chiefs how long it would take to win if we chose to win in Vietnam. He got a spread of 24 hours to 6 months.

General McConnell said with conventional bombing we could turn it into a parking lot in 24 hours—that was the story I was told—and the pessimists said it might take 6 months to wrap it up.

Clearly, when you look at a power like the United States, which took on the two mightiest military powers in history up to that time on opposite sides of the globe and wrapped it up in 3½ years, how could that same power take on 22 million people with no industrial base, dependent on outside imports, one rail line to China, and maintain an involvement of nearly a decade only to walk out with a defeat. There is obviously something wrong in trying to manage conflicts like this through either the House or the Senate's interposition on decisionmaking at the Executive level in the conduct of war. But I think there was also a lack of understanding of direction at the Executive level, too, at that time.

If we determine clearly that American interests are involved, get the declaration, go in, wrap it up with a minimum loss of life and get out.

I was frustrated, to be honest with you, with President Nixon. I was frustrated because President Nixon came into office with a reputation of being a hardline anti-Communist. I figured he would duplicate President Eisenhower's example when he came in following the defeat of Harry Truman and, in effect, communicated to the North Koreans that they had better sit down at the table because it was going to be a different ball game and we were not going to play under the same rules. Richard Nixon had an even greater opportunity because of his reputation in 1969 to do likewise.

I was waiting for the announcement that we had given them an ultimatum and they had better be at the negotiating table in 48 hours or we would be changing our modus operandi in the conduct of the Vietnam war. The decisions that he made after his election in 1972 triggered the actions that should have been taken in 1969.

Now, even former President Nixon acknowledges that. That is what I think a lot of us breathlessly expected was going to happen. Sad to say, it did not.

So, the War Powers Act, in my estimation, grew out of that sense of frustration over the conduct of this magnitude of conflict without having clearcut definitions as to what we intended to do at the outset. And Congress shold have made that determination. Then let the Commander in Chief, the President, conduct the war with a free hand.

After Congress has made the decision to go to war, it is obliged to provide the necessary support to win it. In wartime, traditionally, we have given our President virtually dictatorial powers to make the decisions to conduct the administrative aspect of them.

I agree that there are flaws in the language of the War Powers Act. But, on the other hand, what struck me, given the terms of the War Powers Act—that is, essentially 60 days in which the President has a free hand—is that if the Israelis were able to conduct the biggest tank battles in the history of civilization and wrap that war up in 6 days, 60 days is ample time for the United States to conduct limited operations and get in and get out before Congress starts looking over the President's shoulder and dictating terms. He has another 30 days after that before the Congress can mandate that he get out of that kind of conflict.

If you look at most conflicts, whether you are looking at an incident like Grenada or even if we had taken out the Sandinistas, we could have done that. Had we made the decision to take the Sandinistas out, the President could have done that under the War Powers Act, as I understand it and as I understood it when we debated it. He could go in and do that, so long as he is in and out in 60 days.

I don't see why such an objective could not be accomplished easily within a 60-day timeframe—in fact, much less than that.

I asked Admiral Moorer in some hearings we had on the House side how long would it take if you launched a full-court press against the Sandinistas, an air strike at dawn, and you are taking out all of the armor, you are taking out all of the artillery, you are taking out all of their air force, their logistical depots, base camps—if you were to do that, how long would it take?

He thought for a moment and he said, "Well, 24 hours maybe." I said, "Twenty-four hours? Why would it take 24 hours?" He smiled and he said, "Well, I think it would take infinitely less time. I was just giving myself a cushion."

The fact of the matter is we have that capability.

Now that is a decision at some point for somebody to make. But a President has, under my reading of the War Powers Act, that authority and the capability to do that.

Now, Congress can say we don't want occupation troops down there. I wasn't even talking about putting occupation troops in when I posed the hypothetical to Admiral Moorer. I said bring the Contras into downtown Managua and tell them that they have a cleanup operation, it will take time. We will quarantine the country, interdict supply lines, but the cleanup is theirs. We want a constitution in 6 months and we want free elections in a year, and we will be down here to monitor the free elections—and remind them how they got there.

But this is the kind of decisionmaking which, in my estimation, is still permissible under the War Powers Act. If it involves a conflict of a greater magnitude, then you are obliged to come to Congress, and must. Otherwise, we are into this frustrating situation—frustrating to me—of Congress being on-again off-again. We make a decision to support the Contras; then we decide we don't want to support the Contras. Then we want to make a decision to support the Contras, and then we don't want to support the Contras.

This, I think, is the inevitable consequence of a lack of determination as to goals, on the one hand, on the part of the White House, and, simultaneously, the inevitable frustration that attends in Americans' eyes a policy that is not spelled out in a clearcut manner and with the objective of winning.

Americans will not tolerate draws. Americans will not tolerate losing. So, if you are not going to make the commitment to win, make that decision up front and don't get involved in the first place.

So, I supported the War Powers Act as a measure that in my judgment was not inconsistent with our Constitution and which had a potential, given the precedents in the post-World War II era of rectifying something the Founding Fathers had not anticipated.

From John Adams time on down—Jefferson, Woodrow Wilson, Franklin Delano Roosevelt, Dwight Eisenhower, all engaged in limited actions without consulting Congress in advance or seeking

Congress' support. But these actions did not involve a full-blown war without seeking a declaration.

And, in fact, Abraham Lincoln lost his House seat, because he claimed that there was not a basis for a declaration of war on Mexico, and he opposed our declaration of war with Mexico.

These are decisions, as I say, that were traditionally made in that manner, and I think the War Powers Act provides—maybe with some rectifying language, some clarifying language beyond what is contained in the original bill—but I think it provides a way of addressing what, in my judgment was a clearcut national problem that cut to the quick with all Americans.

The CHAIRMAN. Thank you very much, indeed.

I have just one basic question. I would be interested in the reaction of each of you on how you would reconcile in your own minds the power of Congress to declare war and the power of the President, as Commander in Chief. Under the present system, this is a sort of gray area. How do you see it? Which side do you see having the preponderance of influence?

Senator TOWER. Are you asking me that question?

The CHAIRMAN. Yes, first you, please.

Senator TOWER. I think it was the intention of the Framers to give the President the principal exercise of power in the field of external relations, and the powers that you would not want to bestow on the President as far as domestic affairs are concerned wer given to Congress. This is the way the democratic process should and must work.

But in the field of external affairs, you are looking at a different class of power than the power over domestic affairs.

I think that the scholars have consistently held and the Supreme Court of the United States has held that the President possesses a unique power in terms of international affairs that he cannot, should not, possess in terms of domestic affairs.

The Court has said that divestiture of the power to conduct external relations in the executive branch was something that was a necessary concomitant of nationality, that would obtain even if there were no specific delegation of such powers by the Constitution.

I think it is clear that the President was expected to take the leadership. He was made Commander in Chief of the Armed Forces, given the power to appoint Ambassadors and his subordinate ministers. I think that there was a good reason for that, even though the Senate has the power to confirm them or to reject confirmation of them.

I think it was clearly intended that the President would take the leadership.

We suffer more paralysis in this country in addressing ourselves to external relations than any country. The British, for example, with much less military power than the United States can act more quickly and more decisively than we can. And they are a parliamentary democracy. But theirs is structured so that the Prime Minister can exercise this power, and, of course, if the party disagrees, they can vote against the Prime Minister and she will have to go to the country for an election. Then you would have a popular referendum on the matter. But it just simply does not happen that way in the United States.

I think if we are to have a foreign policy that is comprehensive, reliable, predictable over the long term by friend and adversary alike, we have to give the President enormous flexibility.

I would remind you that military power is an instrument of diplomacy. We use the Navy, for example, as a precision instrument of diplomacy. There are many instances in which the President will feel that to implement policy, we must deploy military force when there may not be an intention to engage that force in hostility.

Here is where your time limit comes to bear on a situation in which there are some ambiguities, in which there is a reasonably clear objective, but in which military force has to be committed for a long period of time whether or not it is engaged in hostilities.

The important thing is that we be perceived as being able to act with decision, with dispatch, and that the policy that we employ will not be picked to pieces through congressional debates or nitpicking congressional action.

Congress is not structured to maintain the day-to-day business of the conduct of diplomacy. Congress is not structured to devise and maintain a long-term, comprehensive, cohesive, reliable foreign policy.

Members of Congress will very often vote on foreign policy issues on the basis of constituent concerns, not on the basis of national concerns. It is the President who has the single vision to identify clearly the national interest in external affairs and to act to promote and defend the national interest.

We, who have served in Congress, have been under a lot of constituent pressures on various matters. I can cite votes that are taken daily that are influenced perhaps more by constituent pressure and political considerations than by any cool assessment of what the foreign policy implications are.

The CHAIRMAN. Thank you very much.

Congressman Crane.

Mr. CRANE. Well, first of all, I would agree with Senator Tower that the executive branch has the responsibility for conducting diplomacy and foreign affairs, short of when the shooting starts. I think in this area, ideally, in the best of all worlds, you would have a cooperative, working relationship, where the Congress fundamentally agrees with the Executive on the importance of the pursuit of certain objectives in diplomacy and foreign policy.

What Senator Tower said, though, about Congress acting upon constituent pressure, that, indeed, is true. The Congress has the power, certainly, through control of the pursestrings, to alter policy, but, again, going back to the perceptions of the Founding Fathers, that is a power that does not belong in the hands of one man.

One man may be granted the power once we have made the policy decision to go to war, and Congress has ratified that decision with a declaration. Then the President enjoys virtually dictatorial power. Presidents have historically always exercised that dictatorial power as Commanders in Chief. But even with a declaration of war, Congress has the power in theory to change its mind and that is to simply stop funding the war.

We would hope with clearcut objectives, that these things would be consummated in the speediest possible time before you get that shifting sentiment.

I would like to go back and just read a couple of comments.

John Locke, in his Second Treatise, for example—Locke was one of the guiding lights in the thinking of the Founding Fathers—observed, "There can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate."

Then, James Madison indicated, "In republican government, the legislative authority necessarily predominates."

Thomas Jefferson, in a letter to Madison in 1789, said, "We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."

Their perception, as I said, was overwhelming, that the decision to go to war was a decision that must reside in the legislative body, and it has, more specifically, originated in the House, "the people's body," the chamber that is closest to the people, on the assumption that this is a decision that has to be made in a way most consistent with what a majority of people think.

Now, no Representative can claim that he truly represents a half million people. The Senators—and I am sorry that they ever made you popularly elected because you were not supposed to have to sweat about elections the way we do, were supposed to be removed from that. I think it was a big mistake when we democratized the election of Senators. But if you take the combination of the two bodies, it was assumed that the combination of your chamber and ours would reflect most closely the sentiment of the people, and that this would be done appropriately, when you are talking conflict, with a declaration of war. Then finance the war, prosecute the war, get in, get out, win it, and come home.

The CHAIRMAN. Thank you very much, indeed, Congressman Crane. We appreciate your views.

I have no further questions, but I would remark that this is a subject of great interest in the Senate, though I think not so much of the general public. It is of some interest here in that we have six times as many Senators here as we do occupants of the press table.

I would now turn to the ranking minority member.

Senator HELMS. Thank you, Mr. Chairman.

One thing that has been omitted from the assessment of the situation, Phil, is that the Vietnam war was the first war ever fought on television in the United States.

I suspect that, had the same situation prevailed during World War II, the French people would be making their vichyssoise out of sauerkraut today. But that is neither here nor there.

I had just gotten here in 1973. I was the new boy on the block. This matter came up and I took home the proposed legislation and some of the statements that had been made. I compared these documents with the Constitution.

I remember going to Sam Ervin, a pretty good country lawyer, regarded as a pretty good constitutional expert. I said, "Senator, I'm not a lawyer," and he said "Well, you're lucky." "But the way I read this thing," I said, "it's clearly unconstitutional." He said, "Well, you may not be a lawyer, but you can read the English language."

I opposed it.

Incidentally, John, there were 18 of us who voted against it and only 3 Senators who voted against it are still in the Senate.

Senator TOWER. Let the record show that I left voluntarily.

Senator HELMS. Pardon?

Senator TOWER. Let the record show that I left voluntarily.

Senator HELMS. Right. Well, some of them didn't leave voluntarily, but most of them did.

John, you authored a very fine piece in a 1981 issue of Foreign Affairs, in which, in my judgment, you pointed out wisely that enacting legislation may become institutionalized and thereby lend a certain sense of rigidity to problems that require flexibility. You alluded to that again.

First of all, Mr. Chairman, I would like for that article to be made a part of the record because it is an excellent article.

The CHAIRMAN. Without objection.

[The information referred to appears in the appendix.]

Senator HELMS. John, I don't know whether you remember writing it or not, but I remember reading it and I reread it the other night.

For the record, can you point to some foreign policy controversies where the War Powers Resolution or the threat of the invocation of the War Powers Resolution made things more difficult rather than less difficult?

Senator TOWER. Well, I think you very often get into debates over whether or not the War Powers Act should be invoked. There is disagreement between and among Members of the Congress as to whether the War Powers Act should be invoked. So, that is a point of debate which I think weakens perceptions abroad of American ability to act decisively.

Now, as I pointed out in my testimony, so far it has not been so inhibiting in actual fact, in terms of the way it has operated. It has never been tested in the courts. I rather suspect that if it ever is tested in court, probably the congressional veto will be found to be unconstitutional.

Now I am not a lawyer either and have no regrets about not being one. I am a political scientist by trade. But, in my view, this could be an inhibiting factor on the President and the use of military force as an instrument of diplomacy.

We tend to think in terms of military force being available to fight a war in Central Europe. We have a sort of "Central European Front mentality," when, in fact, the primary utility of a navy, for example, is likely to be in an interwar period, and as a means of deterring war through using the military for diplomatic purposes.

I think the President is inhibited by the War Powers Act and certainly the perception of the President's ability to act with dispatch and decision is impaired, I think, by the presence of the War Powers Act.

In my view, there is adequate power invested in the Congress to end a war. As Senator Fulbright said, and I quoted him in my testimony, it was not that Congress lacked the power to end the war in Vietnam; it lacked the will. When it finally summoned the will, it did so at the wrong time, with the point that the President was proscribed from enforcing the Paris accords, which would have left us with, as Phil Crane says, an antebellum status quo, which would have been far more desirable than the present situation.

We have to remember that Vietnam was lost to conventional armored attack.

Now, in terms of having to declare a war, as Congressman Crane again points out, we have been engaged in conflict more times in an undeclared war situation than in a declared war situation. Starting in the late 1790's, when the Republic was in its infancy, we fought a naval war with France. In the Jefferson administration, we fought the Barbary Pirates. We fought the Indians without ever having declared war.

There are instances in which you cannot declare war without recognizing the legitimacy of some political entity that you do not choose to recognize.

So, you have to have some flexibility of action to use military force to achieve diplomatic objectives.

Senator **Helms**. I agree.

Senator **Tower**. And I submit that is inhibited by the War Powers Act.

Senator **Helms**. Well, we all know the circumstances. I was hesitating because I don't want to make this a partisan assessment. But I wonder what would have been the case had Richard Nixon not been President, if there had been a President of the other party. I don't think this legislation would ever have been proposed.

I agree with you. Even though I am not a lawyer, I believe the War Powers Resolution is ever contested before the Supreme Court, it is going to bounce out just like a rubber ball and be declared unconstitutional.

Phil, let me ask you to be hypothetical a little bit.

If the War Powers Act is not repealed or substantially revised, preferably the former, what advice would you give to the next President of the United States, whomever he may be, with respect to compliance in situations where U.S. Armed Forces may become engaged? Do we have the prospect of another Boland amendment mess on our hands?

Mr. **Crane**. Well, I think in the case of the Boland amendment, that was clearly subject to a challenge in the courts. I think it would have been overturned.

As I say, given that kind of situation the President faced, you have to make a hard decision, and the hard decision that I would have made, as I indicated, is I would have made that air strike. I would have taken them out. What's the problem?

I'd have waited until a long weekend, like Fourth of July, when all of us are on planes or cruising around the world and we would read about a fait accompli by the time we touched down.

Just make the decision and do it. In fact, I counseled that 2 years ago to some of our people in this administration. I mean, what are we dallying around down there for? We have no qualms whatsoever about overthrowing governments. We created the situation by ousting Somoza. We had widespread public support for that.

OK, let's take the Communists out, too. What's the difference? And you could do it without risk of one American life, barring something mechanical.

If it is not worth making that kind of commitment, then you are going to have the hassle that has inevitably attended an on-again off-again, seemingly not total commitment to an objective.

I have despaired over the administration's presentation of this case. It is frustrating because you are not going to get the backing of the Congress unless you have a clearcut objective and you are willing to get out front and take the heat for having done it.

You know, we went into Grenada and some claimed that we did not have a legitimate pretext for doing it. Some argued that the students were not imperiled; others said they were. We went in; we wrapped it up. I was on a TV show, a Phil Donohue show, with one of our colleagues from Massachusetts a week after it was over. He was on the other side. But the fact of the matter is, by that time the news was trickling in that Americans overwhelmingly supported that involvement.

An administration should have the gumption to do it or get out of the situation and accept the consequences. We have to recognize that we cannot control partial and protracted involvement through Presidents. It's going to be controlled by Congress.

Senator HELMS. Mr. Chairman, I would hope that I could impose upon these two gentlemen to file some written questions. I think it is important to develop a couple of more thoughts, including what impact the War Powers Act has had upon our covert activities and our intelligence capability.

I am of the opinion that it had a decided effect to the disadvantage of the security of the United States. Others will say that that is not so.

Anyway, I will file some questions. If you can find time to respond for the record, I would appreciate it.

I thank both of you for coming this morning.

The CHAIRMAN. Thank you very much.

Senator Adams.

Senator ADAMS. Thank you, Mr. Chairman.

Senator Tower, it is a pleasure to see you again, and it is a pleasure to welcome my former colleague, Representative Crane. I am pleased to see you both.

Senator Tower, you have been a great supporter of this institution and of the Congress, and I admire you for that.

Let me begin with a question about the warmaking power: If the Congress were to declare a war, do you think a President could veto it?

Senator TOWER. No.

Senator ADAMS. I don't either. I don't think there is any right to veto at all.

Second, if the Congress of the United States——

Senator TOWER. But, again, this is where custom and usage come into play, that is, such declarations usually follow a Presidential initiative. I cannot conceive of any situation where that would not be the case.

Of course, that is not a legal opinion as I am not a lawyer.

Senator ADAMS. I understand. Of course, over 25 years, a lot of things happened, and, you know, you might have a President who did not want to do something and the Congress did. But I will go to a simpler case.

Suppose the Congress of the United States decided they wanted to issue letters of marque and tell the U.S. Navy to go out and capture a vessel. Could the President veto that?

Senator TOWER. Well, now you are posing a hypothetical case, and if that ever occurred, I think you would face a constitutional crisis that would have to be resolved in the courts.

Senator ADAMS. I think so, too.

Senator TOWER. Because the President is Commander in Chief.

Senator ADAMS. The reason I am asking this is because on page 3 of your statement, you worry about a constitutional veto in the *Chadha* case, and I am going to pose another example—and, Representative Crane, I would like to go to you in a minute on this, too, but I want to stay with the institutional question for a minute.

The concurrent resolution is traditionally used by the Congress of the United States for its internal affairs, as an exercise in the use of its rules. Do you agree that the Constitution allows the Senate and the House to use a concurrent resolution, for example, to support and go through the Budget Act without the President having the right to veto that concurrent resolution?

Senator TOWER. I'm not sure that I understand the question.

Senator ADAMS. Well, as we both know, the Budget Act itself is based upon the rules of the House and the Senate, and, therefore, a budget resolution, which is passed as a concurrent resolution, is not subject to veto, is it?

Senator TOWER. No, but it is purely a housekeeping resolution, anyway. The Congress can violate, and as a matter of fact has done so, can violate its own budget resolution. The last act of Congress prevails.

Senator ADAMS. I understand.

But if the Congress, for example, were to set up a trigger and say that under the rules of the Congress, by concurrent resolution, we shall vote on whether or not we are in hostilities, it is this Senator's opinion that that is not subject to veto.

Senator TOWER. My point is this. Why resort to that when Congress has the power, through control over the pursestrings, to bring something to a conclusion?

Senator ADAMS. I will answer that.

It was stated yesterday on the floor in debate—we are starting on the defense appropriation bill and we are also working on the dire supplemental appropriation—that there has been $338 million spent in the Persian Gulf. Now, not a dime of that has ever come up as a line item appropriation or in any fashion that I know of to the Congress.

In other words, it's come out of O&M and it is taken from other accounts. The power of the purse cannot operate if the President, as you and I both know he does, has control of the administrative machinery, the Office of Management and Budget and the Departments. I have been in the Departments and you have seen them for years. They can operate for a sustained period of time—in this case, for over a year—without ever having the congressional appropriating power being applied to it.

Senator TOWER. Congress has available to it a very simple device. Let's go back to the Fulbright amendment from the Vietnam war, which said "no moneys authorized or appropriated under this or any other act may be used to support military action" in, around, over—I don't remember what all the language was—Vietnam. That is when the North Vietnamese decided to mount a conventional, armored attack against South Vietnam and overran them.

So, the power is clearly available. Why go to devices like concurrent resolutions, which are of questionable constitutionality—and I am not a constitutional lawyer, as I reemphasize, and it is a matter for the courts ultimately to decide—why resort to things of questionable constitutionality when you have available to you a constitutional power, which you can use unwisely, in my view, sometimes, and I think the Congress has very often used its legitimate constitutional power unwisely.

Senator ADAMS. Senator, I will answer that and then will turn to Representative Crane.

I agree with the statement that the Framers of the Constitution clearly understood that military power and its availability around the world was part of a potential foreign policy usage. But just as clearly and emphatically, they stated that they did not want the dogs of war released without the Congress itself—not just the President—authorizing that.

Now, what we are dealing with here is it is between sitting out a conflict and conducting military operations around the world and actually engaging in hostilities or in combat, and beyond that, in hostilities or combat for a sustained period of time, such as Korea or Vietnam. It happens also to be the gulf.

Now what I am concerned about is the Vietnam war. The question was asked about what if it had been a different President. The problem that was going on in the Vietnam war—and all of us were in Congress at that time—was that a very limited portion of the population was involved in it. A limited number of 18- to 21-year-olds were being drafted and they and their families had a very heightened interest. Reserves were not called up across the board. The country did not have a war tax, and when you speak about Presidents, a number of us fought with the President of the United States to say if you are going to conduct a war, you had better have a war tax. I won't quote his response to us—a Democratic President.

So, you had the country with a certain significant number of people bearing the burden of a war, and that is why they took to the streets. You can criticize their actions or a lot of things, but the political process broke down. That is what the War Powers Resolution was supposed to correct, which was to get a consensus.

Representative Crane, I would like your suggestions because I am concerned about the same things you are. We have tried in the War Powers Resolution to grant the right to an Executive to conduct the day-to-day operations. But there is a line between day-to-day operations and committing the resources of the Nation to, I'll use the word "war," but Lyndon Johnson never called Vietnam a "war." Harry Truman never called Korea a "war." We never called the Persian Gulf a "war."

But to me, this is a commitment of resources in major fashion of the United States to whatever you want to define under it as "war."

How much time would you give and what would be your suggestion—I have my own ideas, but I would like to hear yours—as to triggering an action to say to the House and Senate: "All right, it's time for you to either put the Nation into this sustained conflict or not? How long would you give and how would you trigger it?"

Mr. **Crane**. Well, I would not equate our involvement in the Persian Gulf with either Vietnam or Korea.

Senator **Adams**. All right, then, set that aside and just focus on the others.

Mr. **Crane**. As I say, under international law, guaranteeing freedom of the seas is not defined in the same context, and that is essentially what our role was there in the Persian Gulf.

But in terms of a War Powers Act, it is probably redundant because Congress, with 1-year appropriations, always had that authority. All you have to do is cut off the funds and you can control these policies.

So, in that sense, Congress initially anticipated maybe the duration of a year of involvement, of free action, dependent upon the resources the Congress had already appropriated for the military.

Now, if the President had to come back and ask for more funds because he was exhausting them, that was another matter.

But I think, as I indicated before, a direct kind of hostility involving a commitment of troops and resources for 60 days, is ample time to accomplish those limited objectives that we have done 150 times in our national experience.

I'm not talking about the wars that we fought. I'm talking of 150 military engagements under Democrats, Republicans, Federalists, you name it. This has been a practice that has been viewed as acceptable because it was within sufficient constraints that it really did not exhaust the appropriations given by Congress over the span of 1 year.

The **Chairman**. Thank you very much, indeed, Senator Adams. Senator Pressler.

Senator **Pressler**. Thank you very much.

I would first like to ask whether you believe that the proliferation of Foreign Affairs, Armed Services, and Intelligence Committees affects the ability of Congress to respond under the War Powers Act? Barry Goldwater once gave an extemporaneous speech in which he said he thought that we should combine the Armed Services Committee, the Foreign Relations Committee, and the Intelligence Committee because if the President tries to consult with people up here and to involve Congress, he must involve so many committees that there are bound to be leaks. It is also very unwieldy. The jurisdictions of the committees that deal with foreign affairs overlap and the proliferation of committees in Congress has made it very hard for the President to consult with Congress.

What is your view of that?

Senator **Tower**. Having viewed it both from the congressional side and the Executive side, I would say that this is true.

I agree that there has been too much diffusion of power and authority in the Congress.

Now, when I first came here, freshman Senators took a back seat and kept their mouths shut for a long period of time. Senator Pell will remember that because he was 100 in seniority in the Senate when I came, and then he became 99 and I became 100.

The **CHAIRMAN**. I remember.

Senator **TOWER**. I noticed we both cowered in our back chairs and did not say much the first year or so we were there. I remember Senator Stennis taking me aside early on and saying to me, "John, the first thing you've got to do is learn how to be a Senator."

Well, no longer do we spend much time learning how to be legislators. We become instant powers of authority on various things because of the proliferation of committees and subcommittees. A freshman can then become a ranking member or a chairman of a very key and important subcommittee.

So, I think this proliferation and diffusion of power in the Congress has had an adverse impact on foreign policy.

Do you remember when Tom Connally and Arthur Vandenberg forged a bipartisan policy? There was really a great deal of discipline in the Congress at that time that does not exist now. I would, at this point, like to applaud Senator Kassebaum for her efforts to restore some discipline to this disorderly process and her proposals for congressional reform, which are supported also by Senator Inouye. So, it is a bipartisan effort.

What has happened is not so much partisanship in foreign policy but an adversarial relationship between Congress and the President. It does not matter who dominates the Congress and who dominates the White House. That adversarial relationship has developed and that, in my view, is unfortunate.

Let's go back to the SALT II Treaty. The Foreign Relations Committee was considering it favorably until such time as it was withdrawn, whereas the Armed Services Committee voted 10 to 0 that the SALT II Treaty was not in the national security interest of the United States.

So, you get a paralysis of action, I think, in the Congress very often on elements of foreign policy.

Now, if Congress is going to participate in a significant manner in altering the direction of policy by denying the President a means of implementing policy, then Congress had better get its act together and have the ability to formulate a substitute policy that can be implemented on a day-to-day basis.

I submit Congress cannot do that.

Mr. **CRANE**. I think, with regard to your proposal for fusing those committees, there is much to recommend it, but I would segregate out the Intelligence Committee. In the best of all worlds, I would see a very small Intelligence Committee, a joint House and Senate Intelligence Committee.

Senator **TOWER**. I agree.

Mr. **CRANE**. You need oversight. I would want background checks on every Member who served on that committee. I would want background checks on every staffer who served. I would want clearcut guidelines that you will go to jail if you are guilty of a leak of any information.

I would want to restrict the access to information to other Members on a need-to-know basis. But you have to have oversight by the Congress of the United States.

I remember a friend of mine telling me one time: "The problem with you conservatives, Phil, is when the CIA Director says there is security at risk, you folks just run knee-jerk fashion to protect him and say 'Hey, we don't want to learn about this, we don't want to know.' " He said added that a Communist agent got unwittingly appointed as head of the CIA and he knew that conservatives were going to cover for him every time he raised the flag of national security without really superintending his operations, then he could scuttle U.S. national security with impunity.

I had not thought of it, but he was absolutely right. You have to have oversight. That means that we are not going to have as effective a covert operation in world affairs as some other countries might have, but that is a part of the price we pay for being a free country.

With regard to Foreign Affairs and Armed Services, I think that Senator Tower has put his finger on it. This "balkanization" of committees that started after the 1974 election with the proliferation of subcommittees has certainly worked detrimentally on the Ways and Means Committee.

When Wilbur Mills was chairman, the committee was much smaller, about 25, and we expanded it to 36. Part of the reason for the "balkanization" was to reward fellows who had participated in forming a union that took over the Democratic Caucus on the House side. Creating multiple subcommittees provided these people with their own petty baronies.

But the problem is I have heard exchanges, when we are in executive session, that, "Our colleagues are not going to understand what we have done."

That's disturbing in the extreme. We ask colleagues to support legislation to which we are privy to information that we know they will not understand when we urge that support.

We have a collegial atmosphere on our Ways and Means Committee between the Democrats and Republicans alike. And yet, in subcommittees, I have heard that same language used: "Well, when we get to the full committee, they are not going to understand it. We'll put it in and we'll get it through the full committee."

That is certainly not to me what was intended by the Founding Fathers in representative government.

So, anything that can work to try to get a better consensus, a better working relationship, and a better understanding and better cooperation between executive and legislative branches is in order.

But, if you look historically at our national experience, one of the problems is there has been a shift from an abuse of legislative power to an abuse of Executive power to an abuse of legislative power. No President exercised more Executive power than Abraham Lincoln. The reaction to that, after his assassination, was an abuse of legislative power with radical reconstruction.

So, power excesses have shifted back and forth.

Prior to World War II, the isolationist sentiment in the country caused the President to resort to executive agreements, like swapping destroyers for British bases. This practice continued once we went into the Cold War, after World War II, and that excessive Executive authority is what I think triggered a reaction that now has resulted in an excess of legislative intervention in national policy.

Hopefully, it will get back into balance again. But, in the meantime, I think we ought to be examining the ways in which we can help produce that kind of balance and get a better understanding that, when a President gets elected, he has a mandate and a popular support from the entire Nation in a kind of vague, ill-defined way because he is not talking about specific policies, usually. But, on the other hand, we ought to have more respect, it seems to me, for what the American people are trying to say when a President gets elected on general themes, and then see if we cannot more cooperatively work between the legislative and the executive branches to fulfill that.

The CHAIRMAN. Thank you very much.

Senator Kassebaum.

Senator KASSEBAUM. Thank you, Mr. Chairman.

I am pleased you asked the question, Senator Pressler, about the operation of the Senate, and, of course, I agree very much with Senator Tower's observations.

I also agree with your statement this morning, Senator Tower, and regret I was not here when you gave it, though I have read it. I think your comment at the end about the Congress—both of you made this same comment—if it has the will, how then it can effectively carry out its responsibilities under the Constitution without the War Powers Act is very true.

But in an earlier comments, Senator Tower, you said that we often have to vote here for the national interest above constituent concerns. I agree with that as well. But I think that, over the long term, our responsibility, as well as the President's, is to pull a consensus of support together from constituents, or else we cannot sustain a policy.

I think that is what has happened in Central America. We have not been able to pull together a consensus of support that can sustain our efforts.

So, I think that we don't need the War Powers Resolution. But I think we need to understand better the relationship between the executive and the legislative branches and how we build cooperation between the two to sustain a policy effort.

Would you not agree?

Senator TOWER. Well, I think that Congress has placed itself in the unfortunate position, in voting on so many foreign policy decisions, it has placed itself under constituent pressures. And, when you are dealing with external relations, you are dealing with terribly arcane business that, quite frankly, the general citizenry does not clearly understand. The American people are somewhat unsophisticated on foreign policy matters.

Now, that sounds like a very imperious statement, but the fact is that it is true.

I think that, when the American people elect a President, they give him a mandate, in effect, to implement the policies that he is advocating during the election campaign, be he Democrat or Republican.

The fact is that foreign policy issues usually do not figure in congressional or senatorial campaigns—it's almost always domestic issues, usually constituent-oriented issues. I talked a lot more about the plight of the oil industry when I was running for the Senate or the plight of the cotton farmer than I did about national security issues.

This is because that is the way the Congress is oriented, toward domestic issues. In Presidential elections, foreign policy does become an important element, and you can consider that the President, by virtue of being elected by a majority of the people of the country, in most instances, does have a mandate to implement his policy.

There is a thread of continuity that runs through Presidential foreign policy. If you look back to World War II, you will see pretty much a continuation of policy among Presidents, and Presidents generally tended to react the same. Democratic and Republican Presidents both reacted adversely to the Turkish arms embargo, for example, which was a foreign policy issue. It was an example of congressional dabbling that had, I think, a very deleterious effect on the alliance and on the ability of the alliance to defend itself against attack and to deter attack.

So, I think that, really, the model for all of this goes back to Tom Connally, a Democrat from Texas, and Arthur Vandenberg, a Republican from Michigan, who together with President Truman, forged a policy that had no partisan coloration.

The cry was "politics ends at the water's edge." I would like to see a restoration of that.

Senator KASSEBAUM. I could not agree more. But you are giving an example of where it works the best, because there was effective communication between the executive and legislative branches. They took each other into their confidences and worked out initiatives without it becoming an adversarial role.

Senator TOWER. Well, I would endorse Congressman Crane's suggestion about, for example, a joint Intelligence Committee, which was one of the recommendations of the President's Special Review Board, which I chaired, which was made up of Senator Muskie and General Scowcroft and myself.

It was something we arrived at unanimously. There was no debate on the issue. I think that would be a confidence-building measure. I think the executive branch and the legislative branch both have certain responsibilities. But the legislative branch gets away with a great deal because the press regards itself as having an adversarial relationship with the President. As Sam Donaldson says, "It is the function of the press to hold the President's heels to the fire." It's not the congressional heels to the fire, but the President's.

The press will take on individual Members of Congress for junketing or accepting contributions from certain PACS or being involved in bribery or a scandal of some sort, but the press has never taken on the Congress and the Congress is the institution in this town, in my view, that most cries out for reform.

Again, Senator Kassebaum, I commend you on your efforts, and I hope ultimately that you are successful. But I am afraid I have grown cynical and pessimistic about the prospect of it ever happening.

Senator KASSEBAUM. I would like to follow up on something, for a minute. You touched on the report which you and Senator Muskie did at the time of the Iran-Contra situation, which I think was a very perceptive report.

In that report, you commented on the Chief Executive's powers. I think that is a good example, again, of where there obviously were breakdowns on all sides.

I would like to ask you this. In your experiences in reviewing that situation, knowing what you do on that, let me move on to this: What is the President supposed to do when the Congress does not agree with him, and our power is the power of the purse, and if we withhold funds?

Senator TOWER. Well, I think the President in that situation has no options. He is proscribed by Congress for spending money for something the Congress does not want it spent for, and the perfect example of that was President Ford would have liked to have enforced the Paris accords, but he could not because he was narrowly proscribed by Congress from doing so. Had he been permitted to do so—history never reveals its alternatives—but I think one could speculate that probably you would have a Korean situation in Vietnam today, and you would not have had all of the bloodshed in what was formerly Indochina that you did have.

But one can only speculate on that.

I think Congress makes an error in passing permanent legislation during a time of crisis or perceived crisis.

Again, you have the power of the purse that you can use very quickly and incisively. It is a surgical instrument that you can use to deal with a problem at the moment.

Congress is considering legislation to proscribe the President further in terms of covert action, to try to avoid the recurrence of an Iran arms sale situation. In fact, the President himself has moved to implement the recommendations of the President's Special Review Board—which is erroneously called the "Tower Commission"—and has implemented virtually every one of those recommendations.

We specifically advised Congress not to legislate in haste, to try to institutionalize some kind of solution to a problem that has already been overtaken by events. I am afraid that is what we did in the passage of the War Powers Act. We acted on the whim, the emotion, of a moment. I think that should be avoided.

I think Congress, again, is perfectly capable of using its legitimate powers unwisely.

[Laughter.]

Senator KASSEBAUM. Thank you very much.

The CHAIRMAN. Senator McConnell.

Senator MCCONNELL. You know, we pass a lot of resolutions and bills around here that nobody pays any attention to and that do not ultimately make any difference.

In looking back at the history of this particular measure, it appears that all four of the Presidents under which it has been in effect have essentially ignored it. Moreover, Congress—on those occasions when it got its nose bent out of shape—has not been able to figure out a way to make it operational. Could it be argued, that we should not spend any more time studying the Act and just continue as Congress has and ignore it? Or, is it such a bone of contention, taking up a great deal of the Senate's time arguing about what it means and whether it ought to be enforced, that the issue should be resolved once and for all?

In other words, should we just ignore it, like we have, apparently, over the last 15 years, or work to rewrite it?

Senator TOWER. I think that is an option available to the President, if he wants to ignore it.

Senator MCCONNELL. That's what has happened; is it not?

Senator TOWER. But he can be hauled into court ultimately and his actions questioned in the court. On that day, we will determine the extent of the constitutionality of the War Powers Act.

Senator MCCONNELL. If I may interject, it seems to me that this should have been done a long time ago—the Act should have been challenged, litigated, and had it decided, once and for all.

Senator TOWER. As a matter of fact, I had thought that it would have been tested long before now. We passed the Act, when? Wasn't it in 1973? I fully expected that, before the end of the decade, there would have been a court test on it, but there has not been—because, as you say, the Presidents have tended to skirt around it or ignore it, and Congress has not wanted to grapple with it because it is political dynamite to grapple with problems like that. That is why I say that Congress has put itself on the spot. For example, on arms sales, Congress is very often reacting to what they consider to be constituent pressure because the Turkish arms embargo was clearly not in the national interest of the United States. But, you know, Turkey does not have a very big constituency in the United States.

Mr. CRANE. I think it has been ignored by both Presidents and Congress because the War Powers Act, as I understood the debate at the time and I think as most of our colleagues did, was to be invoked only in the event of another Vietnam-type conflict.

I don't think anyone intended it to apply to the Persian Gulf. I don't think anyone intended it to apply to Grenada or any of these conflicts or hostilities that have come up since passage of the War Powers Act.

But, in the event that we were gravitating heavily into another type Vietnam conflict, that is when I would like to see it invoked, and make the decision: Are we going to war or are we not going to war? And, if we are going to war, then have Congress make the determination, get the declaration that we are going to war, and that we are going to win the war in the shortest possible time.

I think that is why it has been largely ignored today. I think it was crafted to address a problem that caused a lot of anguish and frustration to a lot of Americans and Members of Congress at the time. That was not a pleasant time to serve here.

The fact of the matter is we have not been faced with that kind of decision since that time, and it was to prevent using dodges, like a Gulf of Tonkin Resolution, as a substitute for a declaration of war.

Instead, we should have acknowledged that we were entering a major conflict; that we were engaging in a major commitment of American troops. The President thought it was a wise policy. The Congress should either have ratified that conviction with a declaration of war or told the President he had 30 days to get out of Vietnam.

Senator McConnell. I didn't hear the testimony of either of you, so I don't know what you finally recommended. But would it be your view that maybe the best thing this subcommittee could do, after a decent period of listening to recommendations, rather than trying to rewrite the War Powers Act, is simply to recommend that the matter be litigated and disposed of once and for all?

Senator Tower. I would recommend outright repeal, but I know that is not going to happen.

Senator McConnell. I would, too. But I don't think we are going to get that.

Senator Tower. If you want to preserve anything of it, the reporting requirements would be the least onerous. It is the congressional veto over Presidential action that I think is somewhat stultifying, and from the standpoint of the perception of a President to deal with a crisis on the part of both our friends and our adversaries it is damaging.

Mr. Crane. Except that I think the Congress still retains that power to repeal the President's policy decision because policy is not a function of the President. Policy ultimately is a function of the Congress.

I would rather have a mechanism in place that forces that kind of confrontation to face up to what we are doing.

Senator McConnell. You don't think that cutting off the money is enough?

Mr. Crane. Well, cutting off the money accomplishes the policy objective of Congress if it is in disagreement with the President. But the virtue, it seems to me, of a War Powers Act is it forces all of us to face up to a reality.

I certainly do not want ever again to see this country get involved in that kind of conflict without a declaration of war and with the objective of winning in the shortest possible time. As I said earlier in my original testimony, if they are not worth winning, they are not worth fighting. Make that decision up front. Don't just kind of drift into it and watch it escalate by increments that have not really forced people to face up to the fact that this is a very serious situation that we are getting into.

With a declaration of war, we know what our objectives are. And if it is a war, then fight a war; get in and get out. That is the only way you can justify the loss of an American life.

Senator Tower. I would say that sometimes you want to use military force, though, not to fight a war, but to deter one and to prevent an intrusion on American interests.

We are not in the Persian Gulf because we want to fight anybody and that is not our intent. It is to deter aggression against maritime nations that are using their legitimate rights to the sealanes of communication.

Senator McConnell. And the War Powers act is not keeping us from doing that, either.

Senator TOWER. That is true. But maybe sometimes when you introduce troops, there is the possibility for hostility. But the fact is their presence there reduces the likelihood of hostility.

Mr. CRANE. I would agree totally. But, as I indicated earlier, I think the Persian Gulf situation is totally divorced from any relevance to the War Powers Act. Under international law, we are doing something that is totally acceptable, is not considered a warlike act, and that is guaranteeing freedom of the seas.

Now that does not mean that you are not going to risk losing a *Stark*. That does not mean that you are not going to have the tragic accident of misinterpretation of what that Iranian jetliner was. But those things happen in combat zones.

We are there, fulfulling a function that is recognized in international law as totally legitimate and not a warlike act. The only area where I think we could have spelled out our objectives a little more succinctly is by announcing that we're going to take Iraqis out when they are going after Iranian vessels as readily as we will take out Iranians when they are going after Kuwaiti vessels. I don't think we spelled that out as clearly as we might have done and been on higher moral grounds.

Senator TOWER. The fact is there has been a debate over whether or not the War Powers Act is applicable in this situation.

Senator MCCONNELL. Absolutely.

Senator TOWER. Sometimes the public debate can lead to uncertainty in the minds of the people abroad.

Senator MCCONNELL. I might say, Senator Tower, that until the polls came in on the Persian Gulf, there was great discussion in this body about whether or not the War Powers Act applied. Then, when it appeared as if the American people overwhelmingly supported our presence there, those arguments tended to dry up.

Senator TOWER. Incidentally, what President Reagan is doing is implementing the Carter doctrine.

Now, President Carter might not agree with the means of implementation, but he is the one who articulated the doctrine in the first place. This goes back to my point about their being a continuity in the Presidential view of the national interest beyond our shores.

Senator MCCONNELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I have one question, gentlemen. Are you aware of the Byrd resolution with regard to war powers, the Byrd-Nunn resolution?

Mr. CRANE. No, sir, I am not.

Senator TOWER. I am not up to speed on that, I'm afraid.

The CHAIRMAN. Basically, as I understand your testimony, to digest it, you think we would be better off without the War Powers Act than with it. Would that be correct?

Mr. CRANE. Well, no. I think that is where Senator Tower and I divide.

Senator TOWER. We disagree there. I think we would be better off without it.

Mr. CRANE. My feeling is that we need some mechanism in place to prevent a recurrence not just of Vietnam, but I think it applied to Korea, too.

The CHAIRMAN. So, when faced with the bald choice of with it or without it, you would slightly prefer to be with it?

Mr. CRANE. I would, sir.

The CHAIRMAN. And Senator Tower would prefer to be without it?

Senator TOWER. That's right.

The CHAIRMAN. Incidentally, Senator Tower, you mentioned earlier that by trade you were a political scientist. Don't you think it is a better term to say that we are "political artists," because it is not a predictable science at all, with finite limits. I have always felt the whole concept of political science was wrong and that it should be called "political art."

Senator TOWER. I agree that the term "political science" is a misnomer, but it, unfortunately, has been incorporated into the language and so we are stuck with it. It is like journalistic shorthand.

But I will point out that, when you major in political science, you get a bachelor of arts degree.

[Laughter.]

The CHAIRMAN. You know, when I went to college, you could not go to Harvard and get a bachelor of arts degree if you did not take Latin. That is why I didn't go to Harvard. But that has changed now.

Senator Pressler.

Senator PRESSLER. I would like to ask one final question.

Comparing the Korean war to the Vietnam war, for some reason the Congress acted after the Vietnam war and passed this War Powers Act. Why didn't they do that after the Korean war? The two are somewhat analogous.

Someone has given me a list of the five declared wars that we have had and they have given me a list of the undeclared wars and incidents.

In terms of the President's ability to act and the way things were carried out, they seem very similar to me, the Korean war and the Vietnam war. But, for some reason, after the Vietnam war, we had this great churning about in Congress.

Why didn't we pass the War Powers Act after the Korean war?

Senator TOWER. I think you have to look at what the political climate was at the time of the Korean war and what it was at the time of the Vietnam war. There was generally pretty universal support for American action in the Korean situation. There wasn't a deterioration of public support.

Second, we did what we thought was necessary to bring the war to a successful conclusion. One can argue, and I think Congressman Crane points out that a desirable result would have been a unified, democratic Korea, but that did not happen. But at least we preserved one portion of that country, which I wish could have been the outcome with the Vietnam war, to say the least.

That was resolved and resolved in what was considered at the time a satisfactory way, and that is the preservation of the political and territorial integrity of South Korea.

Mr. CRANE. I would agree with Senator Tower. That war was a tie. Americans are not used to tied ball games and they are frustrating. But there is a whale of a distinction between a tied ball game, which you did not lose, versus losing. Then analyzing some of the reasons for why we lost it, I think in the conduct of the war, too, it is important to remember that in Vietnam, we shackled our troops more than we shackled our troops in the conduct of theater operations in Korea. We permitted our troops to go into North Korea.

Now, we stopped short of bombing the bridges over the Yalu River or the Chinese supply depots in the province to the north. That was a source of frustration to Americans, who said we could have won it had we done that.

My youngest brother was over in Vietnam and, in fact, is a Bronze Star winner. He said that fighting in Vietnam under the terms imposed on our GI's was like getting caught in an alley fight, when you are facing half a dozen guys with switchblades and they have tied one hand behind your back.

Senator TOWER. Yes.

Mr. CRANE. You know, there were limited fire zones, free fire zones, no fire zones; we sent planes over North Vietnam, watching them build the missile sites, but they could not take the sites out during construction——

Senator TOWER. Unless they shoot at you.

Mr. CRANE [continuing]. Yes, they were taking our planes out.

It was a most abominable kind of conflict one can conceive of in which to put American lives.

The war to me, the Vietnam conflict—and I was a supporter of it, supporting it in terms of my votes—it was the most immoral war that this country has ever been involved in. I say "immoral" because we sacrificed American lives for nothing and we put them in there with handcuffs on and said "OK, go out and do your thing." We said "You are trained to serve your country," and then we pulled out the rug from under them in terms of their ability to wage the conflict.

Senator TOWER. You know, I have a good friend who was the British Consul in Hanoi at the time we were bombing the heck out of Hanoi. He asked me this question. He said you really had them on their knees. "Why did you stop bombing them?"

If you remember, when Nixon resumed the bombing, the Christmas bombing, there was a great public outcry for his having done so, when, in fact, he was doing the right thing.

I don't agree necessarily that we militarily lost that war, even though we fought it under very proscriptive rules of engagement, which Congressman Crane has described. I spent a great deal of time in Vietnam with the troops and I understood their frustration.

Even at that, I think we could have had a Korea-type resolution had we given the President the power to enforce the Paris accords, and say you can enforce them by military force utilized in any way that your judgment tells you you should.

This might have meant just bombing the heck out of North Vietnam. It might have been breaking up the dikes, or something like that, something drastic. But it would have prevented armored columns from moving smartly down Route 1, into South Vietnam and overrunning them in a conventional armored attack.

Mr. CRANE. I talked, incidentally, Larry, to a number of those fellows who were in the Hanoi Hilton with John McCain. Imagine their anguish—I don't see how any of them survived—of being incarcerated in cells where you cannot fraternize with fellow prisoners for 7 long years, twice as long as World War II, with no notion of when it is all going to be over. They told me that when they heard the bombs falling, they cheered. They didn't care whether they got blown to Kingdom Come because they thought we had finally made the decision to do the right thing.

Thank God we got them out of there. I am still in awe of people like John, who went through that experience.

Senator **PRESSLER**. I am, too. As one who served in the Army in that war, I identify very much with what both of you have said.

Mr. Chairman, I have no further questions.

The **CHAIRMAN**. Thank you very much.

Thank you very much, Senator Tower and Congressman Crane, for being with us.

This hearing is adjourned.

[Whereupon, at 11:45 a.m., the subcommittee adjourned, to reconvene at 10 a.m., September 7, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

WEDNESDAY, SEPTEMBER 7, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 10 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Joseph Biden (chairman of the subcommittee) presiding.

Present: Senators Pell, Biden, Simon, Adams, Helms, and Pressler.

Senator BIDEN. The committee will come to order, please.

I have a brief opening statement, which I will make in a moment. But first, I wanted to thank, in advance, the three distinguished generals, two former Chiefs and one National Security Adviser, for agreeing to a slight alteration in the presentation of the witnesses and the testimony today.

I would like to ask Mr. Lakeland, in a moment, to be our first witness. I do this, quite frankly, because I think he will provide some historical perspective on the Senate's action on the War Powers Act some 15 years ago.

Hello, Paul, how are you doing?

Senator SIMON. I'm doing fine.

Senator BIDEN. It's good to see you.

Senator SIMON. And it's good to see you.

Senator BIDEN. Thank you.

When I was away, I prayed that I'd come back with Paul Simon's voice, but I didn't. They didn't do a darn thing for me over there.

I was telling you, Generals, about the great Army doctors. They were great. But they promised me that whatever I had in my head going into these operations is what I'd have when I came out, and they didn't put any extra in.

The Special Subcommittee on War Powers today resumes its hearings directed at answering the critical question: Can the War Powers Resolution of 1973 be amended so as to improve the effective cooperation of the President of the United States and the Congress in national decisions concerning the deployment of American forces in situations of actual or likely hostilities?

Clearly, the Constitution, by letter and intent, devided the war power between the executive and the legislative branches. The President, as Commander in Chief, directs the Armed Forces and possesses the inherent authority and responsibility to respond to attacks upon the United States.

Congress, for its part, has the constitutionally mandated duty to raise and maintain the Armed Forces and to make all rules pertinent to their governance and, consequently and conspicuously, the power to declare war—a power described by Chief Justice John Marshall as the power to convert the Nation from a policy of peace to one of war.

This allocation of powers obviously leaves unanswered critical questions of authorization and procedure, particularly with regard to circumstances involving less than full-scale hostilities.

It was with the aim of delineating an answer to such questions that the Congress devised the War Powers Resolution in 1973 and enacted it over President Nixon's veto.

Fifteen years of continuing debate about the law's wisdom and constitutionality have led us to these hearings.

I commend Chairman Pell for his decision to establish a Special Subcommittee on War Powers and appreciate his efforts in chairing the subcommittee's initial three hearings in my absence.

During the month of September, as we proceed with the subcommittee's legislative inquiry into how the law can be strengthened, the Special Subcommittee on War Powers will intensify its activities with 7 additional hearings involving more than 30 distinguished witnesses, including numerous constitutional scholars, several former Secretaries of State and Defense, and a former President of the United States, as well as key representatives of the Reagan administration.

Today, the subcommittee is pleased to receive testimony from three former military leaders of considerable eminence: Generals David Jones and John Vessey, each a former Chairman of the Joint Chiefs of Staff, and General Brent Scowcroft, a former National Security Adviser.

In addition, the subcommittee will hear testimony from former Senate staffers with expert knowledge in the war powers issues. They are Mr. Peter Lakeland, a former Republican staff director of this committee, who served, I would say, with more than just a casual relationship, indeed an intimate relationship, with one of the finest men I believe ever served in the U.S. Senate. I am sure that my colleagues on this dais share that view. That man was Senator Jacob Javits.

Senator Javits is considered by many of us to have been if not the brightest, then clearly one of the wisest, men to serve in the Senate, and part of his wisdom, I am sure, was derived from Mr. Lakeland's sound counsel. During this period of Senator Javits' efforts in drafting the war powers legislation, he had extensive input from Mr. Lakeland.

Today we also have Mr. Terry Emerson, who worked closely with another man of great judgment and loved by all of us here, Barry Goldwater, who, in alignment with the Nixon administration, opposed the creation of the War Powers Act.

Their firsthand experience will provide valuable perspective, I hope.

Gentlemen, I welcome all of you and want to express the subcommittee's appreciation for your willingness to participate in this inquiry.

As you well recognize, war powers is a topic that is both intellectually complex and emotionally laden. It also bears fundamentally on the U.S. national interest and, accordingly, warrants the most thorough and dispassionate consideration this subcommittee can give it.

To the distinguished members of our first panel, let me stress that the subcommittee will attach great weight to your insight and practical experience as former high-level participants in the national policy process. However, for purposes of stimulating our own thoughts and the subcommittee's deliberations, I have asked these three distinguished Generals if they would be willing—and they indicated they would—to have Mr. Lakeland step forward and present his paper first.

Having already looked at Mr. Lakeland's paper, which he previously submitted, I believe that its historical and constitutional analysis would serve as an excellent starting point for your own testimony, based upon modern-day service at the highest echelons of American government.

So, with your agreement, gentlemen, I would like to proceed with Mr. Lakeland.

But first, does anyone else have an opening statement before Mr. Lakeland begins?

The **Chairman**. Yes, Mr. Chairman.

I would just like to express my own joy that you are back with us, a joy that is shared by all your colleagues on both sides of the aisle, and to say how glad I am that you are taking over the chairmanship of this subcommittee. I am not a member of it. I was glad to preside in your absence, and I look forward to your presiding over the next seven hearings.

This being the last month of this Congress, it may be that we will have other matters coming up that may have to take precedence, at times. But I look forward to completing these hearings and congratulate you on your initiatives in it and wish you well.

Senator **Biden**. Thank you very much, Mr. Chairman.

Senator Pressler.

Senator **Pressler**. I join in welcoming you back. We missed your wit and intelligence on this committee, both here in the Foreign Relations Committee and on the Senate floor.

Although we may disagree on what to do about the problems with this Resolution, I respect your leadership in trying to find appropriate solutions.

I have made two or three lengthy opening statements previously, and I shall not repeat that. I will provide you with appropriate copies so that you can read them in your spare time.

In any event, it's great to see you back and I look forward to hearing our witnesses today.

Senator **Biden**. Thank you, Senator Pressler.

I have had a great deal of spare time in the recent past. I have read your opening statements, and I am delighted that you have taken such a keen and deep interest in this subject.

I might say, before I yield to Senator Simon, that I am not sure what to do about the War Powers Act. I am not sure that it is soluble. I think it may be. But I have yet to make a final judgment of my own.

Senator PRESSLER. Mr. Chairman, I made a suggestion at one of the hearings that we might repeal it and start from the beginning.

Senator BIDEN. Well, I'd rather leave it in place and see if we can improve it. After we speak to the remaining 30 witnesses, we can then make a judgment on that.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I share your questioning. I am not sure where we should go. I regret that another meeting is going to prevent me from listening to the witnesses here. But I particularly appreciate, Mr. Lakeland's testimony.

And, if there are three people who have contributed a great deal, who can give us perspective, they are the three Generals who are here: General Jones, General Scowcroft, and General Vessey. I am grateful for all of their contributions.

Primarily I am here, Mr. Chairman, just to join in welcoming you back. I am not sure I will go quite as far as Senator Pressler in saying that we are happy to have your "wit" back here now. [Laughter.]

Let me just say that this Senate and this nation are richer when you are serving in the United States Senate. It feels very, very good to have Joe Biden back here.

Senator BIDEN. Paul, you are very gracious to say that.

When Senator Simon and I were both seeking the nomination, he used to say the same thing, that the Senate would be richer if I stayed in it. [Laughter.]

He really meant it then and I think he means it now, and I appreciate that very, very much.

I would ask for a point of personal privilege just before Mr. Lakeland begins his testimony. This is kind of like my first day in the Senate. I look up and I see that my daughter, my mother, my father, my nephew, my sister, and my brother-in-law are all here.

I want to assure you that they prepared all the questions today. [Laughter.]

They are here just to check to see if I can enunciate them clearly and if I understand the answers.

Welcome all of you.

Now, let's get down to our business.

Senator SIMON. If I may just interject, Mr. Chairman, all of you ought to be very, very proud of Joe Biden.

Senator BIDEN. Thank you.

Now, enough of that. I'm back and that's over.

Let's go to work.

Mr. Lakeland, your testimony, please.

STATEMENT OF ALBERT (PETER) LAKELAND, FORMER MINORITY STAFF DIRECTOR, SENATE COMMITTEE ON FOREIGN RELATIONS

Mr. LAKELAND. Mr. Chairman, I appreciate your invitation to testify before this special subcommittee charged with the task of reviewing the War Powers Act. As you know, I was intimately involved in the enactment of this law, as the principal draftsman of the final legislation which emerged from the House-Senate conference on October 4, 1973, as well as of the precedent Senate bill. It is from this perspective of firsthand involvement in the shaping and passage of the War Powers Act, as well as from the perspective of a 25-year career in national security affairs, that I offer my comments today.

It is clear that the War Powers Act has not worked in the manner intended and expected by its architects, and this review is both timely and desirable. It is equally clear, to me at least, that the refusal, or the inability, of the executive branch to comply with the law, rather than any inherent flaws in the law itself, is the reason for the disappointing result.

At the time the War Powers Act was adopted, it was widely believed that the Presidency had acquired such overbearing strength in national security matters as to disrupt our constitutional system of checks and balances in a vital area, with dangerous consequences to our society. This problem, one of a Commander in Chief no longer accountable for his actions, was regarded as the root problem which needed correction.

I must confess that I shared that view in 1973. I have now come to a somewhat different conclusion, which I believe is highly relevant to the inquiry being conducted by this subcommittee. Baldly stated, I think the problem is one of Presidential weakness, rather than strength.

The Commander in Chief function is broken within the executive branch, and it is this breakdown which incapacitates our Presidents from marshalling the great benefits which the War Powers Act was intended to confer upon the President in his difficult and awesome conduct of his special function of being our Nation's Commander in Chief.

So far as the War Powers Act itself is concerned, I believe that it remains an eminently workable act. However, until the problem of the broken "Commander in Chiefship," which is rooted in conceptual and institutional incoherence within the executive branch is repaired, the War Powers Act will not work as intended.

This is a thesis which I will develop more fully in the course of my statement.

I will abbreviate my statement because it is probably too long to read. The full statement, I believe, will be included in the present record.

I want to begin by relating some of the circumstances which went into the making of the War Powers Act. I have read most of the recent debate and listened to your earlier witnesses in these hearings, and I fear that many misrepresentations and misapprehensions have crept into the current debate. The first is the false idea that the War Powers Act was some hasty and ill-conceived measure directed at the ongoing Vietnam war. That is wrong on all counts.

The dwindling Vietnam war was specifically exempted from the Act's provisions, and many leading supporters of the Vietnam war, preeminently Armed Services Committee Chairman John Stennis, were staunch proponents of the War Powers Act.

The principal sponsors of the War Powers Act were Senator Javits and Senator Stennis, both men of judicious temperament, outstanding lawyers, and brilliant legislators, with decades of experience in the national security field. They were hardly members of the "Woodstock generation," as some would imply today. They were, rather, unabashed patriots and lifelong proponents of American strength and world leadership. They had always in their minds the crucial importance to America of a strong and successful Presidency.

At that time, they were appalled by the quagmire of Vietnam, by the breakdown in relations between the President and the Congress, and by the dangerous isolation of the Presidency—factors which collectively had precipitated the gravest national and constitutional crisis of this century. They were determined to enact a statutory framework to both induce and facilitate a functioning partnership between the President and the Congress as a sine qua non of U.S. national effectiveness in a dangerous world.

To understand the War Powers Act, it is necessary to examine the Constitution itself and its original intent, what we would call today "legislative history." It is clear from the actual wording of the Constitution and from the contemporaneous explanations of the Framers themselves, that the Framers intended to vest the war power in the Congress.

Article 1, section 8, enumerates in some detail, the war powers that are vested in the Congress; for example, "declare war," "provide for the common defense," "raise and support armies," "make rules for the government and reulation of the land and naval forces," et cetera. Senator Mathias, in his earlier testimony, showed that this extended not only to World War II-type general war, but also to limited war, paramilitary war, terrorism and piracy, or irregular war generically.

Against the very broad powers given to the Congress in article 1, section 8, article 2, section 2, says one terse sentence: "The President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States, when called into the actual service of the United States." That sentence is the constitutional basis for Presidential war power, in contrast to the expansive, cumulative detailed war powers of Congress.

In 1976, under a commission from the American Bar Association, Judge Sofaer, the current Legal Adviser at the State Department, published a historical study entitled, "War, Foreign Policy, and Constitutional Power." Given Judge Sofaer's reputation as a staunch advocate of Presidential prerogative, I think it is especially useful to quote his conclusion regarding the Commander in Chiefship.

This is a direct quote:

> The Commander in Chief power received extraordinarily short treatment, considering its subsequent importance. What was said contained no hint of any authority based on this provision to use the Armed Forces without legislative approval.

The writings of Alexander Hamilton are particularly instructive on the question of the Commander in Chiefship. Everyone at the Constitutional Convention knew that George Washington would be elected as the first President, and the Presidency was shaped with Washington very much in mind. Hamilton had been Washington's military aide during the Revolution. Moreover, early in the Convention, Hamilton had put forth his own plan of government, one unabashedly built around an all-powerful President-for-life. Hamilton's plan was decisively rejected.

Against this background of having personally fought for something much more but having lost decisively, what Hamilton had to say in the Federalist Paper No. 69 carries special weight in explaining the meaning and scope of the Commander in Chief clause. Here is Hamilton's explanation:

> The President is to be Commander in Chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the declaring of war and the raising and regulating of fleets and armies—all of which, by the Constitution under consideration, would pertain to the legislature. . . .

It is clear from the contemporary evidence that the Framers of the Constitution, in giving the Commander in Chiefship to the President, did not intend it as a grant of authority in diminution of the war powers they had granted so specifically and intentionally, and in so plenary fashion, to the Congress. Rather, it was a measure to assure the supremacy of the Federal authority over the authority of the constituent States. And, in this equation, the President, as Commander in Chief, was to be the agent of the Congress, not its rival.

It is very important to understand an additional nuance of constitutional drafting that is often overlooked today. If we read carefully, we can see clearly that the designation of the President as Commander in Chief, placed in section 2 of article 2, is intended as an adjunct function of the Presidency, something not otherwise included in the broad Executive power given to the President in the preceding section 1 of article 2.

This adjunct function, as Commander in Chief, was intended to be something quite limited, amounting, Hamilton assures us, to "nothing more" than being "first general and admiral of the Confederacy."

With this in mind, we can proceed to divining the meaning of the authority given to the Congress to declare war.

The penultimate draft of the Constitution gave Congress the power to make war. The change in the final wording resulted from an amendment offered by James Madison.

Madison explained this amendment in the journal which he kept, and later published, of the proceedings of the Constitutional Convention. Madison's verbatim explanation is as follows: "Madison then moved to insert 'declare,' striking out 'make'; leaving to the Executive the power to repel sudden attacks."

What Madison tells us with his amendment is that, while the Commander in Chiefship was normally an authority only to carry into execution a prior congressional decision to make war, the Commander in Chief was also intended to be "free to repel sudden attacks." "Free" from what? Free from the requirement of a prior congressional authorization. "Free" to do what? Free to "repel sudden attacks."

What we have here very cryptically in the words of the Constitution itself is the vesting in the Commander in Chief of a limited, but essential, power to undertake emergency defensive actions on his own authority without prior congressional authorization. This provided the key to the drafting of a 20th century War Powers Act that would be in literal and spiritual consonance with our 18th century Constitution.

Accordingly, the sponsors of the War Powers Act started from the premise that the original intent of the Constitution was to vest in the President, as Commander in Chief, the authority, and indeed the responsibility, to take emergency defensive action to safeguard the Nation, pending a considered decision by the Congress—doubtlessly influenced heavily by the President's own recommendations—to go to war if so required by the duration and gravity of the circumstances.

The whole essence of the War Powers Act was to delineate in clear statutory language the procedures and institutional mechanisms to be followed in circumstances where the Commander in Chief undertakes emergency defensive action without prior congressional authorization.

Having such arrangements in place is absolutely essential. Not only the Constitution, but bitter experience, has taught us that the cojoining of the powers and responsibilities of the Congress with those of the President is a prerequisite to success—however much of a pain in the neck it may be considered by the unelected national security bureaucracy in the executive branch.

The War Powers Act states, quite reasonably, in my judgment, that this cojoining must be accomplished within 60 days, or the President would be left naked of constitutional authority to continue. He would no longer be taking emergency defensive action and therefor without constitutional authority to make war.

Great care was taken in drafting the War Powers Act to give ample leeway to the President to take emergency defensive action within the underlying constitutional framework.

The original Senate bill set the duration of an emergency at 30 days. This was lengthened in the final conference bill to 60 days. Hostilities lasting more than 60 days were presumed to have crossed over from the category of "emergency defensive action," which Madison's amendment left the President free to undertake, and into the realm of "war," which is to be decided by the Congress. On this very point, I commend to you the lucid testimony before this subcommittee a few weeks back of Congressman Phil Crane.

It is useful at this point to also refer to the plenary power given in article 1, section 8, of the Constitution, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers [of Congress] and all other powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof."

That encompasses the Commander in Chiefship, in my judgment, and the War Powers Act is just such a "necessary and proper" law.

I will not take the subcommittee's time to go through all of the provisions of the War Powers Act which you have before you. As I stated at the outset, the primary motivation of the War Powers Act was a perception of a dangerous and overweening strength in the Presidency as regards matters of war, resulting in a profoundly disruption of constitutional imbalance. Certainly, our Nation witnessed, within one 6-year period, the painful spectacle of two extremely strong Presidents, Lyndon Johnson and Richard Nixon, being driven from office on the very issue of abuse of power in attempted unilateral Presidential warmaking.

For all the bravado of Presidents Nixon and Johnson about Vietnam and their Commander in Chief powers, they failed, miserably and tragically and at great cost to our Nation. And, not incidentally our Nation lost the only war in its history, a defeat attributable not to inferior military power, but to leadership failure. It had become a case of the President against the Congress and citizens of the Republic.

The War Powers Act is designed to make it mandatory, and as easy as possible, for the President to marshal congressional legitimation and support for a united national war effort if necessary. Success for him and success for the country in such circumstances is otherwise impossible.

Some critics on the left have criticized the War Powers Act on the grounds that it is too much of a home run ball, served up to the President. Taken as a whole, the War Powers Act is, indeed, a good deal for the President, and was intended to be. I have long been puzzled as to why Presidents have shied away from exploiting its manifestly pro-President features.

In retrospect, the spectre of an "imperial Presidency" has proven to be a mirage. The root problem lies elsewhere in my judgment. The President has become too weak a figure within our Nation's sprawling national security establishment. Under present circumstances, it is the profound disorder in his own house which disables the President from effective performance of his special constitutional function as Commander in Chief.

The Commander in Chiefship today lacks conceptual and institutional coherence within the executive branch. The breakdown is so severe that Presidents have been deterred from using the War Powers Act in part, at least, because they are unable to provide the information required of them in the mandatory, initial War Powers Act report; that is "the circumstances necessitating the introduction of United States Armed Forces; the constitutional and legislative authority under which such introduction took place; and the estimated scope and duration of the hostilities or involvement."

Presidents cannot provide this information because the executive branch is not organized to think and function in such terms and because the Presidency itself is not organized to command the requisite agreement and cooperation from the executive branch departments and agencies concerned. The whole constitutional essence of the Commander in Chiefship has been lost.

The President and the Congress need someone specifically charged with the authority and responsibility to assure that Commander in Chiefship actions are performed in conformity with the constitutional and statutory parameters of that office.

The conceptual and institutional incoherence within the executive branch, which is the nub of the problem, was most graphically illustrated by the Iran-Contra affair.

A small coterie of NSC staff, acting perhaps in league with the Director of Central Intelligence, initiated extremely far-reaching activities, which were intentionally kept secret, not only from the Congress, but also from the Secretary of State and the Secretary of Defense, and, can you believe it, secret from the Commander in Chief himself.

These functions, were, of course, at cross purposes with the stated policies of the President.

The acute embarrassment caused by the Iran-Contra revelations was the immediate proximate cause of the hasty, subsequent decision to assign the U.S. Navy to escort duty in the Persian Gulf, where eventual involvement in military hostilities was inevitable.

The escort decision was deemed necessary by the State Department because Kuwait, alienated by revelations of United States arms shipments to Iran, had threatened to enlist Soviet naval protection. Of course, the Joint Chiefs were not consulted about this portentious military decision, and the civilian leadership of the Pentagon, as well as the CIA, were reported to have had a view of the strategic situation significantly different from that of the State Department, which was narrowly focused on mollifying the Arab states offended by the clandestine sale of United States arms to Iran.

After a period of initial consternation, the Congress was soon eager for an opportunity to endorse the Persian Gulf naval deployment decision and virtually begged the President to let it do so by sending up a report to trigger the War Powers Act. But nobody in the executive branch was in a position to get interdepartmental agreement on the answers to the questions required by the War Powers Act, so profound was splintering of policy and authority.

It was this chain of events that led directly to the War Powers Act review being conducted by this subcommittee.

Mr. Chairman, there is an underlying, systemic problem which is not new or unique to the Reagan administration. The problem is there and it needs to be fixed. The President, as Commander in Chief, is not the master of his own, vast national security establishment, and this, more than anything, disables him from interfacing constructively with the Congress, as mandated by the Constitution and blueprinted by the War Powers Act.

Mr. Chairman, if I might at this moment, I would like to make a brief reference to an article which came to my attention after I had submitted my prepared statement. I would like to quote very briefly from it because it is extremely pertinent.

It is written by a gentleman with quite a different perspective. It is an article by Geoffrey Kemp who, from 1981 to 1984, was Special Assistant to President Reagan for National Security Affairs and was Senior Director for Near East and South Asian Affairs on the NSC staff. It is an article entitled, "Lessons of Lebanon: A Guideline for Future U.S. Policy." It appeared in the summer edition of Middle East Insight.

I am going to quote briefly from it. Most of this article is a detailed narrative recitation of what actually happened in Lebanon. I am just going to quote from some of his conclusions.

> Between 1981 and 1984, the United States became deeply involved in the effort to resolve the Lebanon crisis. That policy ended in failure. The reasons for failure included divisive leadership and bureaucratic conflict; strategic misjudgment; poorly executed military operations; ambiguous signals to allies and adversaries alike; and bad luck.

Then, from Kemp's conclusions:

> Once a risky, but important, policy initiative reaches a point when the egos and prestige of senior advisers are on the line, it is difficult to change direction, irrespective of what the intelligence community and commonsense may say, unless the President himself plays a strong role. In the case of Lebanon, the President never once ordered the Secretary of Defense to play a more assertive role in supporting U.S. policy in Lebanon. Indeed, at the height of the debate within the White House over whether or not the Marines should be redeployed to ships in 1984, President Reagan's own viewpoint was difficult to discern. The decision in favor of withdrawal was made by a simple majority within the inner circle of advisers. . . .
>
> The first lesson concerns basic military strategy. If the United States contemplates the use of force in a hostile environment, military commanders must be given clear, specific, military objectives and provided with enough resources to win any likely encounters with the enemy. They must feel confident in the political judgment of the President and his advisers. In the case of Lebanon, the military commanders and the Secretary of Defense were convinced that the operation was flawed. Their cooperation was not wholehearted, and put many obstacles in the way of extending or protracting the mandate of the Multinational Force. U.S. military leaders have learned the lessons of Vietnam and are reluctant to endorse new commitments that involve openended deployments of U.S. ground forces.

Finally, Mr. Chairman, one additional, brief passage.

> Lebanon has left its mark on the White House in other ways. The experience of Lebanon convinced some senior NSC staff that because George Shultz and Caspar Weinberger had such basic disagreements on how to use American power, especially military power, there would always be gridlock if risky policy initiatives were to be considered. It was this concern that helped create the conditions for the Iran-Contra scandal and reported conversations between Oliver North and William Casey about creating an organization for conducting covert operations outside the system.

What needs revision, Mr. Chairman, is not the War Powers Act, but the National Security Act of 1947. I think consideration should be given to redefining the position of the National Security Adviser to make it a focus of Presidential authority over the bureaucracy. It could be upgraded and transformed by statute into a position that might be called "Deputy to the President for Commander in Chiefship Affairs."

Such a position, properly defined and endowed, would bring a conceptual focus and a constitutional coherence to the Presidency in an area where focus and coherence are now lacking. It should be, in my judgment, a civilian position, subject to confirmation and located in the White House, in close proximity to the Oval Office. It would have a specific responsibility of assuring that the Commander in Chiefship functions constitutionally and in conformity with the War Powers Act.

In closing, Mr. Chairman, let me state what must by now be obvious: I oppose the Byrd-Warner amendment to the War Powers Act. That amendment, in my judgment, would exacerbate each of the problems it professes to alleviate, and it would create a number of serious, new problems. The most fundamental flaw of the Byrd-Warner amendment is that it would stand the Constitution on its head by empowering the President to wage war unilaterally. Instead of congressional concurrence, he would need only the support of one-third plus one Member of either House of Congress to sustain a veto.

The new consultation provisions of the Byrd-Warner amendment offer little promise of working and create a hierarchy of three classes of Senators in matters in which all Senators share the same constitutional responsibilities. Moreover, the amendment would seriously undermine the established committee system of the Senate and the House. The leadership group, already overburdened with political and administrative responsibilities and lacking substantive expertise, is exactly the wrong group to judge such matters on their merits, especially with no provision for staff, for recordkeeping, and for consultation with and dissemination of its sensitive information to other Senators, among other things.

Moreover, the proposed special legislative powers of the leadership group are discriminatory and, thus, perhaps unconstitutional.

My high regard for Senators Byrd and Warner notwithstanding, their proposed amendment to the War Powers Act is an invitation to mischief and danger, in my judgment.

Thank you.

It is a great pleasure for me to be back.

[The prepared statement of Mr. Lakeland appears in the appendix.]

Senator BIDEN. Thank you, Mr. Lakeland.

It has been a while, but it seems as though we are more comfortable having you on this side [indicating], as against down there [indicating].

Under your analysis, the war powers problem that we face resides not in the Congress or in the Resolution itself, but in the inability of the Executive to frame and articulate a coherent policy in war powers situations.

This would make it appear that the problem is a bureaucratic one, susceptible to a bureaucratic fix. This leads you to envision the creation of a Deputy to the President for Commander in Chief Affairs.

But isn't the problem even more profoundly attitudinal? By this I mean that it originates in the executive branch's attitude, first articulated at the outset of the Korean war, that the President is entitled to the exercise of war powers unilaterally and ought not be fettered by the procedural constraints of obtaining formal congressional approval.

How can this attitudinal problem, which reflects a fundamental, philosophic dispute, be addressed?

Let me augment that slightly.

When speaking with staff yesterday, we were talking about how up to the Korean war there had, in fact, been a bipartisan foreign policy and a foreign policy that every President felt the necessity for and was eager to get, and got, congressional approval. And it was after World War II, at the start of the Korean war, that we began to see this change, where the Executive concluded, as I have indicated here, every Executive, Democrat and Republican alike, attitudinally, that somehow this was strictly within their province.

How do we deal with that attitude? Assuming you even had in place the mechanism you are proposing, you are still faced, it seems to me, with a clearly articulated attitudinal problem, articulated by every one of the past Presidents since I have been here.

Mr. **Lakeland**. Well, I don't think it is so much an attitudinal problem on the part of the President per se. That is perhaps where we differ.

I think the attitudinal problem is on the part of the people who advise the President; people who do not have to be accountable to voters. They work under very difficult circumstances. They have to make decisions often without adequate information and under great time pressures. It's like performing brain surgery in a crowded rowboat with teenagers elbowing you. It is very difficult, and adding one more pain in the neck—getting congressional approval—is resisted.

Senator **Biden**. You know, I can relate to that. [Laughter.]

Mr. **Lakeland**. I have great sympathy here. I served in the executive branch, though not in such a lofty status as the Chairman of the Joint Chiefs or the National Security Adviser. But I know it is tough work under the best of circumstances, and you sure don't want anybody else looking over your shoulder if you can help it.

Now my whole thesis is that the attitude we have to change is the Presidency's attitude, his national security entourage, and it is in his own interest that this attitude be changed. The President has become more or less the captive of his own bureaucracy, and he pays for their mistakes.

It was Dean Acheson who concocted that thesis. It was absolutely novel in constitutional theory in 1950 that the President had an inherent warmaking authority. Prof. Arthur Schlesinger, Jr., was quite eloquent on that point when he was testifying here earlier.

You could ask why didn't Dean Acheson want to present his case to Congress? Well, there are political and historical reasons, including, perhaps, Mr. Acheson's statement excluding Korea from the United States perimeter zone of national security interest, which is widely believed by many to have been taken as an invitation by the North Koreans and the Soviets for their invasion of South Korea. It was one good reason why he had a real bias against getting Congress into the Act.

But I think we are always going to have this problem unless it is corrected institutionally.

You know, "bureaucrats" is a pejorative word, and I do not want to use it pejoratively because it is really hard work, and there are many, many patriotic, dedicated, extremely skillful people working on these very tough problems with inadequate facilities, conflicting authority, and so on. They feel they have enough trouble fighting it out within the executive branch.

But it cannot be left there. It cannot be left there because it is not in our Nation's interest. The system doesn't work when it's left that way. We don't get success. We don't get success in military affairs. We don't get political success for Presidents. And Congress is deprived of its constitutional right.

Senator **Biden**. Now I don't disagree with your analysis of the situation. But that last paragraph you read, by Kemp, in "Lessons of Lebanon," he said:

> Lebanon has left its mark on the White House in other ways. The experience convinced some NSC staffers that because George Shultz and Caspar Weinberger had such basic disagreements on how to use American power, especially military power, there would always be a gridlock of risky policy initiatives were to be considered.

What I don't understand is why, in all the situations, the 19 or so, that the War Powers Act arguably should have been invoked, why the President, all by himself, unrelated to the need for an extra person to straighten out the bureaucracy, could not have said, I side with Shultz, or I side with Weinberger, assuming there were diverse views—why the President doesn't make decisions.

I am not being facetious when I say that.

Mr. **Lakeland**. Oh, I understand. That is the problem.

Senator **Biden**. I don't mean just this President. I mean other Presidents, as well.

Mr. **Lakeland**. I understand. This is not a unique problem to this administration, by any means.

Presidents lack the self-assurance that they know more than the conflicting advisers that are around them, and sometimes they lack the interest.

Senator **Biden**. I think that is correct, though I am not sure how adding one more person will change that.

Let me go on to a second issue, consultation.

Senator Javits used to stress that the consultation requirement of the War Powers Resolution should be read as "maximal, rather than minimal; that is, that the consultation is not discretionary for the President; rather, the President must consult extensively and in a timely fashion."

I remember him coming back to us in the committee and talking about how critical that was.

Senator Javits was also emphatic in stressing that consultation, however extensive, was not a substitute—not a substitute—to specific statutory authorization.

Could you expand on the original intention of the section 3 requirement that the President, in every possible instance, consult with Congress before introducing Armed Forces into hostilities.

Mr. **Lakeland**. I think that there was somewhat this feeling, that consultation requires some advance knowledge of what is on the President's mind. He is enjoined to do it, but if you don't know what is on his mind, you can't very well force him to consult.

But, when he takes an action, that is unmistakable. An action requires prior congressional authorization.

Senator **Biden**. How important was the consultation portion, in your view, when you were sitting down and drafting this act.

Mr. **Lakeland**. How important was it?

Senator **Biden**. How important was it in terms of the workability of the Act, the effectiveness?

Mr. **Lakeland**. Senator, I have to confess that there was a lot of disappointment, almost cynicism, about the bona fides of consultation.

The history of consultation had really been one of manipulative briefing, where selected leaders are called down into the Oval

Office and informed of a decision already taken, usually a sensitive military action already underway, and sworn to secrecy.

That has been the history of consultation. That has exacerbated the problem, rather than alleviated the problem.

That is why putting all of our eggs in the consultation basket was not considered the route that we should go.

Senator **Biden**. My time is up, and if I have another chance, I will ask several more questions. What I was trying to get was not whether consultation was an alternative to that, but how important was consultation considered to be, not as an alternative, but as part of the process.

Mr. **Lakeland**. I can give you the answer to that, and I think it is the answer you are looking for. If consultation worked the way it was envisaged and desired, you might not even need a war powers act.

Senator **Biden**. Thank you very much.

I yield to my colleague, Senator Pressler.

Senator **Pressler**. Mr. Chairman, let me ask about the order of witnesses today. Will we be hearing from Mr. Emerson as the next witness?

The reason I am asking is because of the questions. It seems that we have two former staffers, and if we could juxtapose them, it would be a good idea. They are not appearing in the order that the agenda lists them.

Senator **Biden**. My intention was because of the Generals' schedule, to hear next from the Generals, and then it seemed to me that it made sense to have a staff person with a very different perspective be able to comment on what all three have said—the experience of the Act plus the drafting of the Act. That was my intention.

Senator **Pressler**. All right, fine.

Let me ask Mr. Lakeland this question.

In your judgment, is the War Powers Resolution essentially a result of the whole Vietnam situation? Some have said that it sprung from that controversial time and that perhaps it was designed to meet that particular situation, and that perhaps we should go back to the drawingboards and start fresh.

How much was the War Powers Resolution precipitated by our involvement in Vietnam?

Mr. **Lakeland**. Senator, I addressed that point at some length in my prepared statement.

I said that first is the false idea that the War Powers Act was some hasty and ill-conceived measure directed at the ongoing Vietnam war. That is wrong on all counts. The dwindling Vietnam war was specifically exempted from the Act's provisions, and many of the leading supporters of the Vietnam war, preeminently Armed Services Committee Chairman John Stennis, were staunch proponents of the Act.

The overwhelming votes in the Senate and in the House included a number of Members of both Houses who went down the line on the Vietnam war.

No, I disagree with that idea. That is a canard that is just not true, in my view.

Senator **Pressler**. Under your interpretation of the War Powers Resolution, can the President rescue Americans abroad if there is a risk that our forces might thereby become involved in hostilities?

Mr. **Lakeland**. My own personal view is "Yes," and that was in the original Senate bill.

Senator **Pressler**. So, in other words, in Panama today, if some Americans became involved, what course of action, if some American lives were endangered and the President decided he wanted to send United States troops to rescue them, what would his course of action be under this act?

Mr. **Lakeland**. Well, I presume he would do it as an emergency defensive action and use the forces he needed to evacuate our citizens. If it extended beyond 60 days and became a general occupation of Panama or a continuing military mopup operation against Noriega, the national guard, or whatever, it would then cross the line.

Senator **Pressler**. It would be classified as a defensive act?

Mr. **Lakeland**. Which—the protection and rescue of American citizens?

Senator **Pressler**. Yes.

Mr. **Lakeland**. I would believe so.

Senator **Pressler**. Does "imminent involvement," as used in the War Powers Resolution, contemplate future involvement, or does it mean immediate, such as today or tomorrow?

Mr. **Lakeland**. We didn't say "today" or "tomorrow," but if you really want to know the thinking there, I will go back.

The Commander in Chief can deploy the Armed Forces as Commander in Chief. He can order the First Division from here to there, and whatever. Although Congress has the authority to make rules for the Government and regulation of the Armed Forces, that is left to the Commander in Chief.

But if the Commander in Chief decides to put the First Division right between two hostile forces, or right in the path of an oncoming army, and involvement is clearly indicated by those circumstances, that act itself would trigger the War Powers Act, rather than waiting for the inevitable first bullet or handgrenade or rocket or mortar or whatever to fly.

That was the reason.

Senator **Pressler**. Now in the recent Persian Gulf situation, what was your assessment of that and how would the War Powers Act have worked? Did you consider that "imminent involvement"?

Mr. **Lakeland**. Yes. Yes.

I certainly think that there was "imminent involvement" within the first 60-day period—and the President has 60 days to come up for his authorization. He does not have to come up for his authorization within 48 hours, he only has to report within 48 hours.

All he has to do is tell the Congress that he has done something covered by the law. Then he has another 58 days to get authorization, if it is going to be something that is significant and lasting that long. If it's all over in less than 60 days, he doesn't need additional authorization. Over 60 days is something that looks like a war.

It was very clear well before 60 days that our naval forces in the Persian Gulf were going to get involved in hostilities, and they certainly did get involved in hostilities. Unfortunately it was not always with the best results. This is pretty clear, for example, regarding the U.S.S. *Stark* and U.S.S. *Vincennes*.

Senator PRESSLER. Does the term "hostilities" in your judgment include an accidental or mistaken attack by or against the Armed Forces of the United States?

Mr. LAKELAND. Whether it is accidental or not is not distinguished by the Act. If there is an attack, there is an attack. We don't look to the motivation of the attacking force. The President could take that into consideration in framing his emergency defensive reaction.

Senator PRESSLER. By voting under section 6 of the War Powers Resolution, could Congress push for more forceful military action than the President has proposed or wants?

Mr. LAKELAND. It could declare war, sure. Congress can declare war whether the President wants it or not.

Senator PRESSLER. Thank you, Mr. Chairman.

Senator BIDEN. Thank you.

Senator Adams.

Senator ADAMS. Thank you, Mr. Chairman. Welcome back. We certainly missed you and are glad you are here. We certainly need your strong voice on this particular issue.

Senator BIDEN. Thank you.

Senator ADAMS. Mr. Lakeland, welcome. I have been waiting for you for some time and I am pleased that you are here.

Mr. LAKELAND. Thank you, Senator.

Senator ADAMS. Mr. Lakeland, I am deeply disturbed by the Byrd-Warner amendment. One reason that I did not join in it is the experience—and it has been painful experience—over the past 2 years of not having a more automatic trigger for this act.

I want to ask you, first, is it your opinion that the Congress alone has the power to declare war, as set forth in the Constitution?

Mr. LAKELAND. That's where it's vested in the Constitution.

Senator ADAMS. A President really doesn't have the power even to veto a declaration of war if one were made by the Congress, does he?

Mr. LAKELAND. I don't believe so, and I think we had some extensive testimony earlier in this hearing on that point.

Senator ADAMS. We have. I have asked that question because I think too often we put this in the context of legislation, and this is not a legislative power. This is a constitutional power, such as impeachment or other powers that are vested in the Congress.

I particularly am concerned when we look at the original Framers. Alexander Hamilton who was a supporter of a strong Executive, said in Federalist Paper 75 that the President, unlike the king, did not have the power to declare war.

Now, Mr. Lakeland, we have presently in place in the Senate a trigger mechanism by a unanimous consent order that was entered last year.

Are you aware of that?

Mr. LAKELAND. I am not upon the details of that. I know that there has been considerable procedural maneuvering in the Senate on the war powers question.

Senator **Adams**. Let me put it to you this way because it is practical, and you have defended the existing War Powers Act.

I want to say, first, that I agree with you that Commander in Chief powers can be used defensively. But this act was drawn for the problem when we go beyond an isolated defensive response and get into beyond a 60-day period, to marshal the assets of the Nation, the resources of the Nation, the political will of the Nation, to carry out a type of war.

Isn't that correct?

Mr. **Lakeland**. Yes.

Senator **Adams**. We heard Senator Mathias testify to us—and you mentioned it this morning—that the Constitution, under article 1, section 8, not only provides for declaring war, but says "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations."

Mr. **Lakeland**. Right.

Senator **Adams**. So, actually, it was a congressional power to punish a felony or punish an act of war committed against us on the high seas. Isn't that correct?

Mr. **Lakeland**. Yes, to make the decision as to how that was to be done. But the President, as the Executive, would do it. But the decision as to what and how it was to be done was clearly given to the Congress in the Constitution.

Senator **Adams**. To me, this is a very fundamental constitutional question, and the War Powers Resolution, as I read it, is firmly bottomed on the use of a constitutional power, not much used in the course of our democracy, but about to be called into question again and again in the future as we face a series of so-called undeclared wars.

I will be very brief, but will mention that I served in Congress during the Johnson Presidency, and I didn't ever hear him call it a war. It was always a "situation" or an "incident" or a "police action."

This has been the situation, for example, in Korea. We were a United Nations force.

Senator Mathias and your former mentor, Senator Javits, considered all of the powers, which ranged from the absolute power to declare war and marshal offenses, down to the powers for anything other than a repelling of a defensive or offensive act.

Isn't that correct?

Mr. **Lakeland**. Yes, sir.

Senator **Adams**. The question I want to focus on is this, Mr. Lakeland.

But first, Mr. Chairman, I want to tell you that I missed you very much. We certainly needed you in what I consider to be the fundamental problem here, which is the triggering of the Act.

When we tried to trigger the Act in the Persian Gulf situation, it was filibustered. That is the only part of the Act that I really want to focus on at this time. What we have in place as a result of that effort is a unanimous consent agreement whereby any Member can declare that there are hostilities under the Act or troops in imminent hostilities. Once that declaration is made, the joint resolution filed, it goes to committee. If it is not voted out of committee in a certain period of time, then it goes to the Senate floor where there are 4 hours of debate and the Senate votes on whether or not there are hostilities, which would trigger the Act.

Now, what I am concerned about with Byrd-Warner is that there is no triggering.

Do you agree that in order for the War Powers Resolution to work, there has to be, under the rules of the House and the Senate, a form of trigger that avoids filibuster? I'm suggesting that there be a vote on whether or not there are hostilities, which then would trigger the Act under 4(a)(1).

Mr. LAKELAND. You have raised a very good point, Senator.

This act was drafted on the assumption, which was both believed and also considered to be essential, that the President would obey the law.

Senator ADAMS. And we have not had that, have we?

Mr. LAKELAND. We did include very intentionally a phrase that gave power to the Congress to act without the triggering mechanism of a report, when a report is submitted or ought to have been submitted.

Senator ADAMS. You used the congressional power to pass a bill that cannot be vetoed and people have been afraid of that because of the *Chadha* decision; isn't that correct?

Mr. LAKELAND. The fundamental situation is that it is up to the President to get Congress to act if he wants to make war. There is in this provision—it was not in the Senate bill, but it was in the House bill—a provision that by concurrent resolution, the two Houses of Congress could cut the President off short of the 60 days. That pre-60-day provision, put in by the House, has been questioned.

Senator ADAMS. And actually, if this is not legislation which could be vetoed by a President, that provision is probably valid—I'm not going to try to argue it in the Supreme Court now—but that provision is probably valid because it is not a legislative act, it is a constitutional act. Is it not?

Mr. LAKELAND. Well, I don't know. My own personal view is against that.

I don't think that Congress, having given him a 60-day emergency period, in my own personal view, ought to shorten it; that oughtn't to be able to be shortened by concurrent resolution.

That is my own personal view.

Senator ADAMS. All right. Let's set that aside. We have a difference of opinion on it.

Now let's go to the second point, which is the one that you say is of key importance. I can say from this Senator's viewpoint, as a practical matter, it is of key importance.

Every President has refused to send up the appropriate letter.

Mr. LAKELAND. Well, that is not quite true.

Senator ADAMS. With the possible exception of President Ford. But each time we get a letter it is said to not be a trigger. We have had that happen again and again in the last 2 years, so let's just focus on it.

What would you put in as a trigger?

Mr. LAKELAND. It's the phrase they use. Instead of "pursuant to," they have "consistent with" or something like that.

Senator **Adams**. "In concurrence with," but it was always defined as not triggering the 60 days. They have not said that 60 days ever started.

Mr. **Lakeland**. No, they have not said the 60 days started.

Senator **Adams**. So, what would you do?

What is the trigger to appropriately make the Constitution work under the law? We are violating the law every day—every day—on this. I want to know what trigger you would either use as a substitute, which this committee would come out with, or if you think there is another way.

Mr. **Lakeland**. Well, Congress does not get such great marks either, in my own view, under the War Powers Act.

I don't think the problem lies primarily in Congress. But, as a last resort, we assumed that Congress would step up to bat when necessary, and call the President to account, if necessary.

Senator **Adams**. I don't defend the Congress completely, Mr. Lakeland. But we have had many votes on three different procedural kinds of amendments.

Mr. **Lakeland**. Yes.

Senator **Adams**. I am not defending what happened there. The votes were there, but the mechanism never did let us get at the War Powers Act.

Mr. **Lakeland**. I am really just not in a position now to get into the procedurals. I used to live and die on that kind of question when I was up here for 14 years. But I am really not up to speed on all of the nuances of the procedural situation, and I can't be a lot of help to you.

If a determined majority of the Congress, of the Senate or the House, wants to put on its mantle and say, "Mr. President, you are obeying this law whether you like it or not," I believe it can do it. And I believe it would be sustained by the Supreme Court.

But we have not had that situation either.

Senator **Adams**. My time is up, I see.

Mr. **Lakeland**. I'm sorry that I could not give you a more satisfactory answer, Senator.

Senator **Adams**. Oh, I am in agreement with your position. I don't like the Byrd-Warner bill because it does not provide for specific action.

Mr. **Lakeland**. I think there are much more serious defects in Byrd-Warner than that, sir.

Senator **Biden**. But I am going to ask you one last question, and I would ask Mr. Emerson to listen to this one, too, because his opinion on this one, when he testifies, is, I believe, very important.

My recollection—and I was here at the time, when the Act was drafted—is that one of the purposes of the Act was to create a kind of automaticity. The essential thing we were setting out to do was to put the President in the position of having to justify what he did and have the Congress respond to his declaration, not of war, but declaration of what he was about to do.

But of course we did not want a completely automatic congressional response.

We all understood, separate and apart from Vietnam, that, whatever action a President takes militarily, the immediate reaction of the Congress and the American people is to rally around the flag.

One of the reasons I was glad we moved from 30 to 60 days in conference was because the shorter the time limit, the more it is a Presidential act.

If, in fact, we had to vote 5 days after the President sent up a 4(a)(1) statement, instead of 60 days later, I cannot think of any circumstance where the Congress would not vote a Tonkin Gulf: "Mr. President, yes, you've got it."

If it's 10 days, there's a little less chance; and less with 30, and 60.

But let's return to the hoped-for automaticity of the mechanism itself. Senator Javits used to refer to the essential element of this act as its automaticity. He said it was grounded entirely upon the foundation of a written hostilities report submitted by the President. In the absence of any such report, in absence of the Executive's good-faith adherence to the spirit of the Resolution, which the sponsors also had mistakenly expected, the whole procedural edifice turns out to be a house of cards.

Mr. **Lakeland**. I think that the purpose of the War Powers Act really was not to set up a mechanism for secondguessing the President.

I really think the primary motivation was, one, to try to implant in the President, he has to have in his mind all the time that this has to be something that "sells" to the country and "sells" on the Hill. But it was really intended to make inevitable that you join the President and the Congress together, because when they are fighting between themselves, our country suffers and the President suffers and we cannot win wars.

There are so many goodies in this bill for the President that it really is difficult to understand why he doesn't exploit them. You know, as you have pointed out, the Congress wants to salute, and it does want to salute.

But we wanted to make him and those under him, the people who perform under him, think in certain terms—you know, what are you doing, what is the policy, how long is it going to last? What is the constitutional and statutory authority under which you are acting?

We wanted to burn that mindset into the executive branch and then say when you are operating this way, you come on up, and we've got it greased for you if you need more than 60 days.

Senator **Adams**. Mr. Chairman.

Senator **Biden**. Yes.

Senator **Adams**. I agree with you completely. That is one of the reasons I have never been able to understand why a President did not come up and state "This is the policy."

When I talk about the trigger, it is not to make the decision. I think the chairman is absolutely correct. The Congress is not capable of making a decision in the first 3 or 4 days because you always get the reaction of rallying around the flag.

But the mechanism never got started.

I agree with the chairman that some period of time is needed as a cooling off period for unification of the country so we can work out a policy for how you are going to deal with the military situation which had already started, rather than lurching from spot to spot to spot.

Mr. Lakeland, let's just take the Persian Gulf straight-on.

None of us ever said to cut and run from the Persian Gulf. Never. What we were trying to do is unite the country behind a policy that considers how it fits in with our diplomatic policy, what implementing the policy will cost, and how much danger are our men in. We were not trying to micromanage the war.

We have never received the bill for the Persian Gulf, Mr. Lakeland. This has been a year-long military exercise, and at some point somebody is going to come up and say this is what it cost.

Congress may well say it is worth it. When I talked about trigger I was not talking about the Congress making a final decision in the short, original period. To start the Act, you've got to have at the end of it a time when the troops have to come out. Otherwise, the President just says "Well, I have reported and that is the end of that." There has to be a time limit when the policy is in place.

I hope you agree with that is what this law was about and what the Constitution is about.

Mr. LAKELAND. I agree with what you are saying very much. It has become a problem.

I would like to offer two brief comments on that, if I may.

What kind of situation would we be in, supposing you were Commissioner of the IRS and nobody is submitting a tax return. How can I enforce the tax laws when nobody is submitting a tax return?

Well, we have a tax law based on voluntary compliance, and I don't know what you would do as Tax Commissioner. You can't arrest the whole country. I don't think the Congress can arrest the President and his advisors for not complying with the War Powers Act.

But we have a problem there of a decision not to obey the law, and it is a decision I think dictated by the vast national security bureaucracy that just does not want to face congressional accountability.

One final comment, Mr. Chairman.

After we set up the War Powers Act, we tried to do one thing to ensure war powers reports. We worked out with then-Secretary of State Kissinger and then-Secretary of Defense Schlesinger an exchange of letters—they are in the record somewhere—designating who in the administration was going to be responsible for initiating a war powers report.

We were told—and there are letters in the record—that there would basically be two action officers. One would be the Legal Adviser of the State Department and the other would be the General Counsel of the Defense Department. They would be responsible for monitoring and recommending within the executive branch.

So, you would have two legal officers reading the law, presumably ordered to be in compliance with it, and they would say "OK, we now have to do it." But that has not worked. I think it has been dropped. I think it went out with the Ford administration.

That is why I have come up with this conclusion. If the President has standing next to him a man with his confidence, with authority, and who is a specialist in Commander in Chief affairs, and looking at it that way—let's not look at it as broad national security. We're talking about a particular constitutional function, "Commander in Chief." It has parameters which are not coextensive with the general parameters of the Presidency. It is a special function of the Presidency.

I think we could go a long way if we created someone and put him next to the President, and he is the one who is the President's hammer, to make sure that our great bureaucracy and military establishment proceeds with this in mind.

That is the best I can do at this stage.

Senator BIDEN. Thank you.

I have many more questions. I am going to withhold because I am not accustomed to keeping Generals waiting.

Thank you very much, Mr. Lakeland.

I ask now if the Generals will come forward, Generals Jones, Vessey, and Scowcroft, and if they have opening statements, to proceed with them.

If not, we will proceed with our questions.

Then we will hear from Mr. Emerson to wrap this up.

Gentlemen, does any of you have an opening statement?

General JONES. We don't have any prepared statements, no. But we each could make some comments.

General SCOWCROFT. We could make some opening comments to you.

Senator BIDEN. Yes, if you would like to make comments. Whatever you would like. Make those prior to our questioning.

General JONES. General Vessey and I voted 2 to 1 that General Scowcroft would handle all of the tough questions.

Senator BIDEN. All right, then. You fellows can make the statements and I will ask him the questions. [Laughter.]

STATEMENT OF GEN. DAVID C. JONES, (USAF-RET.), FORMER CHAIRMAN, JOINT CHIEFS OF STAFF

General JONES. Mr. Chairman, Members of the Committee, all three of us appreciate the opportunity to make some comments on the War Powers Resolution.

Right up front, I think the Nation would be best served by repeal of the entire act, the Resolution.

I say this recognizing the important role of Congress, and I say it as a former military officer who does not want to introduce troops into a conflict unless the American public is in great support. It undermines them unless there is that support.

Having been involved in discussions on implementation of the War Powers Resolution as a member of the Joint Chiefs, I believe it would be better for us to repeal it.

Despite what Mr. Lakeland said about it being a pre-Vietnam issue—there may be some truth to that in the initial study—I am convinced that many Members of Congress voted for it because of the Vietnam environment.

At about the same time or shortly thereafter we had the Clark amendment, which further restricted the President—I recall 1975 discussions with President Ford and General Scowcroft on the introduction of Cuban troops into Angola and the agonizing discussion we had on the fact that we were completely barred from providing any support, even communications equipment.

Interestingly, a couple of years ago, in a discussion with a Soviet official, he said they felt a freedom of action, particularly in the seventies, because of the Clark amendment, because of the War Powers Resolution, because of a divided America. They felt they could introduce Cuban troops into Angola, do things in Ethiopia and in a lot of other areas without a risk of the United States becoming involved.

So, my No. 1 reason for advocating repeal is that to potential adversaries, a willingness to use power and the ability of a President to act strengthens deterrence.

The other point is the discussion about rallying around the flag.

Since Korea and Vietnam, we have not had a major crisis of the magnitude to require implementation of the War Powers Resolution.

If we had not rallied around the flag immediately upon the invasion of South Korea, we would have had great difficulty in trying to get our allies to support us. Remember how fortuitous it was that the Soviets walked out of the Council and we were able to get our allies to support and to commit at that time.

I believe that if we had had the War Powers Resolution, it would have been extremely difficult to get support from other nations. How assured are you, they might ask, that you are going to get an authorization to continue. They might also say we'll defer our decision for 60 days until we see whether your Congress acts. I think that would have undermined our ability to get our allies aboard.

Also, I think it would have undermined our troops. That is the No. 1 thing I am interested in.

When we commit to force and then, to have a divisive 60 days of debate, with television cameras on the scene could be devastating. If you think back to Korea, we were almost pushed off the peninsula. We were in desperate straits. It would have been very divisive to have a 60-day debate on whether or not to continue with our forces.

There are many reasons to repeal the Act. It has not accomplished what the authors intended. It is a continuing sore in the relationship between the Congress and the Executive Department, regardless of who is in the office of the Presidency.

So, I urge that the Act be repealed and that other discussions take place as to consultation with the Congress, to ensure the congressional role is adequately considered.

Thank you, Mr. Chairman.

Senator **Biden**. Thank you, General.

General Vessey.

STATEMENT OF GEN. JOHN WILLIAM VESSEY, JR. (USA-RET.), FORMER CHAIRMAN, JOINT CHIEFS OF STAFF

General **Vessey**. Mr. Chairman, I would like to say on the record welcome back. Your presence here is strong testimony about the importance of adequate support for a good military medical system.

Senator **Biden**. I, along with John Stennis, believe that funding for Walter Reed Hospital should be continually increased. [Laughter.]

They have made a convert.

General VESSEY. Concerning the issue at hand, it seems to me that there are a number of things that the Congress needs to address as it addresses the War Powers Resolution.

I want to say right off the bat that I agree with the need for consultation and certainly no President can engage in foreign policy acts of any kind, certainly those that involve hostilities, without getting the support of the American people and the Congress.

But I think you have to ask yourself is the Resolution, as it is now constructed, or any of the proposed changes to it, anachronistic in a world in which we have had about 20 wars going on in any given day over the last 20 years, and the last time that I know there was a declaration of war was 43 years ago, when the Soviets declared war on the Japanese.

In a world in which we have banded together with other freedom-loving peoples of the world in a strategy of deterrence, which involves placing our forces and the forces of other nations perhaps closer to hostilities than we ever did in the past, that is, pre-World War I, for example, and where that line is less defined today than it ever was in the past, is it anachronistic? Is it anachronistic in a world in which all potential enemies of ours have used our own political process to try to drive wedges inside the American body politic to gain their own purposes?

That 60-day time limit gives those people an opportunity to drive those wedges, particularly in these situations of less than all-out war. Certainly our strategy involves preventing an all-out war.

That is really what we want to do.

I think those are the questions that you have to ask of yourselves as you deal with this.

From my point of view, I sort of agree with General Jones, that repeal of the Act would be a good thing to do. But I recognize that there is a need for consultation, and there certainly is a need for a President to get the support of the Congress and the people for what he wants to do.

Senator BIDEN. Thank you, General.

General Scowcroft.

STATEMENT OF GEN. BRENT SCOWCROFT (USAF-RET.), FORMER NATIONAL SECURITY ADVISER

General SCOWCROFT. Mr. Chairman, welcome back. We are all pleased to have you with us.

Senator BIDEN. Thank you.

General SCOWCROFT. I appreciate the opportunity to appear before the committee on such an important national issue. Let me make my position clear at the outset.

In my view, the War Powers Resolution is a well meaning, but deeply flawed, piece of legislation. To me, the heart of it is the consultation provision; that is, to force consultation on the President, to bring the two branches of Government together on important decisions.

This is a worthwhile goal. There is no question about that. And we have not always pursued that goal adequately, either branch of the Government.

The basic problem is that the weapon available to the Congress to work its will—that is, basically the power of the purse in national security matters—is a very blunt instrument. But so is the War Powers Resolution.

The actual fact is, as General Vessey has said, that no President can pursue a major policy over a significant period of time without congressional support, and if any President needed it, that was underscored, I think, by the Iran-Contra example as an object lesson of that truth.

One of the really practical problems for any administration—while I certainly disagree with Mr. Lakeland's characterization of chaos in the executive branch—is that the process of reaching a decision within the executive branch is frequently so laborious there is little inclination to start the process over again with the Congress.

That is not the right way to do it, anyway; but that process is another story.

But, even assuming the President has all the goodwill in the world and wants to consult there are real problems with the process.

First of all, the Congress, in its organization and procedures, has changed over the last couple of decades. It is not clear what is meant by "consultation," or with whom. When has the President really consulted? What are the consequences of that consultation in terms of what then follows? How does the President deal with objections to what he proposes to do? Are other Congressmen bound by the consultation, those who do not participate in it? How can a President ensure confidentiality if that is required by the proposed activity? What if the Congress is not in session?

There are all kinds of question attendant to the consultation process that have not been resolved and, as far as I can see, the Congress has not taken any real steps to extend the President a hand and make consultation any easier.

But I think there are also substantive problems.

Fundamentally, the War Powers Resolution produces incentives in all the wrong directions. It could make it more difficult to deal with a problem early, when the issues may be relatively ambiguous, but when small applications of force or other moves, could be more effective than massive moves made than later on.

As General Jones says, the War Powers Resolution raises questions of will in the minds of those against whom or for whom the military forces are being moved, the question of who, in fact, is running foreign policy and how can one rely on an inconsistent United States.

The reporting requirements can produce incentives for a President to obfuscate on what the true situation is, as I think probably happened in the gulf, and even to prevent useful consultation or discussions with the Congress because of fear over triggering the Resolution.

If the Resolution is triggered, the President then has an incentive to get the action completed within 60 or 90 days, regardless of the natural pacing of whatever the issue is, and an opponent against whom the deployment is being made has an incentive, (*a*) to trigger the Act, and then, (*b*) to try to stall for 60 to 90 days to see whether the United States will have to pull out.

There is one additional problem, and that is that to a layman, it seems that the law almost certainly is unconstitutional. The Act recognizes that it cannot confer or take away any of the constitutional powers of the President.

But if being Commander in Chief has any meaning at all, it must include the ability to move troops.

The Resolution does not claim that the President cannot deploy military forces. Indeed, the President can, in fact, fight a war for 60 days under the terms of the War Powers Act.

But if the President has the power to deploy forces, and it seems clear that he does under his authority as Commander in Chief, how can he possibly be required to withdraw those forces by congressional inaction? That, incidentally, is not the most bold, courageous way for the Congress to face an important national issue.

I believe, Mr. Chairman, that it is time to recognize that the War Powers Resolution represents a policy failure, and that there is so much emotion vested in it that the best course of action is to repeal the War Powers Resolution, and then look at how the two branches can better go about the important process of consulting.

Thank you.

Senator BIDEN. Thank you, General.

I have a number of questions based on your comments, in addition to the ones I have prepared.

Let me begin with you, General Scowcroft, because you have made a statement that was echoed by your colleagues, and that concerns the sort of fixation that we all have on the 60 days.

Section 4(a)(1), which is the hostilities report the President would submit, which would start the clock running the 60 days, has the effect of triggering another portion of the Act which says that if, in fact, there has not been congressional approval for the action within the 60-day period, then the troops, the forces, are automatically withdrawn.

But I want to make something clear. I am sure you all know it, but maybe it has gone unstated here for too long.

The President, when he sends that report up, that 4(a)(1) report, starting the clock running, can ask with that report that there be immediate authorization for his action.

You know, we don't have to wait 60 days. No President has to wait that long.

Let me ask you a practical question. You are men not only of demonstrated intellectual competence in reaching one of the several most important positions that are held in this democracy, but also practical men. I have always wondered why has no President asked at the outset of his action to make it a 4(a)(1) and to ask for authorization? Can any of you think of any time, in your lifetimes, where a President has taken the action of committing U.S. forces anywhere that the Congress has not, if asked or having participated in it, immediately after the action was taken, that the Congress has not supported it?

Can any of you imagine in your many years of experience a President saying he was committing troops for the withdrawal of students from Grenada, or he was committing troops for saving anyone in Panama, that a congressional body of 535 women and men, if asked in the immediate aftermath of that for their support, would not give it?

I don't understand why Presidents have not used what we thought it was beneficial for. There was General Vessey's point about the need for a united nation. There was General Jones' point about how, as a general, you don't want to commit troops if the Nation is not behind the commitment.

Why hasn't a President ever done that? Or am I mistaken in my reading of the Congress and the American people from a historical perspective?

General SCOWCROFT. No, I don't think so. And I would say certainly in a case where hostilities are underway, that reaction is one where I cannot think of an exception to it.

I think there are other cases, however, where the possibility of hostilities is present, but not certain, where there could be a real question raised. And I think that Presidents fundamentally—most of the times the War Powers Act has been relevant in one way or another have been in minor actions—I think the President has felt that it is within his constitutional authority to do what he did and that to ask for ratification was not necessary.

Senator BIDEN. General, if there were no War Powers Resolution, what limits do you believe the Constitution places on a President's power? What specifically could a President not do without congressional authorization?

General SCOWCROFT. I think what the President could not do is prosecute any war without congressional authorization because appropriations have to be passed for the prosecution of that war.

It seems to me that that is fundamentally the way the Constitution divided the powers.

Senator BIDEN. Well, let's pursue that for a second.

You are saying that the ability to prosecute what most people would call a war would be affected by the amount of money the President needed to conduct that war. I don't know what the cumulative number was, but if I am not mistaken, the Defense Department had to spend several billion dollars in the Persian Gulf to maintain the additional fleet presence there.

So, does $1 or $2 billion not rise to the level of a war?

Do we have to get into a situation where the prosecution of a military action exceeds $100 billion before that is called a war?

I mean, little old Grenada cost a lot of money. It cost a lot of ribbons, and it cost a lot of money, too.

So, I am not quite sure how we define this. If we define it only in terms of the size of the authorization, then I don't know where it starts to click.

General SCOWCROFT. No. I did not mean to so define it.

I was talking about the power of the Congress to restrict the President's action in national security affairs. It seems to me that the power of the purse, whether it be the Persian Gulf or anywhere else—you could certainly prevent any moneys under any appropriations act from being used to outfit those forces in the Persian Gulf.

Senator BIDEN. It seems to me that what you are saying is the President can initiate any war he wishes to and the Congress can stop any initiated war, if it wishes to.

That is the logic of your statement, unless I am misunderstanding something.

General SCOWCROFT. Look at the logic of American history.

I believe there have been—and I may have missed this by 1 or 2—15 declared wars in American history. But there have been upward of 200 times where American forces have been committed to combat, beginning with the operation against the Barbary Pirates by a President who was as mindful of the restrictions on Presidential authority and the powers of the Congress as any, President Jefferson.

In fact, as Prof. Edwin Corwin has said, the Constitution, in the field of foreign policy, is an invitation to struggle between the two branches. What I think we need to do is to look at ways that we can enhance the cooperation of the branches, not an attempt to tie one down by the other.

Senator BIDEN. Excuse me for a moment.

[Pause.]

Senator ADAMS. May I ask a question, Mr. Chairman, while you are consulting?

Senator BIDEN. Sure.

Senator ADAMS. General, what we don't understand, and I want to follow up on the chairman's question, is that there is nothing to prevent a President, when hostilities have occurred and there has been a rescue or defensive action, from coming to the Congress and requesting authorization. It was done in Lebanon, for example. It is an orderly way of going through with consultation and moving ahead the foreign policy objectives of the United States.

What I don't understand is the assumption that the three of you have made, that it is better to let the pot boil until there is an explosion between the Congress and the President, or between the people and the President, rather than the War Powers Resolution, which is an orderly, automatic system of, first, consultation, then authorization by Congress. I agree with the chairman that such authorization would be given.

The War Powers Resolution is a tool in the hands of the President, properly used, to say to opponents and others that we are moving to the next step.

This has been argued as a theoretical matter too much and too much as a technical matter, rather than doing what the authors of this Resolution intended, which was to produce a consultation system and a way of moving the Congress with the President.

I thank you for yielding, Mr. Chairman.

I just don't understand why all of you assume that the Congress is going automatically be opposed to any Presidential request.

General VESSEY. I don't think that is an assumption, Senator.

If I could get back to the earlier question of the chairman and make a couple of points on it, it might help to illuminate this.

We are not dealing with a situation where we are talking about going to war or not going to war. I think the world with which we deal today is this world that I have tried to define earlier, where our strategy is preventing war. We really want to prevent war, and we ought to assume success at that.

But, preventing war requires taking a certain number of risks and it requires some cost to the United States—$300 billion a year for a defense budget; 2 million-plus people in the active forces and another 1 million in the Reserves.

So, we pay a considerable price to prevent war. But we have decided that it is a small cost compared to the cost of war itself.

We really want to prevent it, and it requires taking some risks at times. Having sat in a couple of times on what I think Presidents would have called consultation, and Congresspeople probably would have said it was not consultation, that they were simply being informed, I recognize that there is that difference and that it is something that you have to deal with and that Presidents have to deal with. Then seeing Presidents who were reluctant themselves to take those risks, but finally decided they had to take those risks, and then seeing the leaders of the Congress come up and say "Well, we hear you, but we don't agree with it and it had doggone well better be right." Then the forces march off as in the case of Grenada, it comes out all right with the Congress eventually supporting the operation. You can see how concerns of Presidents can arise.

Senator BIDEN. But that, General, was one of the reasons for the Act, because the Congress has to go on the line one way or another. And if it does not work, it does not allow Congress to come back and say—if they have supported the President, that "Well, it didn't work, and I told you it wasn't going to work."

Let me focus on this a little more. By way of an example. President Reagan and others have argued that the existence of the Sandinista regime in Nicaragua is a destabilizing factor in the hemisphere and may lead to broader conflict, involving U.S. interests. Do you believe the President would have the authority, in order to prevent war, to prevent further conflict, to say I am going to invade Nicaragua with American troops.

Does he have the authority to do that?

General SCOWCROFT. Yes.

It may not be prudent if he does not have the support of the Congress, of the country, and a debacle could ensue.

But, yes.

Senator BIDEN. I understand that.

General JONES. With or without the War Powers Resolution?

Senator BIDEN. Yes, with or without. I am just asking whether he has the authority to do that under the Constitution, as you see it, under the heading of preventing war. When the situation in Poland was at a fever pitch, right at the interregnum period, between Carter and Reagan—and many of you were involved; indeed all of you were on active duty at the time, in various capacities—there was concern that there may be a very serious problem if the Soviet Union committed the 40 divisions they had amassed in and around Poland. In order to prevent a broader war, would the President have the authority to invade Poland, to prevent that from occurring?

General SCOWCROFT. Yes.

Senator BIDEN. Well, it seems to me that it is really simple.

But first, do you all agree with that?

General **Vessey**. There is a question between authority and good judgment.

Senator **Biden**. I agree. But I am only talking about authority. I am not talking about good judgment. I am talking about authority.

The reason I pursue this is because I think it is important that it be clearly stated here that the extension of the use of military power under your reading of the Constitution—meaning you, collectively—if the President, in his wisdom or lack thereof, deems that the interjection of American forces into hostilities as a means of preventing a wider conflict, as a means of preventing a larger war, has the authority to do that. This is a fundamental disagreement.

I don't think even Professor Corwin was talking about that. He was talking about the ability to determine the conduct of foreign policy, not, in effect, what is a clear war situation, whether it is a declared war or otherwise.

Anyway, my time is up. I have many more questions, however.

General **Vessey**. I think it is important to add, Mr. Chairman, that the President clearly also has to come back and get the support of the Congress.

Senator **Biden**. I understand that.

You see, I guess the reason why some of us are both dissatisfied with the War Powers Act and also see a need for a War Powers Act—that is a category in which I put myself—is because conditions have changed so drastically in the world over the last 40 years in how wars are made and the potential consequences of making war, even small wars. We find ourselves in a position where once a President makes a commitment of consequence, it is almost impossible in the short run to undo that commitment.

We get the double whammy, Generals. I have been here a long time now and served in the Intelligence Committee for a number of years. I think I served there longer than anybody who has served in the Senate.

What would happen is, if the President makes a commitment, wisely or unwisely, and it turns out, after the fact, to have been unwise, the argument then is Biden, you can't undercut the President now. We've made a commitment. America's honor is at stake. There are 5, 10, 50,000, 70,000, 100,000, 500,000 American boys out there, Biden. You've got to protect them.

So, we all know that once the President makes any kind of major commitment, in the near term it is almost impossible to change that.

I believe that that is what used to be envisioned as a declaration of war, and I thought the Constitution said that the Congress had a role to play in that. But I will not pursue that right now and will yield to my colleague.

General **Scowcroft**. Mr. Chairman, if I may deal with that, I don't think the War Powers Act deals with that in any way. The President still can do whatever he could do before for 60 days.

The War Powers Act only forces him to terminate at a certain time. It does not prevent whatever his constitutional powers before were. He could notify the Congress that he is sending troops to

Poland to protect the freedom fighters, or for whatever reason you pose.

Senator **Biden**. That is absolutely correct, and that is where you talked about the consultation period.

One of the potential amendments I am considering drafting to the War Powers Act would set up a mechanism for consultation similar to that required in the Intelligence Act, which, notwithstanding public opinion, has worked much more than it has failed.

Do you know why?

You'd have somebody come up and sit there in front of us with some harebrained scheme that was signed off on, and he would find that there was an allegiance between Barry Goldwater and Joe Biden looking at him, saying "What? You're kidding. You're really going to do that? Are you guys crazy? What's going on here?"

Barry would use more colorful language than I would. But, nonetheless, that would be said.

It has an interesting, salutary effect on actions.

I could point out a number of circumstances under which approved intelligence actions were either withdrawn and or modified because somebody said "Whoa, wait a minute."

One of the purposes of this Act was to be in a position where events do not overtake what is sound judgment.

Strangely enough, the War Powers Act has worked in one way.

Although I have never been President, I would imagine that every President since the Act has been in force has sat there at some point and said to "you guys" in various capacities, he has sat there and said: "Can I do this? Am I going to get myself in a legal jam doing this? What's going to happen here? That War Powers Act, what is that going to do? How is that going to affect this. Are we going to have to go around this?"

I'll bet you that some initiatives were dropped merely because of the existence of that Act, sitting up there.

I may be wrong. But I'll bet you that at least it made people think a little bit more.

I yield to my colleague.

Senator **Pressler**. Thank you.

One area that I want to explore with these three military experts is military planning, both on our side and on the side of our potential enemies.

The War Powers Resolution provides that after the deployment of U.S. troops in certain circumstances, Congress must be notified. However, the Act also provides that, within days of the Presidential notification, troops must be withdrawn unless Congress provides specific authorization to the contrary.

Does the threat that the War Powers Resolution may be invoked adversely affect our military planning in any way?

How does the requirement for congressional authorization following a Presidential notification affect military planning?

I will address those to each of the three of you for any comments you may have.

General **Jones**. I really do not believe the War Powers Resolution had any conscious impact on war planning at all—the planning, the contingency plans, East-West plans, a lot of different planning. It would be in their execution that there would be discussion, but not in the preparation of plans—at least in my experience.

General **Vessey**. I think that's right.

There are two sorts of activities that we are concerned with. One is the sort of prevention of war and the other is the war plans themselves.

Our war plans today involve combined action with allies almost completely. Those plans assume that once they are executed, we will have support for those plans, and it would be an absolute disaster withdrawing from Europe, for example, within 60 days after a Soviet attack.

I have looked down the list of the other 35 or so incidents when Armed Forces have been deployed since the War Powers Resolution has been enacted, and I do not believe that the War Powers Resolution had any impact on the planning for any of those.

Now, admittedly, they were all rather small actions. But I don't believe that it impacted the planning at all.

General **Scowcroft**. I would agree with my colleagues.

Senator **Pressler**. Now, do you believe that our adversaries have changed their military planning any because of the existence of the War Powers Act? Does any of you have any thoughts on that?

General **Jones**. I doubt they have changed their plans. I would guess that it is considered more in a tactical operation, a specific incident, trying to promote controversy within our society, but not a change in plans.

General **Vessey**. I would echo that. I think it gives them an opening that I find uncomfortable, for them to try to drive wedges inside the American body politic and get support from the American people for their planned actions.

Senator **Pressler**. You have already stated that the Congress has the authorization and appropriation power to deal with some of these questions already under the Constitution. But if we were to repeal the War Powers Act, it seems to me that Congress has plenty of avenues where, if they really disagree with what the President is doing, they could make life pretty miserable over there.

Let's say that the Congress did repeal the War Powers Act, or that it did not exist, and the President did something that the Congress clearly disagreed with—he invaded Mexico, or something, for ballot fraud, something that Congress was absolutely in disagreement with—what steps could the Congress take, from your point of view, from your observations? What would you expect Congress to do if it really disagreed with the President, without the War Powers Act?

General **Scowcroft**. I would expect, if they really disagreed, that they would pass legislation that would say that no moneys appropriated under whatever acts could be used to prosecute activities against the state of Mexico.

General **Vessey**. As they have done in the past.

General **Scowcroft**. Yes.

Senator **Pressler**. And that could be done very quickly. It could be done in a day; could it not?

General **Scowcroft**. Yes.

General **Vessey**. As I recall, when I was sent to Laos to coordinate military operations there, the Symington amendment was imposed, restricting support for operations in Laos to $250 million a year, and half the year had already gone by and most of the $250 million had already been spent. It made for a very interesting year, trying to figure out how to stay within that $250 million.

General **Scowcroft**. There were several of those—the Symington amendment, the Cooper-Church amendment. There were several like that.

Senator **Pressler**. Yes.

The point has been raised here that because of this complicated statute which is in existence, maybe it has made Presidents think more deeply about what the consequences might be. Maybe in some instances a President has not done what would be in the interest of the country because of this complicated statute.

You could use that argument both ways.

Let me ask you this. During the Persian Gulf operations, there was a lot of growling around up here on the Hill. But the War Powers Act was never acted on by Congress or never invoked. I think Congress, both sides, Republicans and Democrats, sort of wanted to have a certain amount of cover. Everybody was raising questions about it.

How would Congress' reaction to that have differed if the War Powers Act did not exist? Do some of you have some analysis of the Persian Gulf thing?

General **Vessey**. I don't think it would have changed.

General **Scowcroft**. I doubt it. You know, especially at the outset, it was a controversial action, and I think the grumbling would have gone on whether or not there was—well, yes, there was an added aspect to it. This is that it seemed, clearly from the terms of the Act, that forces were going into an area where hostilities could quite likely take place. That I think added to the acerbity of the grumbling.

Senator **Pressler**. Yes.

What I'm trying to get at here are what are the results of the War Powers Act having been in existence. Have we not engaged in some activities that we would have engaged in, in your judgment?

Since it has been in existence, has U.S. policy been any different because of it? Have Presidents been more cautious, or more bold?

General **Scowcroft**. I guess I would have to say that it has had virtually no impact. Presidents do not take decisions about moving forces into areas of possible conflict or into conflict lightly. Certainly consultation is important. But I don't think that it makes the difference between a President doing something harebrained and doing something responsible.

The only specific time that I can remember the War Powers Act made a difference was when we were evacuating Embassy people, Americans, from Lebanon in 1976, and there was a big debate about whether the sailors on the landing craft could carry rifles or could carry pistols, and would either one of those trigger the War Powers Act.

Senator **Pressler**. There seems to have been a great deal of debate. There have been debates about what the meaning of "imminent hostilities," and so forth.

But, in terms of a change in policy or in terms of Congress' real involvement, I do not see that the War Powers Act has changed anything, except that it makes for a lot of debate and a lot of discussion.

It seems to me that that same debate and discussion could occur under the appropriations process. Indeed, Congress can act pretty quickly if it wants to on something. It can act within a matter of hours.

I just wonder if we are not cluttering up a very good system with something that is vague. I guess one could use the argument that by having a vague statute, it confuses everybody and makes people more cautious. But you could use that same argument the other way and maybe you can hide under a vague statute.

It strikes me that we have created something here that has not changed history, that causes us a lot of problems in getting things done, and that is very cumbersome. That is my general assessment.

I take it that the three of you, generally speaking, would share that.

General SCOWCROFT. I suspect, Senator, that it may inhibit consultation because Presidents, by and large, take umbrage at the forced aspect behind the War Powers Resolution, that they have to do this and they have to do that, when they do not think they do. Therefore, the kind of voluntary coming forward with consultation may be inhibited because of this.

Senator PRESSLER. They may well do more.

General SCOWCROFT. Act more unilaterally.

General JONES. Going back to the bigger point on the use of force and questions such as going into Mexico or into Poland, I think there is a lack of appreciation for what constraints are on the President within the executive branch, both the physical constraints of being able to move forces and get them there in a fast manner. Presidents do not act in a vacuum.

I have worked for the last four Presidents as a member of the Joint Chiefs of Staff and, in every case, there was a good discussion within the Government on use of force. There are constraints within that that would prevent a President going off half-triggered, half-cocked, with something that is going to get us deeply into trouble. This is not to say that everything is thought through to the extent that perhaps it should be.

I think it is important to note that four Presidents, of the two different parties, have all agreed that the War Powers Resolution is counterproductive. It is counterproductive to promoting discussions, counterproductive to the role of the Congress in the Act.

I would bet, no matter which candidate is elected, when he gets into that Oval Office, he will feel just like the last four Presidents, and I think so with due regard to the responsibilities of the Congress.

I would hope that, after January 20, you could sit down with a new President and try to embark on more of a bipartisan foreign policy and a recognition by the President of the role of Congress and by the Congress of the role of the President. Somehow, putting the War Powers Resolution aside or get rid of it because it has been so controversial and has not worked. Why not start with a new slate, saying we're going to protect the interests of the President and protect the interests of the Congress.

I think you could make some progress in that regard.

Senator PRESSLER. The Act sort of assumes a very adversary relationship; does it not? It creates an atmosphere that is almost like having a lawyer and a group of legal rules to talk with your colleagues or something like that. It perhaps creates more tension between the Congress and the President in certain circumstances than would otherwise be.

Would that be your judgment?

General JONES. Yes. In most cases, the discussion was on a decision to do something. Then, at the end, what should be done about the War Powers Resolution? How do we make sure that it does not cause us a problem, that it does not get implemented. Therefore, it was decided to send a letter saying the action was consistent with the War Powers Resolution.

I think the attitude was not that the Congress has a role to play and let's bring them on in. It was how do we make sure that we don't trigger the War Powers Resolution.

I think the Resolution is counterproductive to promoting a dialog between the executive and the legislative branches of Government.

Senator PRESSLER. This will be my last question, Mr. Chairman.

Do you see a circumstance where, for example, in Panama or in some country, if the lives of American citizens were endangered in the President's judgment, he might hesitate to act because of the War Powers Act?

General JONES. I don't think so.

General SCOWCROFT. [Nods negatively.]

General VESSEY. [Nods negatively.]

Senator PRESSLER. Thank you very much, Mr. Chairman.

I have some more questions for the record, and I will submit them for a response.

Senator BIDEN. Thank you.

Gentlemen, I was checking on the author of the quote that the trouble with Christianity is not that it has failed, but that it has never been tried. G.K. Chesterton said it.

I would say the same about the War Powers Act. It has not failed; it has never been tried.

Let me make one closing comment with the three of you here.

It seems as though something perverse has occurred over the last 30 years. Everyone has written, and I suspect most of you would subscribe to the notion, that a declared war occurring again, ever, is highly unlikely, and the argument is being made that the only time the Congress can have anything to do with whether or not forces are deployed is if there is a declared war.

What we are saying is that Congress can stop an action after the fact by dealing with the appropriations process. Congress can also stop a President from violating the Constitution by impeaching him. That is roughly the same thing. It represents the use of an extremely blunt, negative instrument. It does not represent any king of joint decision-making.

Now, if we agree that there are going to be no more declared wars, then what does the Congress do to meet the intention and requirements of the Constitution? You are all saying, it seems to me, that the only thing it can do is be reactive and stop wars that it does not like that the President has started.

General **Scowcroft**. I think that is not true.

Let's take the Gulf, for example. There was a lot of discussion about what we ought to do in the Gulf before forces were sent. If the Congress felt strongly about the issue, it could prospectively have prevented the use of any appropriations for the deployment of naval forces to the Persian Gulf, or under any kind of restriction that it chose.

Senator **Biden**. But it could not, prospectively, stop the invasion of Nicaragua, which you have said he would have authority to do.

General **Scowcroft**. Of course it could. It could stop the invasion of Nicaragua tomorrow by the same device—by preventing the use of any appropriated funds for troops in or around Nicaragua.

Senator **Biden**. Well, maybe the way it could do it, then, is it could pass legislation taking the whole globe and declaring that the President, other than to defend, to repel attack, does not have authority to use United States forces, and start with Mexico, for example, and just work our way down, all the way to Eastern Europe. That's what you are telling me?

General **Scowcroft**. Mr. Chairman, I think that is what the Constitution says.

Senator **Biden**. What did it mean when it said only the Congress can declare war? What did it mean by that?

General **Scowcroft**. Well, I take a different view from Mr. Lakeland about the change. The original change was only Congress can "make war." That was changed to only Congress can "declare war," that a state of war does, in fact exist.

That is a legal condition.

Senator **Biden**. Oh, I see.

General **Scowcroft**. I think we are dealing with legalities, not with the fundamental premise, and that is that a President cannot unilaterally make war.

Senator **Biden**. But he sure can.

General **Scowcroft**. He can get us engaged in hostilities, but it is not going to work unless he has the support of the Congress and the people, and that is what the Constitution is trying to do.

Senator **Biden**. What you are saying is the President cannot unilaterally declare a war, because that requires a legal instrument. But you are saying that he can have all of the accoutrements of war—bombs going off, troops being deployed, people being killed—because that does not require a legal instrument.

General **Scowcroft**. The War Powers Act permits all of that.

Senator **Biden**. Forget the War Powers Act now. Let's assume that we don't have the War Powers Act.

I'm just trying to understand what you think the Constitution means.

General **Scowcroft**. Mr. Chairman, why does the President have the authority to repel attacks on the United States? The Constitution does not say that.

Senator **Biden**. That's the distinction between "make" and "declare."

General **Scowcroft**. That's war?

Senator BIDEN. Sure it's war, and the rationale behind that is there is no opportunity for Congress to respond. It's just like the rationale right now that we all have used. The reason why the President should have the power to respond is if, in fact, you folks say "The red light just went off, Mr. President, and there are incoming missiles." The President should not have to sit down with all of us and say "Now do you think we should, in fact, engage any of our nuclear forces." There is no time for that. There is no time to have debates about repelling attack when the Indians are coming up over the horizon.

But there is time to make a judgment whether or not you are going to send divisions into Poland, into Mexico, into Nicaragua. There is time to make those judgments.

I thought that is what the purpose of "declare" was, that the Congress is the only one to "declare." Otherwise, what we have is, constitutionally, a monarchy when it comes to the use of American force in power and the projection of it.

General VESSEY. But I think it is only very limited.

If you look back at all the recent instances, the use of the force has been limited; the hostilities have been limited.

As Brent pointed out earlier, we have had 15 declared wars and 200-some-odd incidents where American forces have been engaged in hostilities.

I disagree with the presumption that we are never going to see another declared war. I hope we don't see one, and I hope we do everything to prevent one. Certainly, it is unlikely, if we are successful, but there is a great deal of usefulness in declaring war at the right time.

I think that Congress has all sorts of power to restrict Presidents—certainly in the construction of the Armed Forces, in how the defenses of the United States are built, in the ratification of treaties. Congress has all sorts of power to restrict the use of Armed Forces.

Senator BIDEN. Well, I guess what I am worried about is if I were President and I said to my Legal Advisor: "You know, I really would very much like to move in to Poland now. It is a propitious moment. The Soviets have been stung very badly, both in Poland and also in Afghanistan"—whatever rationale I had. And I turn to my Legal Adviser and ask, "Do I have the constitutional authority to do that?" I hope Presidents still ask those kinds of questions. And he says to me: "You sure do, Boss. You have the authority to do that." I wonder about the Constitution here.

I mean, Madison changed the constitutional draft from "make" to "declare" and expressly stated why he changed it, so that the President would have the ability to repel. So implicitly in the Constitution it is there.

So I just wonder, are there any limitations on the President?

General VESSEY. But he does have some very practical ones, yes. He has to turn to his Joint Chiefs of Staff and say "Can we do it," and they'll tell you "No, you can't do it."

Senator BIDEN. If you three guys were there, I would be confident of that. But I'm not so sure.

General JONES. Mr. Chairman, on the point you were making about the adviser, it would seem to me the only difference the War

Powers Resolution would make would be this: "Mr. President, you have full authority, constitutional authority, to go into Poland, but you'd better get it over with in 62 days."

Senator **Biden**. But you know, that was the strongest argument against the War Powers Act when we were debating it, by those who thought there should be some limitation on the President but were worried that we were implicitly giving him a power he did not already have.

Anyway, I thank you all for your input and I appreciate your consideration in going second and not first.

Mr. Emerson, I particularly thank you for your indulgence. I hope you can bring light and wisdom to everything that has been said.

As I indicated, Mr. Emerson was a close adviser to Senator Barry Goldwater in the effort with the Nixon administration to take issue with the Act in the first instance.

We are delighted to have you back. Thank you again for waiting.

If you have a statement, please proceed.

STATEMENT OF TERRY EMERSON, FORMER COUNSEL AND LEGISLATIVE ASSISTANT TO SENATOR BARRY GOLDWATER

Mr. **Emerson**. Mr. Chairman, I ask if you would submit my prepared statement for the printed record, if there is a printed version, and I will just make some extemporaneous remarks.

You used a quotation. I would like to offer a quotation, too. It came to my mind as the debate went on, and the questions were asked this morning.

The quotation is by my namesake, Ralph Waldo. He wrote, "Foolish legislation is like a rope of sand. It breaks in the twisting."

I think that applies to some of the experience with the War Powers Resolution.

Senator **Biden**. He also said "Foolish consistency is the hobgoblin of little minds, adorned by petty statesmen and divines."

Mr. **Emerson**. Yes, very good.

Senator **Biden**. Believe it or not, I do know who I quote most of the time. I just forget on occasion. [Laughter.]

Mr. **Emerson**. Mr. Chairman, my comments reflect what was a small minority view of the time. I have the last report of the Senate Foreign Relations Committee on the last version of the War Powers Resolution, and it notes in it that there were 20 witnesses speaking in favor of the last version, and there were only 4 witnesses who appeared in opposition, and Senator Goldwater was 1 of those 4.

Then, on the final vote to override President Nixon's veto, there were only 17 Senators, I believe, who supported the President's position.

So, I would make note that we were reflecting a very small, minority, position at that time.

I do feel that it is obvious the War Powers Resolution was enacted in an atmosphere of grave concern by Congress about what the majority of Congress felt was the unconstitutional military activities in Vietnam, and also it occurred, enactment of the War

Powers Resolution occurred, during the Watergate investigation period.

So, I think it was a very unusual moment of history when such a large majority would go against Presidential defense powers.

To quote again from this last war powers report of your committee, it even makes specific note: "The immediate legislative origin of the war powers bills is the disappointing experience with the Gulf of Tonkin Resolution, adopted in 1964, and the Vietnam war which ensued. . . ."

So, the committee itself pointed out that Vietnam is the legislative origin. That statute also was adopted the same year as the Watergate investigations were underway in Congress. That is really what the source of all the antagonism at that time between the President and Congress was.

Senator, our view on the Constitution was expressed over and over at the time. I will not repeat that in detail today.

We felt that the President has self-defense powers for the Nation. Perhaps we can get into that in any questions you have.

Rather than argue the constitutional issue, which may never be decided by the Supreme Court, in any event, on the ground of the political question doctrine, I propose to go into some of the issues arising out of the Byrd-Warner-Nunn-Mitchell resolution.

I was struck in reading earlier hearings, I believe that of August 5, by this special subcommittee, that Senator Kassebaum was saying one of the real questions is how do we build cooperation between the executive and legislative branches to sustain a policy effort. Instead of looking at antagonism between the two political branches, what can we do to try to get some kind of new partnership, some visible unity of national policy?

I think that, while my personal position supports repeal of the War Powers Resolution, I don't see that coming, so I would look at something like the Byrd resolution and say that that is a way of at least improving the situation.

I think the consultation provision, in particular, consultation not just on introduction of U.S. troops into hostilities, but consultation on vital national security matters generally, which is covered in the Byrd resolution, might be a way of cooperating, by having the President or his top officers consult with this select group, this very small consultative group. Perhaps it would meet in an emergency, and only six Members of Congress would be consulted, or it may be a larger group. About 18, I think, would be the largest.

Well, this could be a workable group. Maybe that is a worthwhile experiment to try, to see if it helps bring about some understanding of what the President's purposes are, what his strategic purposes are, why he feels he has to commit the troops somewhere or station our Navy somewhere. Get some understanding among Congress of his position. Then Congress, the leadership on this consultative committee, would also make its constituency, the American people, make their voice clear to the President, too.

I think that would be a helpful addition to the existing War Powers Resolution.

I would also like to go back to Senator Javits' original bill—at least it is the version he had in January 1971: Senator Javits' S. 731. In there, he specifically said that "the Armed Forces of the

United States, under the President, as Commander in Chief, may act . . . to protect the lives and property, as may be required, of U.S. nationals abroad."

I would like to see that language put specifically in the War Powers Resolution—not just authority to act in the case of a direct attack on U.S. territory proper or U.S. military forces located abroad, but also to allow the President clearly to act, and eliminate any question in the mind of potential adversaries that might calculate that the War Powers Resolution does not permit the President to act to protect American citizens abroad.

That was also a suggestion in Senator Taft's legislation of the time, Senate Joint Resolution 18, which he introduced in 1971. He put it a little broader, and I like his language, too. He proposed to add that the President has authority to deploy the troops when it "is necessary to exercise the inherent right of self-defense of the Nation or its nationals."

This self-defense is what the Framers had in mind, together with the power to repel attacks.

Thomas Jefferson was a strict constructionist, and when he was President, this is how he interpreted the declaration of war power, as contrasted with his own Commander in Chief power.

Jefferson made notes of a Cabinet meeting in May 1801, and he quoted Gallatin, one of his really top advisers, on the issue being debated then of whether the U.S. naval squadron that was located in Norfolk could be moved into the Mediterranean in order to protect U.S. commerce and American citizens who might be traveling back and forth to conduct business in the area.

As a result of this Cabinet meeting, Jefferson's Cabinet concluded, "The Executive cannot put us in a state of war. But, if we be put into that state by the other nation," if ships of another nation—ships of the Barbary Pirates—attack our citizens or our commerce, then "the command and direction of the public force belongs to the Executive."

And that is the policy that was carried out by Jefferson.

I think that is what is meant by "self-defense."

Another example of self-defense would be President Kennedy's use of the Navy and enlarging the defense services, the reserve forces, during the time of the Cuban missile crisis. I think his action was clearly constitutional, even though it risked a nuclear war. It was in self-defense.

Those are the types of situations where Senator Goldwater and those other Senators who opposed the War Powers Resolution would have felt that the President has constitutional power that cannot be denied him by the Congress.

Then there are other provisions in the Byrd resolution that I personally like very much. Troops would no longer be subject to automatic withdrawal after 60 days. I think it is very wise to remove that arbitrary time period.

Also, under the Byrd resolution, Congress would no longer use a simple concurrent resolution to order a halt to the President's deployment of the forces. Instead, Congress would use a joint resolution, which would be subject to Presidential veto. I think that is a better way of doing it.

Third, as I mentioned, I think the consultation group is important because Congress finally would identify, under the War Powers Resolution, exactly who it is the President is supposed to be consulting with—not all 535 Members.

So, Mr. Chairman, I accept any questions you may have.

[The prepared statement of Mr. Emerson appears in the appendix.]

Senator **Biden**. I do have a couple of questions.

I was under the impression that one of the reasons for the War Powers Act was to give the President an opportunity to deal with this partnership that is being urged and which you are urging, this greater cooperation in the formation of a bipartisan foreign policy.

As one who is not in favor of the War Powers Act, could you give me your insight as to why no President has taken obvious advantage of being able to gather everyone under sort of one bushel basket here to take the same position that he is taking, by coming to the Congress?

Mr. **Emerson**. I believe one reason is the fear of establishing a legal precedent by invoking the War Powers Resolution, accepting it completely, attempting to use it for his own purposes by requesting the specific statutory authority you have mentioned.

The President would, in effect, be conceding the constitutionality of the War Powers Resolution and its procedures and process. I don't think Presidents are prepared to do that.

But also, you asked earlier was there any situation that you can think of when Congress might not give that authority, if it is reasonable, a reasonable situation.

Senator **Biden**. Yes.

Mr. **Emerson**. I want to go back and review this, but I believe on April 10, 1975, President Ford came to Congress and asked for specific authority to evacuate Americans and South Vietnamese allies of the United States during the massive North Vietnamese invasion of South Vietnam. I believe Congress debated and debated and debated, and never did grant the specific, clear authority, and President Ford withdrew all those Americans and several South Vietnamese allies from Laos and South Vietnam on his own.

But also I would look back to more distant history.

I refer in my prepared statement to the isolationist mood of the country and Congress preceding the declarations of war in World War II, where Congress, during the late 1930's, enacted neutrality legislation. I refer to the vote in 1940, in which the House of Representatives, by only one vote, gave the President power to draft into the military services.

It might be that we have to go back that far to find a situation where it would have been very risky for a President to come to Congress and solicit authority. But yet, it is there in the history books, and it is possible to conceive of such a situation.

It is a risk that I don't think the President should have to take, seeking specific authority in the moment.

Senator **Biden**. I think you are right about the 1940 vote. But we have to remember what was swirling around. The outcome of that vote and the reason for the draft was the probability that, if the draft occurred, we would be in a Second World War, which was already underway.

I am not sure that that is analogous to the commitment to flag Kuwaiti tankers. But it does answer my question.

Let me ask you another question.

Do you believe that the present War Powers Act is unconstitutional?

Mr. **Emerson**. Well, I personally believe it is unconstitutional with its concurrent resolution provision. I think, under the *Chadha* case, forgetting questions about war powers but just questions about separation of powers, legislative veto is not valid. In effect, the statute is using a concurrent resolution that would not be submitted to the President's desk as a legislative veto. So, I think that part of it is unconstitutional, the part permitting Congress to order the withdrawal of American forces from abroad by a simple resolution. Also, the automatic 60-day veto over the President's continued use of the forces is unconstitutional, in many, many situations. If it is a situation where the President has used the Armed Forces, for the purpose of self-defense, not for the purpose of conquest, or strictly aggression, but if he has acted out of self-defense and became embroiled in hostilities as a result of rescuing American citizens from abroad or protecting American shipping in the Persian Gulf, I think the President would have constitutional power to continue to uphold that purpose of his, that being one of his independent Presidential powers.

But at all times I think even without the War Powers Resolution permitting Congress to look over his shoulder, again, going back to FDR, from what I have read of that period, he was worried, President Roosevelt was worried, before the declaration of war, that Congress might impeach him for some of the steps he was taking in support of Britain and preserving some democratic resistance to Nazi Germany.

So, I think the Constitution makes a President worry. The Constitution gives Congress the power of impeachment, and it creates a free press. It creates a free press that can criticize the President. It creates a requirement of new elections. The President cannot suspend habeas corpus or the civil process, even under his war powers. I don't believe he can do that. That would be unconstitutional. He cannot suspend the election process.

I think there are many other ways that the Constitution would give whereby the President would eventually be checked.

Senator **Biden**. I'm sorry to keep you for so long, but let me ask you one more question. I don't know where Senator Pressler went. He may have gone to vote. You know the routine, the drill, around here well. He may have gone to vote and may be coming back, and I am going to have to leave to vote.

Can you tell us why the provision in the bill you referred to—the provision to forestall an attack on the United States or to protect endangered U.S. nationals—to the best of your recollection, why was that not kept in the final draft?

Mr. **Emerson**. Why was that removed?

Perhaps pressure from Senator Eagleton. Perhaps some of the arguments made by Senator Eagleton.

Excuse me. Senator Javits said at one time, either in the Senate or later at oversight hearings, that he did this because he did not want to attempt to define what the self-defense powers of the President were.

I believe Senator Javits indicated later that he felt it was impossible to really spell out the President's own self-defense powers; recognizing that there were some, but he was fearful of putting that into statutory language.

Senator **Biden**. I am going to have to go and vote. I don't know whether Senator Pressler has further questions for you. But I am sure he can submit his questions. Please excuse me.

[Whereupon, at 12:46 p.m., the hearing was adjourned, to reconvene at 9:38 a.m., September 15, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

THURSDAY, SEPTEMBER 15, 1988

U.S. Senate,
Special Subcommittee on War Powers
of the Committee on Foreign Relations,
Washington, DC.

The subcommittee met at 9:38 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the subcommittee) presiding.

Present: Senators Biden, Sarbanes, Kerry, Simon, Adams, Helms, Kassebaum, Pressler, and Evans.

Senator **Biden**. The hearing will come to order.

Judge, welcome to our hearing. It is delightful to be back, and it is particularly delightful to be back and presiding over only the second hearing I have presided over in a long time under circumstances where you and I—having had our differences in the past—are together discussing a subject about which I am not sure we differ.

I want to recognize you at the outset here as one of the few people who—at the time this Act was written—was recognized as an informed scholar on this subject. And it is a pleasure to have you back here, not only in your capacity as a representative of the administration, but also as a legal scholar who has a great deal of insight into the Constitution.

As I said, it is delightful to be here in much less combative circumstances.

Mr. **Sofaer**. Well, it's a lot easier for me to be in that kind of a situation, Senator, even than for you.

But I might say, since we are on a personal note, I would just like to add my own voice and the voice of my department to the many, many voices, to the chorus of voices, in this town and throughout the country welcoming you back and wishing you and your family the best of health.

Senator **Biden**. You are very gracious, Judge.

You don't mind my calling you Judge, do you?

Mr. **Sofaer**. I worry when people call me Judge, Senator.

Senator **Biden**. Well, what would you prefer to be called? I don't want to call you Abe. It's a little too informal.

Mr. **Sofaer**. I have been called a lot worse things than either of those, but whatever you are comfortable with. I am the legal adviser. My name is Sofaer. Abe is fine. Any of those things would be fine.

Senator **Biden**. But on this matter you have a great deal to contribute as with others.

Mr. **Sofaer**. They say that once you are a Federal judge, you are entitled to be called Judge for the rest of your life because of the salary you take while you are a judge.

Senator **Biden**. They say the same about Senators. [Laughter.]

But as the chairman of the Judiciary Committee, I have tried my best to deal with the salaries for judges in an appropriate manner, but unfortunately it occurred after you got off the bench. So, unless you are going to plan on going back on, it is not going to be of much help.

The Special Subcommittee on War Powers today resumes hearings directed at answering a critical question: Can the War Powers Resolution of 1973 be amended or repealed so as to improve the effective cooperation of the President and the Congress in national decisions concerning the deployment of American forces in situations of actual or likely hostilities?

In its initial session, the subcommittee received testimony from various legislators who were involved in the origins of the War Powers Resolution and from distinguished American historians. In the session immediately prior to this one, the subcommittee heard from three former military leaders, two former chairs of the Joint Chiefs of Staff, and a former national security advisor. In hearings yet to come, the subcommittee will hear from a number of prominent constitutional scholars and from several former and present Secretaries of State and Defense.

Today the subcommittee will receive testimony of particular importance from two witnesses. Between now and 11 o'clock we will hear from the State Department Legal Adviser, Judge Sofaer, who is the senior executive branch official responsible for pronouncing on legal questions bearing on the U.S. role in the world arena. Then beginning at 11 o'clock, the subcommittee will be honored to commence a second hearing and a special session during which we will have the benefit of testimony from a former President of the United States Gerald Ford.

Mr. Sofaer, I welcome you today. In the months just passed, as I indicated, you and I have had our differences on the subject of treaty power. I hope, however, that as the subcommittee proceeds with its inquiry concerning war power, we will be sharing some common ground. I know that you are an established scholar in the area of the Constitution and its allocation of the warmaking power. I will weigh, along with the rest of my colleagues, your testimony with great care.

And as I have said before, the war power issue is both intellectually complex and emotionally laden. It also bears fundamentally on the U.S. national interest, and accordingly warrants the most thorough and dispassionate consideration. It is my hope that the subcommittee will provide a forum for that kind of deliberation leading toward an improvement in the law and an end to the current constitutional stalemate.

In the days ahead, I may be asking for your response to a draft bill which I am still working on, the skeletal form of which has been completed, and I will like at some point to send that to you for your perusal and consideration. But for now, I shall be interested to hear your testimony concerning the law as it now stands.

With that, let me yield to my colleague, Senator Pressler, for any opening statement he may have and then to the rest of my colleagues.

Senator **Pressler**. Thank you very much, Mr. Chairman.

Judge Sofaer, it is a pleasure to see you again and to welcome you to this committee. We have profited from your judgment and your expertise in the past, and I know that we will again be informed by your comments here.

It is especially important to have Judge Sofaer testifying on the war powers since he is a noted legal scholar, a former professor at a prestigious law university, a distinguished Federal judge who was the central figure in a bestselling book about a famous trial over which he presided, and who for the past 3 years has been an able, effective, and influential legal adviser to the Department of State and in that capacity to the Secretary of State and the President of the United States.

This morning, as we have been for the past 7 weeks, we are discussing not only the war powers, but also discussing, indeed, closely analyzing the Constitution of the United States. We are also examining the intentions of the Founding Fathers, as well as assessing the historical results of their handiwork. Frankly, in rereading Madison's notes on the Convention debates and essays contained in the Federalist Papers, I see nothing in them to indicate that the Framers had any conception of what the War Powers Resolution has provided.

And incidentally, I just learned this morning that Madison was not a lawyer for my colleague, Paul Simon, which is very interesting. And maybe that is why the papers are so clear.

Thirty-six years ago in his concurring opinion in the famous *Youngstown Steel* case, Justice Felix Frankfurter, a great Supreme Court Justice whose opinions are still cited by legal scholars, pointed up the importance of history in the development of American constitutional law. He warned the court against disregarding the gloss of historical experience.

He then went on to point out the importance of that experience in constitutional development when there exists a systematic unbroken executive practice long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our Government, which may be treated as a gloss on the executive power. That executive power, Mr. Chairman, is found in article 2, section 1 of the U.S. Constitution.

Mr. Chairman, in conclusion if the War Powers Resolution questions the President's authority, it certainly has not influenced the Congress during the past 15 years. During this very Congress, the Senate repeatedly rejected efforts to invoke the War Powers Resolution in the Persian Gulf, and rightly so.

Judge Sofaer, you are a distinguished lawyer, a distinguished scholar, a distinguished judge, and a very able civil servant. We will all benefit from your testimony.

Let me repeat that it has been my basic feeling in these hearings that I think we would be better off without a War Powers Resolution because I think that our Constitution and our system of Government allows Congress through the appropriations and authorizing process and through other means available to express itself and that the War Powers Resolution has led to great misunderstandings and confusion in foreign policy. I know we are reviewing it. It would be my present recommendation to repeal it, but I rather doubt that will happen. But I hope we don't make it any worse than it is at the end of this process.

Thank you, Mr. Chairman.

Senator **Biden**. James Madison Simon?

[Laughter.]

Opening Statement of Senator Simon

Senator **Simon**. I thank you.

And my colleague is correct. The principal author of the Constitution, James Madison, was not a lawyer.

Senator **Biden**. Was Thomas Jefferson a lawyer? He wasn't a lawyer either, was he?

Senator **Simon**. I am not sure. He was certainly a scholar. Both of them were scholars, Jefferson particularly a great scholar.

Senator **Pressler**. These fellows managed to write so clearly that they couldn't have been lawyers, could they? [Laughter.]

I am speaking as a lawyer myself.

Senator **Simon**. But it is related to our discussion today because they did write clearly.

And the intent in the Constitution—and I regret I am going to have to be in and out during our hearings this morning—clearly was restraint in this area of making war. And it is very interesting that in the Constitution, there is only one limitation on appropriations that Congress can make. We can appropriate for 10 years for any other project, but it says to raise and support armies—this is what Congress shall have the power to do—but no appropriation of money to that use shall be for a longer term than 2 years. The aim was restraint.

I have read through your statement, Judge, and I think it is perhaps summarized best by this sentence. "The War Powers Resolution has not made a positive contribution to executive-congressional cooperation." I don't know that we can mandate cooperation through the law. It is very, very difficult to do. I guess what you can mandate is consultation and precisely how we do that I am not sure.

And I will look forward to seeing the draft of your legislation and to hearing your comments here today, Judge. You have dealt very practically in this arena.

In your statement you talk about the appropriations process being a sufficient weapon for Congress. I don't think it is a sufficient weapon because if the President commits American troops to—let's just take a hypothetical case and say the Soviets invade Iran and we commit American troops. I don't think there are going to be very many Senators who will want to say—I certainly don't want to say—let's not fund the American troops who are there. So, that appropriations process works very, very slowly in terms of restraint.

How do we guarantee there is consultation before there is a commitment? I think that is the fundamental question. And I don't have the answer for that, but I assume between Senator Biden and Senator Helms and Senator Pressler and the Judge, that the four of you will come up with the answer here. [Laughter.]

Thank you.

Senator **Biden**. It sounds like three against one to me.

Thomas Jefferson, by the way, was a lawyer. He studied with George Wyeth. He was admitted to the practice in 1767. It is good to know that the most articulate person dealing with this issue or any issue along these lines was a lawyer. Thank goodness we have been reprieved.

I yield to my colleague, the ranking member of the committee, Senator Helms.

Opening Statement of Senator Helms

Senator **Helms**. Thank you. And old Tom also invented the dumbwaiter if that will be of any help. [Laughter.]

Talking about lawyers, Judge, there is a gravestone in a very old cemetery in North Carolina that says "John Smith, a lawyer and an honest man." And somebody walked by and said there must be two folks in there. [Laughter.]

On the other hand, the Lord must have loved Washington lawyers because he made so many of them.

There was a candidate some years ago in a television debate who said there you go again. I can't remember his name, but here we go again. This is the fourth committee hearing on the War Powers Resolution since the end of July with approximately, about four or five more to come, as I understand it.

There have been seven votes in the Senate during this 100th Congress dealing with attempts to implement the War Powers Resolution in the Persian Gulf. Luckily, for everybody concerned, commonsense prevailed, at least thus far. The President's policies have also prevailed, and they now appear to have contributed substantially to the beginnings of a new negotiated settlement in that volatile area.

Before we came in this morning, I was chatting with Judge Sofaer, and I told him about my first year in the Senate, Joe, when this Resolution was approved. And I took it home as soon as I printed a copy. The next morning I called my distinguished senior colleague from North Carolina, Sam Ervin, and I said, "Senator, do you have a few minutes." He said, "Sure. Come on over."

So, I did, and I went in. I said, "Have you read this?" He said, "Have I ever." He sort of chuckled and said, "What do you think of it?" I said, "Well, I'm not a lawyer, but if this is not unconstitutional, I can't imagine what would be." He said, "Well, Jesse, you may not be a lawyer, but you can understand the English language." And I think I can.

The War Powers Resolution is not only a move by Congress to control foreign policy and its implementation, but it is also a misreading of the history of the constitutional republic for these past 200 years.

Now, Mr. Chairman, I know we differ on this, and I respect your views, as I know you respect mine. But from my understanding of history, history itself is the intended victim of the War Powers Act or War Powers Resolution, for if you will look back and be candid about it, this legislation was an effort, albeit a misguided one, to rewrite the history of American foreign policy. It is just as simple as that.

Now, we all know that the war powers legislation was, in fact, a political protest by the Congress against American involvement in the Vietnam war. It was an attempt to capture the future by striking out against the past. It has disrupted our political system and beclouded our constitutional process. And it has other defects beyond that.

It is, of course, the Constitution with which our distinguished expert witness will deal with this morning. Judge Sofaer is a noted legal scholar, as has been acknowledged by all of us here, as a former law professor, and a distinguished Federal judge. He knows the Constitution, while so many people either don't know it or don't care about it. And Judge Sofaer knows what the Founding Fathers intended.

Well, we ought to proceed with the questions and the statement by this distinguished witness. So, I will forbear for the time being, Mr. Chairman, and I thank you very much.

Senator BIDEN. I thank you, Senator.

Judge, we have about 1 hour and 3 minutes. I have read your statement, and you have been kind enough to respond in writing to a number of questions that I had sent to you ahead of time. I will be guided by your judgment as to how you would prefer to proceed, whether statement or whether you would like to go directly to questions in the interest of time. It is up to you. We will do it any way you want to do it.

Mr. SOFAER. I thought I would summarize my statement. There are some points in there that I think will set off some good questioning. I particularly went out of my way, since you went out of your way to ask good questions ahead of the hearing, which is not usually done in this town—we get the good questions after the hearing quite often. But this time you asked a whole series of excellent questions before the hearing, and I thought I should do my best to get you answers before the hearing so we would be able to speak about those as well.

So, I would like to get out of your way the statements that I have written down as quickly as possible. But I think it is worth touching on some of these points because of the points already made by the various Senators.

Senator BIDEN. OK.

STATEMENT OF HON. ABRAHAM D. SOFAER, LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. SOFAER. Just one quote that I thought might amuse you, Senator Biden.

First of all, let me say that I still believe that whatever differences we have had have been exaggerated by the intensity of what happens here in this town, and I look forward to sitting down with you and going over exactly what I said and what I meant. Sometimes one says things that are not clearly enough said.

Senator **Biden**. Believe me. I know that. I understand that. [Laughter.]

Mr. **Sofaer**. I don't need to spend another moment on that then.

But I couldn't resist. Senator Helms gave me much too much credit when he said I know the Constitution.

In my research on the Constitution, one of the first things I did was study the administration of George Washington. And during that time, I noticed intense debates on the floor of the House and the Senate about what the Constitution meant. And it was shocking to me, because most of the people who were debating were at the Constitutional Convention or one of the State ratifying conventions. Some 50 or so of them were actually there when they heard the debates about what the various provisions were.

And I found one quote, which is at page 61 of my book, which I wanted to share with you. It was William Vans Murray of Maryland in the House debate on the Jay Treaty. They couldn't agree on what the role of the House was in determining the meaning of the Jay Treaty and in having access to information about it.

And he said at a certain point—and this was in volume 5 of the Annals of Congress—"We have all seen the Constitution from its cradle. We know it from its infancy, and have the most perfect knowledge of it and more light than ever a body of men in any country have ever had of ascertaining any other constitution. If, however, a refining spirit can at this day, so full of light shining upon every part of it, excite and establish doubts upon some of its plainest passages, what is the prospect of that posterity which is to be deprived of those lights which its very framers now find incompetent to lead them?"

And I must say I think that there is so much doubt—there is always so much uncertainty—that even in our differences we have to realize that right back there in the 1790's, those gentlemen had the same problem.

I am honored to be here before you, Mr. Chairman, and this distinguished committee on this subject. I think it is a very worthwhile hearing. I think there are some suggestions being made now about the War Powers Resolution that are different in kind from suggestions that have been heard before. And so, I see a Congress taking more seriously the possibility of revising this Resolution than I have ever witnessed since 1973.

It has been controversial since that time. Executive officials and Members of Congress have criticized various aspects of it. Presidents have disputed its constitutionality in various ways. These debates are part of our beloved system of Government, but I think debates about the War Powers Resolution have been particularly sterile. They have focused on definitions of words like "hostility," "the adequacy of consultation," technicalities, if you will, rather than the policies that are at stake.

Now, it has led, I believe, and will continue to lead to unnecessary and undesirable legal faceoffs between Congress and the President at times when the Nation most needs to formulate and implement policy effectively and wisely. And that is why the issues this committee is addressing are of the greatest importance. The crucial question in any war power situation should be how the political branches can best cooperate in the Nation's interest, not which branch is right or wrong on particular legal issues.

This administration recognizes that Congress has a critical role to play in the determination of the circumstances under which the United States should commit its forces to actual or potential hostilities. No Executive policy or activity in this area can have any hope of success in the long term unless Congress and the American people concur in it and are willing to support its execution.

We also believe that this Resolution has caused unnecessary controversy and uncertainty and will do so in the future. It incorporates a view of the Government that is at odds with 200 years of experience, and it is based, Mr. Chairman, on erroneous assumptions, as I say in my statement, about the power of both Congress and the President, not just about the power of the President, but of the power of Congress as well. It underestimates in my judgment the power of Congress in the sense that it is not needed to make clear that Congress has substantial power under the Constitution in matters concerning war, and it is unnecessary in that it can grant Congress no more power in such matters than the Constitution allows.

Madison said something in his evaluation of the Constitution. He said, "In republican government, the legislative authority necessarily predominates." Congress has powers that enable it to curb any Executive pretention including the power to declare war, to raise and support armies, to tax and spend, to regulate foreign commerce, and to adopt measures necessary and proper to implement its powers.

President Johnson did not make war in Vietnam. The United States made war there until Congress decided to end its support. It is ironic, I have always found, that the Vietnam war was the purported basis for the War Powers Resolution when Congress was, in fact, a full player in that war.

President Nixon regarded repeal of the Gulf of Tonkin Resolution as insufficient to prevent him from continuing the war. But this was in the context of Congress continuing to pay for and thereby to authorize his action. Once Congress denied funds for certain military activities, President Nixon complied.

President Ford properly regarded as a strategic catastrophe Congress' insistence that we completely abandon Indochina and later take no action in Angola to offset Soviet and Cuban intervention. But he complied, as did Presidents Carter and Reagan, in Angola until the Clark amendment was repealed.

So, the Resolution is intended to prevent the President from acting unilaterally beyond a limited time period even when Congress has not ordered him to stop and even though the President is acting for purposes traditionally regarded as appropriate. This constitutes, as former Legal Adviser Monroe Leigh put it, a procedure by which Congress attempts "to restrain the Executive without taking responsibility for the exercise of that restraint in time of crisis."

Now, I think that Congress and the American people expect the President to act when Congress has not told the President specifically not to act. And it is a fact of life, Mr. Chairman, that even with respect to the most serious forms of military power, the use of nuclear weapons, that Congress has placed at the disposal of the President the power to take us to war in the most serious way.

So, Congress has enormous power and not just over appropriations, as Senator Simon mentioned, but over the dedication of troops to certain military activities. I think that when Congress makes up its mind to tell the President to do something or not to do something—and recent experience has shown that to me, if I didn't know it before—that is something that the President has to deal with and in history has always had to deal with.

On the other hand, Congress must recognize and respect the role the President plays under our scheme of Government. As a repository of the Executive power of the United States, Commander in Chief of the Armed Forces, and the officer in charge of the diplomatic and intelligence resources of the United States, the President is responsible for acting promptly to deal with threats to U.S. interests, including the deployment and use of U.S. forces where necessary in defense of the national security of the United States. Congress should not as a matter of sound policy, and cannot as a matter of constitutional law, impose statutory restrictions that impede the President's ability to carry out these responsibilities.

It is against these basic concepts that the adequacy of the key provisions of the War Powers Resolution should be judged and are judged in the rest of my statement.

I turn to section 2(c), Mr. Chairman, where there is a list of circumstances about when the President would be expected to act. I think that list is incomplete. I believe that you probably think that list is incomplete. Most people do.

We do not think it would be wise to attempt to complete that list. We think that the list omits many things—and I have listed some of them—that the President can and must do in order to fulfill his oath. But we believe the solution to this problem is to delete section 2(c) altogether, as proposed by Senators Byrd, Nunn, and Warner.

The only way that the character and limits of such fundamental——

Senator **Biden**. For the record, 2(c) is designed to set out the things that the President has the inherent authority to do.

Mr. **Sofaer**. Right.

Senator **Biden**. People are trying to pay attention to this issue, and I think it is important they understand what we are talking about.

Mr. **Sofaer**. I appreciate the intervention.

The only way that the character and limits of such fundamental constitutional powers can be defined and understood is through the actions of the two branches in coping with real world events over the years. We do get new types of challenges, and your questions have raised some of them, such as the movement of our antiterrorist forces. These are things that we did not have to worry about even 50 years ago. And it is important that we don't create a list that blocks the development of agreed utilizations of power.

In section 3, the Resolution requires the President to consult with Congress in every possible instance before introducing U.S. Armed Forces into actual or imminent hostilities. Over the years we have consulted before and after the introduction of forces into actual or imminent hostilities. We believe that the Resolution's words "in every possible instance" recognize that consultation may be impossible in a particular case, and we think that that is wise.

We believe that President Carter was on firm ground by using that language—and that, incidentally, has been the only instance in which that exception has been invoked—to justify not consulting ahead of the Iran rescue effort.

The President's flexibility respecting the number of persons consulted is something that we think should also be preserved. Any requirement for a schedule of regular meetings that does not preserve this element of flexibility would, we believe, impermissibly interfere with the exercise of the President's article 3 powers.

An additional constitutional problem could be created by the proposed permanent consultative group of the Byrd-Nunn-Warner bill. Under that proposal, the requirement that the President consult with the group is triggered by a majority vote of that group. This we believe is inconsistent with the *Chadha* decision, which precludes the Congress from taking actions having legal effect on the executive branch except by approval of both Houses and presentment to the President for signature or veto.

On the other hand, let me say this—because I think this issue of consultation is so central to your concerns and to Senator Simon's concerns and others—Secretary Shultz before Congress long ago indicated his support for ways of encouraging ongoing consultations between the leaders of the executive branch and Congress on national security issues generally. The procedure proposed in the Byrd-Nunn-Warner bill may create an unwieldy cabinet-like institution, but the basic idea is one which Secretary Shultz has approved and which, if you will look back at my testimony before the House Foreign Affairs Committee on the War Powers Resolution, you will see I approved heartily.

I would interrupt my testimony at this point, Mr. Chairman, to point out one particularly constructive thought that Chairman Fascell had a couple of years ago when he proposed a bill to set up a consultative group, and he issued this proposal publicly. And I would be happy to bring that to your attention.

What he does there, he distinguishes between interfering with the Executive in the day-to-day operation in the management of a particular military decision and consultation on the basic policies that the administration was going to adopt; for example, the basic policy in the gulf, the reflagging policy, which was extensively discussed in Congress before it was implemented, or the basic policy of striking back at state-supported terrorism, which was extensively discussed in Congress before it was implemented. So, I think that that Chairman Fascell's idea has some real merit and is worthy of the committee's attention.

Section 4 requires that the President submit, within 48 hours after the introduction of U.S. forces, a written report to Congress in certain circumstances that are described. Presidents have uniformly provided these written reports to the Congress while reserving the executive branch's position on the applicability and the constitutionality of the Resolution. Indeed, we have supplied reports even though we are convinced in particular situations that the terms of the Resolution might not mandate a report.

The executive branch's administration of this section has satisfied any special need for information that Congress may have in this area. The section does not require the President to state the particular subsection under which reports are made and no President has felt compelled to do so. A definitive judgment at the outset of a deployment as to whether hostilities will result is often difficult to make, and this practice is a useful way, Mr. Chairman, for the Executive to avoid unnecessary constitutional confrontations over whether section 4(a)(1) is applicable or whether, even if its conditions are met, it can properly be deemed to trigger an automatic termination under section 5.

Section 5 purports to require the withdrawal of U.S. forces from a situation of actual or imminent hostilities in the two circumstances stated. We believe that this 60-day provision is unconstitutional, that the President has the constitutional authority and responsibility as Commander in Chief to deploy and use U.S. forces in a variety of circumstances such as the exercise of our inherent right of self-defense, including the protection of American citizens.

The provision not only raises constitutional issues, but in my statement I go through some of the tactical and strategic consequences of this kind of a provision, the kind of signal it gives to other nations and to our enemies about whether we have the will to follow through on a policy.

And in that connection, Mr. Chairman, I must say that one of the finest expositions of these tactical and strategic points is contained in a statement made by Senator Nunn last year in which he points out that—and I think he even makes the point that if the War Powers Resolution were in effect during the Civil War, the capital of the United States, given its adverse effects on our tactical strategies, might well have been up the road in Richmond, VA, rather than in Washington, DC. I think it was a very humorous point, but a point well taken.

Senator BIDEN. Judge, could I ask you to summarize in the next several minutes? I am afraid we are not going to get a chance to ask you some questions. The entire statement is worth reading, but in light of the time constraint, it might be helpful because some of the questions we have—I have at least—relate to the statement which I have already read.

Mr. SOFAER. Well, then let me say this that we do think *Chadha* precludes the use of the concurrent resolution in this context.

We think in section 6——

Senator BIDEN. I happen to agree with you in that regard, by the way——

Mr. SOFAER. Thank you, Mr. Chairman.

Senator BIDEN [continuing]. As I think most everyone else does.

Mr. SOFAER. Well, there are some who have said that they do not, but I think that a very strong case can be made, and I am willing to make it.

On the expenditure of funds, I cannot question Congress' power to use the expenditure of funds in principle to cut off virtually anything Congress does not want to occur.

But there are limits there too as well, Mr. Chairman. Congress cannot, for example, tell a court how to decide a case by cutting off the funds for the judiciary, and Congress cannot tell the Commander in Chief how to run a particular tactical exercise by threatening to cut off funds. So, there are limitations there as well.

I am moving along very quickly, as you can see.

Section 8. The problem there is not so much constitutional. The problem there, Mr. Chairman, is that a Congress in 1973 said the only way that you can infer our approval of a military action from the War Powers Resolution is from a provision that specifically refers to the War Powers Resolution and says this is an approval under that Resolution.

Well, I don't think that a Congress in 1973 can effectively preclude you in 1988 from passing a bill that says we approve what the President is doing in the gulf or anywhere else in some other form that is legally sufficient in our courts. Section 8 was an effort to get people to focus on the War Powers Resolution, but not an effective effort in limiting the types of approvals that can be obtained.

So, with those comments, I would just say in conclusion we urge the repeal of the War Powers Resolution altogether. We particularly urge the repeal of sections 2(c), 5(b), 5(c), and 8(a).

And in the last analysis, Mr. Chairman, I think we agree that we cannot solve the problem which the Resolution seeks to remedy merely by adopting new, more detailed statutes or restating general principles. The only effective solution for these problems is for the two political branches to work together in pursuit of common national interests, to communicate more effectively with one another on their particular concerns and ideas, and to utilize their proper powers to influence events rather than attempting to modify a constitutional framework that has served us too well to jeopardize.

[The prepared statement of Mr. Sofaer appears in the appendix.]

Senator **Biden**. Thank you, Judge.

I ask the staff to limit all of us to 10 minutes. And in that spirit, Judge, I would be grateful if you could answer the questions as rapidly and succinctly as possible because we have a number of Senators who want to ask you questions and our time is limited.

Let me start off with a general question that has fascinated me. Is the President's flexibility or the Congress' flexibility to impact upon the placement of, the duration of, the nature of the commitment limited, more or less, if there is a declared war as opposed to an undeclared war?

For example, whenever Congress declares war, it seems clear to me that it cannot tell the Executive "Do not move in to northern Africa"—we'll use the World War II analogy—"move directly into Normandy." It is clear to me that the Congress cannot do that.

On the other hand, in an undeclared war, does the Congress have greater flexibility to tell the President, for example, "Do not place any troops in Honduras"? You are not authorized prospectively. Can the Congress do that?

Mr. **Sofaer**. Well, if an actual war is going on in Honduras or some——

Senator **Biden**. No, no. There is no war going on in Honduras that involves U.S. forces, or there is a war going on in Honduras that does not involve U.S. forces. Can Congress proscribe the President in an undeclared war situation, assuming the President says "It is in our national interest to be in Honduras"?

The Congress says it is hereby declared by Congress that it is not in the national interest of the United States of America to place troops in Honduras. Let's not pick Honduras. Pick country X. And the President says "I think it is in our national interest." The President can veto the legislation obviously, and Congress overrides the veto of the President saying "It is declared by Congress that no American troops should be placed in country X because it is not in our national interest." Can the Congress do that?

Mr. **Sofaer**. I think we have a good precedent in Indochina. Congress did it. It was respected by the President except in one respect. The President went in to save American forces, to evacuate American forces, and he took out some non-Americans as part of that process. And he felt he had the constitutional duty and responsibility to do that. So, there might be some constitutional limitations on the effect of such legislation. But my answer to you is, "Yes, the Congress can do that subject to those limitations."

Senator **Biden**. On page 14 you say: "On what basis can Congress seek to terminate the President's authority by the mere passage of time?" I would like to discuss that a little bit.

Is it not true that the President's inherent powers as Commander in Chief all derive from the concept of meeting emergencies, since otherwise he would have the power to make and declare war himself?

The reason why the power to make war resides in the President, rather than Congress is that the Framers recognized that there are emergency circumstances in which the President would have to act absent the authorization of the Congress, such as bringing out American troops, saving American citizens' lives, protecting American shipping, whatever. But they all relate, as I understand it to the emergency powers required. It is the possibility of an emergency that requires the President to have that authority.

Mr. **Sofaer**. Well, I wouldn't use the word "emergency," Senator. The examples you are giving are not examples of emergencies.

We are a nation, just as any other nation. Our Government is set up in such a way that our President exercises the powers of this Nation. He is not a prime minister. He is a President. He is not simply ordered to do X, Y, and Z by Congress. He is the person who sends our forces out there to do the things with our forces that every nation does with its forces, and those aren't just emergencies.

When the first frigates were made, everyone knew that John Adams and Thomas Jefferson were going to take them out to the Mediterranean to protect ordinary commercial shipping. That is not an emergency. They were there to keep——

Senator **Biden**. No, but to engage them would be. Obviously, you can take them out there. They are in international waters, but the right of the President to engage them—that is to have them fire upon another country's vessel—would be as a consequence of the

President, or the captain of that ship with the authorization of the President, concluding that American shipping was about to be under attack or was under attack. There is no time for the captain to pick up the phone, call the President and for the President then to call the Congress and say, "Now, look, I want authorization to do that."

That is the context in which I distinguish emergency from policy. There is a difference. I think it is emergency, versus policy, that provides the President with constitutional authority to initiate use of force. And if that is true, it seems to me there is a logical way in which the Congress can limit the utilization of U.S. forces in situations where there no longer is an emergency—where the situation moves from emergency to the conduct of a policy.

Let's address the question slightly differently.

Mr. **Sofaer**. Could we use the word "legitimacy"? That the President should use force governed by a concept of legitimacy and not merely by some general concept of national interest?

Senator **Biden**. Yes, perhaps.

Mr. **Sofaer**. If so, I would agree with you.

Senator **Biden**. All right. Let's address the question another way.

In a particular situation, do you believe it is constitutional for the Congress to authorize the President to undertake military initiatives for a specified period of time?

For example, could the Congress say, even if the President wasn't so crazy about it, "Mr. President, we authorize you to deploy American forces to country X for a period of 1 year, but only 1 year"? Now, that might be bad policy in my view, but would the Congress under the Constitution be able to do that? And at the end of that 1 year, would the President be bound to withdraw those troops because the authorization had expired? Could the Congress do that and would the President be bound by that limitation?

Mr. **Sofaer**. Rather than take up a lot of time, I would say that you have asked that excellent question in your question No. 13, which relates to the 18-month approval that the Congress gave the President in Lebanon. And you asked me whether that was a constitutional approval. And my answer to that was, "Yes," it was treated as an appropriate approval, but the President did in his signing statement say that in approving it, circumstances could arise in which he would be required under his independent constitutional duties to go beyond the 18 months. In other words, in principle he accepted Congress' control, but there are always things that can happen that might force him to act beyond it.

And I have in my answer the quote from the President's statement.

Senator **Biden**. Let me ask you one last question. I can't ask you. My time is up. I will come back.

Senator **Helms**. No, go ahead.

Senator **Biden**. I thank my colleague.

Your statement on page 6 with regard to nuclear weapons seems to say something that is either quite obvious or from my perspective quite extraordinary. And I would like to clarify which it is. The statement is, "Congress and the American people expect that the President will use the military forces placed by Congress at his disposal for long-recognized purposes, including the defense of the

United States and its allies. This is true," you say, "even with respect to the most serious forms of military power—the use of nuclear weapons. In placing such weapons at the President's disposal, Congress has recognized that the President must have the authority to use them without prior approval, in order to deter effectively an enemy attack."

Does that mean that the President is authorized to strike back if the United States or its forces are attacked? That is a Presidential power that is clearly envisioned by the Framers. Or do you also mean that by equipping the President with nuclear weapons, as the Congress has done, that Congress has authorized the President to use them as he sees fit, even for first strike, if he believes that it will further our national security interests?

Mr. SOFAER. It was a very complex question. But the latter part of what you said is not what I mean.

Senator BIDEN. So, by us equipping the President with nuclear weapons, we have not authorized him to initiate a first strike?

Mr. SOFAER. You have given the President an enormous power, but it is within the context of hundreds of hearings, many, many discussions between the executive branch and the President, many discussions with the Joint Chiefs, all kinds of regulations and rules that have been created, strategy plans that have been shared with Congress and with the leaders of Congress.

And my point here is not that the President can go off and do whatever he wants to do with nuclear power at his disposal. My point is that we trust the President with that important power in order to enhance peace. That is really my point. And we shouldn't be regarding a weak President or the weakening of a President as enhancing the chances of peace in the world. Ever since Washington, our greatest Presidents have reminded us that they need strength to ensure peace.

Senator BIDEN. I apologize to my colleagues for going over the time. This is an area I would like to really explore and maybe we will have a chance later.

Senator HELMS. Go ahead.

Senator BIDEN. No, no, because we are going to have to stop, Jesse, for President Ford, and I am trespassing too much on everyone else's time.

Senator HELMS. Well, you had a followon there, and I think you should have gone on.

Senator BIDEN. No. I appreciate that, but why don't you go and then Senator Sarbanes and then Senator Adams.

Senator HELMS. You know, all of this is very interesting if you start looking back and you try to decide what the Founding Fathers meant. Alexander Hamilton in Federalist Essay No. 25, I believe it was, took the view that declarations of war had gone out of style anyhow. He was looking at Europe and other places. There were something like 80 wars, conflicts, going on or had gone on, and there had been 5 declarations of war. So, the point is that the Founding Fathers didn't anticipate all these political machinations about this.

And furthermore, it used to be around this town, around this country, that the politics ended at the water's edge. That is no longer so. And each Senator will have his own opinion about whether that is good or bad. I happen to think it is bad no matter who is President. Jimmy Carter did some things that I didn't care for, but I didn't get on his case, and I wouldn't the next time.

But the point is, isn't it, Judge, that the Founding Fathers spent less than a day and a half on this war powers business, but they spent substantially more time than that on how to select Federal judges? Is that so?

Mr. **Sofaer**. They did; yes.

Senator **Helms**. Pardon?

Mr. **Sofaer**. They did. They spent quite a bit of time on how to select judges.

Senator **Helms**. But a day and a half or less on this.

Mr. **Sofaer**. But I think they spent even more time on how much power the States would lose.

Senator **Helms**. Well, I am glad they spent some time on that. [Laughter.]

In any case, it indicates, if you want to go back and analyze, what was intended and what was not. But let's come up to the present time.

How do you respond, Judge, to those among your critics who maintain that you have been indifferent to the rule of law, either international or constitutional, when it comes to the conduct of American foreign relations? How do you react when you hear that?

Mr. **Sofaer**. Well, it hurts on a personal level, but on a professional level, I usually sit down and I write an explanation and I show that it is not so.

And I happen to have written recently an explanation particularly on the use of force issue. Some people were claiming that I disregard the rule of law in connection with the use of force, particularly in connection with the bombing of Libya and other things, which now incidentally are getting apparently more popular than they were earlier on. So what I did, Senator, was write an address to the American Society of International Law, which I would be very happy to give you a copy of, in which I showed that the principles which have governed my determination and advice to the President of the United States and to the Secretary of State about the use of force in protecting Americans overseas, who were being killed by state-sponsored terrorists and in other situations, are exactly the principles that have governed ever since the U.N. Charter's adoption.

One of the critics, incidentally, of my judgments in this connection wrote two articles during the 1960's when he served as Legal Adviser both about the use of force and about the role of the International Court of Justice. And in my article, I adopt his 1965 rationale. The problem is now that he is out of the Government in 1988, he seems to have changed his mind and he sees the law somewhat differently.

So, I respond by saying I care about the law. We care about the law. What we have done in each instance has been carefully modulated to be proportionate, and I am willing to sit down here and talk about any one of those instances of the use of force. I think they are all defensible. They have been in the U.S. interests. They have had very good effects. So, I would ask, Senator, that I leave this with you for you to read and see. It is my response to the American Society of International Law on this specific question.

Senator **Helms**. Does the staff know whether that has already been made a part of the record previously? I ask unanimous consent, Mr. Chairman, that the address be made a part of this record because I think it is important.

Senator **Biden**. Without objection.

[The information referred to appears in the appendix.]

Senator **Helms**. Now, you are a former Federal judge. Do you think there are any limits to be placed on the encroachments or attempted encroachments by the legislative branch on the conduct of foreign policy?

Mr. **Sofaer**. I think that the Constitution has limits on that. The system that I see having been set up is a lot like the system you see having been set up. There are powers that have been given by the Framers to Congress and powers that have been given to the President over the same subject matter. Corwin described this brilliantly I thought in his book. So, we can expect conflict on each of the major issues that we have.

But many wise people have talked about the need for modulating that conflict. We are trying to understand each other's needs for communicating more and attempting to have party politics stop at the border, as you put it.

It is an endless battle, Senator. I don't think there are any immediate prescriptions that work, and we just have to keep trying.

Senator **Helms**. Someone suggested that I mention to you the *Curtiss-Wright* v. *United States* case. I mention it to you and ask you, one, in layman's language, describe that case; and two, is it still good law?

Mr. **Sofaer**. Well, I think the case has never been overruled. I know the case has never been overruled. And it certainly states that the President is the sole organ for the conduct of foreign relations. And I think that in essence it is still good law and it is still good practice.

Congress has ample power to let the President know and to the let the Secretary of State know that they disagree with something he is doing. The important thing is not to get in the way of effective policy once it is decided upon.

Senator **Helms**. Judge, nobody asked me to offer an amendment, which I offered on October 20 of last year. You may recall it. No. 1022 is a perfecting amendment to my own amendment because I didn't want anybody coming in and muddying the water with a second-degree amendment. The amendment authorized the U.S. Navy to sink any Iranian vessel, destroy any Iranian missile battery, or neutralize any Iranian installation which threatens the safe passage of American war ships or other vessels known to have U.S. citizens aboard.

What do you think the vote on that was?

Mr. **Sofaer**. I don't know, Senator.

Senator **Helms**. It was 93-to-2 in favor of it.

Mr. **Sofaer**. In favor.

Senator **Helms**. And Senator Boren offered one with respect to the same sort of thing on October 20, and his was 92-to-1. Now, the administration didn't ask him to do that.

And here is another one. Senator Dole offered an amendment to the Byrd-Warner amendment No. 952 stating that nothing in Senate Joint Resolution No. 194 should be construed as limiting the President's constitutional powers as Commander in Chief to use American military forces in self-defense operations. Also, nothing in the Resolution should be interpreted as urging the withdrawal of American military forces from the Persian Gulf. I don't know for sure about that one, but I doubt that the administration asked anybody to do it.

I know I offered mine just to present the interesting contrast, in light of all of the political machinations about the War Powers Resolution. And then when you put it to them, they voted 93-to-2 in favor of the President's doing what he ought to be permitted to do without a lot of fufa in the first place.

Mr. **SOFAER**. Well, that is what is wrong with the War Powers Resolution. It gets Congress talking about these legal issues when the real question is, Are we there doing the right thing? And sometimes Congress may feel that we are not, and that should come out too.

Senator **HELMS**. Sure. I agree.

Mr. **SOFAER**. But in the Gulf, it seemed to me Congress thought we were doing the right thing. And it has worked out. And it has helped America's interests.

And incidentally, it is a policy that, as you point out, began with President Carter. President Carter was the one who issued a very brave and important statement about the freedom of passage in the gulf.

Senator **HELMS**. Yes, sir.

Mr. **SOFAER**. And it is that statement that we are to this day implementing.

Senator **HELMS**. Well, my time is up, Mr. Chairman. I thank you very much.

Senator **SARBANES**. Thank you very much, Senator Helms.

Judge Sofaer, just following up what we had been discussing, obviously there is a significant difference between the President's use of force in an instance in which Congress approves it beforehand and where Congress has not done so. Is there not?

Mr. **SOFAER**. I missed the last few words, Senator.

Senator **SARBANES**. An instance in which Congress has not done so.

Mr. **SOFAER**. Has not approved the specific use of force.

Senator **SARBANES**. In all the instances that were cited, the Congress, in effect, had taken a position supporting the use of the American military.

Mr. **SOFAER**. Well, Congress had not taken a position supporting the use of the military in the Gulf before we went into the Gulf.

Senator **SARBANES**. Right, but Congress sanctioned it subsequently according to the things that Senator Helms was citing.

Mr. **SOFAER**. There was a resolution praising our attack on the *Iran Ajr* when we caught them actually mining in the middle of the night, and we sank that vessel.

Incidentally, there was also criticism of me again about how could I let such a violation of international law occur.

Senator **Sarbanes**. Now, do you think that there are any instances in which the President cannot commit the military without the prior approval of the Congress?

Mr. **Sofaer**. Yes, sir.

Senator **Sarbanes**. And what defines that line?

Mr. **Sofaer**. Well, part of it is tradition. Tradition doesn't make law always. Just because something has happened in the past doesn't mean it is right necessarily. But certainly one looks to tradition and proper behavior as a guide. A long-pursued practice can become a gloss on the Constitution as Frankfurter has pointed out.

One of the guides is, Are we doing something for America? That is, is what we are doing with the Armed Forces something that falls within the traditionally understood role of the American Armed Forces? And I will give you an example. I might get myself in trouble for this, but I will give you an example.

Protecting the American-flag vessels in the gulf was something that fell squarely within the traditional role of the American Navy because those vessels had been flagged. We went through a proper, legal, statutory process to flag those vessels.

It is a different matter entirely for the American Navy to go around the world, the Gulf, or anywhere else, and start protecting the vessels of other countries, jeopardizing our forces, our naval forces, our troops, just because we may favor one country as opposed to another without Congress' approval.

Senator **Sarbanes**. You would say that the President could not do that. Is that correct?

Mr. **Sofaer**. There are times when under international law where a commander in the field would see someone being attacked and it would appear to him to be a violation of international law occurring before his eyes—a commander of a U.S. public vessel—where he would be authorized I believe to come to the defense of that vessel. But normally speaking as a general policy, it would be my position that the President of the United States should seek Congress' prior approval before putting the U.S. Navy at the disposal of defending the ships of a foreign state.

Senator **Sarbanes**. So, it is your view that there are some instances in which the President could act on his own and commit American forces without prior approval by the Congress, but that there are other instances in which he could not do so, and that in those instances in order to commit American forces, he would have to have the prior approval of the Congress. Is that correct?

Mr. **Sofaer**. Yes. And we are assuming a situation where Congress has not acted already; yes.

Senator **Sarbanes**. Well, I know our time is running short, and I want to make sure that I reserve a few minutes for Senator Adams. So, I will forgo the balance of my questioning, Mr. Chairman.

Mr. **Sofaer**. The President's scope of action is even narrower where the Congress has indicated a desire to narrow his scope of action.

Senator **Sarbanes**. Even in those instances in which you think he could commit forces on his own. Is that correct?

Mr. **Sofaer**. Yes, sir.

Senator **Biden**. Senator Adams.

Senator **Adams**. Thank you, Mr. Chairman. Mr. Sofaer, I arrived in the Congress just after the Gulf of Tonkin Resolution. I was also here in 1973 at the passage of the War Powers Resolution. Regardless of what the Gulf of Tonkin Resolution had said, we had under President Nixon an invasion of Cambodia with American forces, and that led to the War Powers Resolution.

Now, do you believe that a President of the United States has the power to commit an invasion or an act of war against another country without any congressional approval?

Mr. **Sofaer**. Well, I think, Senator, if I am not mistaken, in the case of *Orlando* v. *Laird,* even though the Gulf of Tonkin Resolution had been repealed, a circuit court found that in numerous laws and in other resolutions that Congress had passed, or actions that Congress had taken, Congress in effect had approved the continuation of the war despite the repeal of the Gulf of Tonkin Resolution.

Senator **Adams**. All right. Now that brings me to the specific point. If you believe this law is unconstitutional, why hasn't the executive branch been willing to have this law tested in the courts? I also want to ask you this. Does the President have the constitutional authority to veto a declaration of war?

Mr. **Sofaer**. I have noticed that question, Senator, and I can't—I am not sitting in the highest court of the land. I am just a legal adviser giving you my best judgment.

Senator **Adams**. I understand that.

Mr. **Sofaer**. I think the President historically has signed every declaration of war this country has ever adopted.

Senator **Adams**. And he has never indicated in any way there was any power in the Presidency on the declaration of war. We can go clear back to Alexander Hamilton in Federalist 69. As you know he was in favor of a strong Presidency. And he points out: "While that of the British King extends to the declaring of war and to the raising and regulation of fleets and armies, all of which by the Constitution under consideration, would appertain to the legislature."

Mr. **Sofaer**. Right, but there are two different issues. One involves the principle that the President cannot declare war. But the suggestion that I have heard in these hearings, in prior questioning, was that the Congress can declare war without the President's approval, which I found an ironic assertion because I think that the Constitution does want both branches to be involved in warmaking.

Senator **Adams**. That is what the War Powers Resolution is all about. Both parties should be involved.

Mr. **Sofaer**. Both parties involved; right.

Senator **Adams**. For example, the very case that you mentioned. When we were in the Persian Gulf trying to determine a policy, officials from the executive branch came to the Congress and said we have changed the rules of engagement and U.S. vessels will protect all neutral vessels in the gulf. They made a unilateral decision that went beyond the 12 ships which were reflagged. We were constantly changing the rules of engagement, and under your own statement, we were at that point initiating offensive actions, or we were defending non-American groups.

What I am concerned about——

Mr. **Sofaer**. But that was with prior notice to you, and in the course of the convoying.

Senator **Adams**. But not under the law, Professor Sofaer. If they were going to do that, that is a clear time to come to the Congress and get the approval. None of us ever felt that the President would not get a form of approval. But we were all concerned about precisely why the War Powers Act was not triggered as required under law.

The War Powers Resolution became law because Presidents were in the course of starting wars and expanding them, and then sending Congress the bill. We didn't get the bill in Vietnam for about 3 years, and then we had to try to decide whether to raise a war tax. When we couldn't get that, we tilted the whole financial basis of the country around because of Presidential acts which continued. We tilted around a whole generation of people who felt that they were being drafted while others were getting out.

What we are trying to say, Professor Sofaer, is that this act, enacted over a veto states clearly that the Constitution gives the power to Congress. Article 1, section 8 of the Constitution even states that Congress, not the President, defines and punishes piracies and felonies committed on the high seas and offenses against the law of nations, includes the power to declare war and grant letters of marque and reprisal concerning captures.

Professor Sofaer, my problem with this is everybody says the President has the power of Commander in Chief. I agree with that. I have never questioned his power to defend American citizens against foreign attack. But through our failure to apply the War Powers Resolution we have completely wiped out the shared power that was so explicitly stated in the Constitution that Presidents run wars, but Congress is the one that decides whether or not we are going to start one. You can argue whether 48 hours of action is the right time, but the 60 days was put in here so that the Congress and the President could in this 60 days after the 48 hours decide whether or not we marshal the forces of the United States to go on a war footing.

It doesn't have to be a complete declaration of war. It can be rather an incident, police action, temporary availability, or any of these kinds of things, but if you do not have the Congress and the money in behind you, the Nation splits.

And I might state to you and to my colleagues that so far as I know we have never received a bill yet for the U.S. actions in the Persian Gulf. I hear figures running all the way from $300 million to $1 billion. Now, that is going to come out of either military or civilian programs.

You talk about consultation. Consultation to me is not coming up and saying to Senator Biden and to Senator Sarbanes and to myself, "Well, we have started this war over here and it is getting bigger and we are going to have to bring in another carrier. And now we are going to bring in a guided missile frigate, and we are up to 50 ships. And now we have decided we have to do some air cover. And we will tell you later what it is going to cost you. Oh, by the way, we have changed our policy. It is not going to just be protecting our ships; we are going to protect other ships." Maybe that is a good policy, but why didn't we get something back from the British, French, and Japanese?

One person wasn't meant to conduct the military use of force as part of foreign policy. It is clear in the Constitution. It is clear in this law, and if you want to correct the law to trigger it better, I will help you. But this is an attempt to get the two together, and consultation alone is not enough.

Mr. SOFAER. Senator, I think the law is a mistake in part because it makes Congress look like it has less power than it really has. I hope you can understand what I am saying. By creating this situation which puts the pressure on Congress to somehow do something within 60 days, it makes it look like Congress needs to do something in 60 days for something to happen.

Senator ADAMS. Well, Professor Sofaer, let me tell you something very practical about legislative bodies. And I have served in a lot of them, and I welcome you up here to serve in one of them. Once a President gets out there and commits troops in the field and starts pouring men and money in and the jingoism starts, you do not have an opportunity to stop that unless you have a specific procedure. It goes on and on and on.

Mr. SOFAER. But the gulf policy, Senator, was presented to Congress long before a single ship was sent out there, long before the reflagging occurred. I have a list. I have a list with me here today of over 40 consultations with various congressional committees on the gulf policy including reports that were submitted by the Department of Defense and the Department of State. There was extensive consultation and extensive support.

What I am saying is why put that kind of pressure on yourselves, yourselves, which is the preeminent power of our Constitution, of our Government? Why put this kind of pressure on yourselves to have to act in some ritualistic manner within 60 days? And I am not the only one who has said it. Senator Nunn said it a lot better than I did.

Senator ADAMS. Let me tell you. When you talk about consultation, Professor Sofaer, when the vote came up as to whether or not we should reflag those Kuwaiti vessels a majority of the U.S. Senate voted that it was a wrong policy. There were very definite, long-range difficult policy issues at stake, and as a Senator and as a Congressman, we are responsible for making those. The bad comes with the good with this job.

But there is a problem when you come in very late in the Act, such as in Vietnam. I use Vietnam simply because it was such an agony for all of us. There we found that Nixon already had the tanks rolling into Cambodia. That is the kind of thing we were trying to say is making war. This is not some kind of foreign policy with some military force attached to it. It is a whole different animal, and this act is drawn to accomplish that.

Mr. Chairman, I am willing to look at sections of the War Powers Resolution to make a better trigger or to work to make it work better. This act is the important link that the American public sees between the two branches of Government regarding the war power.

To conclude, Professor Sofaer, I just want to state that everybody is not in agreement with you on *Chadha*. *Chadha* is a one-house veto, and I don't think you can veto war powers of the Congress. I would love to see this in front of the Supreme Court. I don't know why Presidents haven't taken it up there and had it decided one way or the other.

The reason I think they haven't is because the Supreme Court will say that the war power is a shared power, and that the Congress has the preeminent role just as the President has a preeminent role in foreign policy. That is why it doesn't come up.

Senator **Biden**. I say to my colleague the bad comes with the good also in being Chair.

Senator **Adams**. Thank you, Mr. Chairman.

Senator **Biden**. I must suggest at this point—and I realize my colleague from Illinois has not had a chance to ask questions yet—that any remaining questions be submitted.

I ask unanimous consent at this time to place the Judge's entire statement in the record, which he was kind enough to curtail for us, and also the 17 questions which he fully answered in response to the questions I asked.

[The information referred to appears in the appendix.]

Senator **Biden**. Judge, you have been good to come up here. As you have already observed, we could go on for another 5 or 6 hours. I appreciate your time. I will also submit to you my draft proposal, if I decide to move forward beyond the skeletal form of the alternative that I am preparing, and ask your consideration. You have always been cooperative in coming up here. I may ask you to come again if you would be willing.

Mr. **Sofaer**. I would be most happy to work with you, Senator.

Senator **Biden**. Thank you very much.

The committee will recess for 2 or 3 minutes, and we will come back at that time with President Ford.

Thank you very much, Judge.

Mr. **Sofaer**. Thank you, sir.

[A brief recess was taken.]

Senator **Biden**. The hearing will come to order.

Mr. President, welcome. A moment ago, I suggested that I believe that on a personal basis, in my view, you have been the most popular man to hold that office with the Members of the Congress. You were one of us for so long. I asked you how many years you had been in the Congress and as a congressional leader, and you said 25½; was it?

President **Ford**. That's correct.

Senator **Biden**. So, many of us got to know you in that capacity, and when you became Vice President and then President of the United States, we viewed you as one of us, regardless of which party we belonged to.

Mr. President, it truly is an honor to have you here today. It is a testimony to your spirit of public service that you have agreed to appear before the Foreign Relations Committee to offer your views concerning the War Powers Resolution and, more generally, Mr. President, on the question of how Congress and the President can cooperate more effectively with regard to the critical decision to introduce and maintain U.S. Armed Forces in hostilities.

As I said, you are one of the rare people who have had a chance to view this from both ends, as not only as a Congressman, but as a leader of your party in the House of Representatives, and as President of the United States.

You were the first President to use force abroad after the enactment of the war powers legislation, and I know you have a strong and well-considered view about it.

Let me express on behalf of the chairman of the full committee his sincere regrets in not being able to be here today. Senator Pell is attending a funeral, but was concerned that I declare his gratitude for your contribution in appearing before the committee to offer testimony and the benefit of your years of leadership in both the Congress and the White House.

If any of my colleagues have statements, I would ask that they be brief, because our time is limited.

Senator **Helms**. I suggest we all forgo our statements. We all welcome you here, Mr. President.

President **Ford**. Thank you.

Senator **Adams**. We would like to say welcome, those of us who didn't get the chance to see you in the back, Mr. President. It is good to see an old friend.

Senator **Sarbanes**. Mr. Chairman, I would just like to say I had the privilege of serving with President Ford in the House of Representatives, and I also served on the Committee of the Judiciary when we applied the 25th amendment which took him away from the House and made him the Vice President of the United States, and then, of course, subsequently the President of the United States. We are very pleased and delighted to have him here today.

Senator **Biden**. Mr. President, welcome, and proceed in any way you see fit.

STATEMENT OF HON. GERALD FORD, FORMER PRESIDENT OF THE UNITED STATES

President **Ford**. Well, Mr. Chairman, and members of the subcommittee, it is a very high honor and a very great privilege for me to return to Capitol Hill. I have nothing but the fondest memories of my service both in the House and for a limited period of time as Vice President, presiding officer of the Senate. I repeatedly say, as I travel around the country and get asked questions about Washington, I have the highest admiration, the greatest respect, as well as fondness, for the legislative branch. I truly treasure and cherish my many, many friends in both the House and Senate, both Democrats and Republicans. So, it is a bit nostalgic, to be honest with you, to come back to Capitol Hill where I spent 25½ years, years that I really feel most strongly about. And I am grateful for the very warm and cordial welcome of you and the members of the committee.

I apologize at the outset, Mr. Chairman. I have no prepared text, and if I have violated the rules of this subcommittee or committee, I am embarrassed.

Senator **Biden**. As far as I am concerned, Presidents can set the rules. [Laughter.]

President **Ford**. Thank you.

I do, however, look forward to the opportunity for questions and answers.

So, there is no misunderstanding on the part of any members of this group, I voted against the War Powers Resolution when it went through the House of Representatives. I voted against the conference report, and I also led the fight and voted to sustain President Nixon's veto. So, my feelings are quite clear and on the record.

And I should add, Mr. Chairman, my views have not changed. If anything, I am in firmer opposition to the so-called War Powers Resolution today than when I was in the White House or when I was in the Congress.

I opposed it initially because I happen to believe that it was probably unconstitutional because of the so-called legislative veto provision. I also believe that it violated the separation of powers between the executive and the legislative branches. The *Chadha* case probably would confirm the feeling that I have that it is unconstitutional, at least in that part of the proposal.

Second, I have long felt that the War Powers Resolution was impractical. As all of you know, as well if not better than I, the provisions call for notification, for consultation, for reporting. It is my judgment, based on some practical experience, that it is impractical to try to go through those steps if and when a President is faced with a very serious military and or foreign policy decision. I will speak more about it later.

But while I was in the White House, we had at least four and possibly six instances where you might argue that the War Powers Resolution was effective. Actually, I never conceded that the facts did fall under the umbrella of the War Powers Resolution.

But the first was the operation of evacuating military and civilian personnel and others from Danang in April 1975. The second was the evacuation of civilians and military and others from Phnom Penh in Cambodia in April 1975. The third was the tragic withdrawal of all—as many as we possibly could—of our military civilians, as well as allies, from Saigon in April 1975. And the fourth one was the *Mayaguez* incident which happened in May 1975. There is no question that at least we tried to report within the consistency of the Resolution although we never conceded that what we did fall under that umbrella.

Now, there were two other instances that you might have argued that the War Powers Act was applicable, the two evacuations of civilians and military at the time of the Lebanese withdrawal in I think it was June 1976.

Now, let me give you an illustration of why I think there is some impracticality of the War Powers Resolution. When we had the evacuation of Danang in April 1975, Congress was in a congressional Easter recess. Not one member of the key bipartisan leaders of Congress was in Washington. Without mentioning names—and this is part of a speech that I periodically make on the War Powers Resolution—here is where we found the leaders of Congress. Two were in Mexico. Three were in Greece. One was in the Middle East. One was in Europe, and two were in the People's Republic of China. The rest were found in 12 widely scattered States of the Union.

Now, this one might say was an unfair example because Congress was in recess. But I hasten to add that critical world events, especially military operations, seldom wait for the Congress to meet. All I am saying is there are practical problems about the War Powers Resolution as to notification and consultation particularly.

Now I am going to make another statement that I am sure will be challenged, but I firmly believe it. I happen to believe that the War Powers Resolution undermines the capability of a President to achieve or to maintain peace.

Now, I say that because as long as that legislation is a potential, and certainly if it were operative, it gives to our adversaries some encouragement to nip away at us, to threaten us, and so forth. I really believe that that legislation is harmful in this particular area.

Now, I know also one of the proposals that in good faith was a part of the War Powers Resolution was to enhance good relations between the executive and legislative branches. I happen to think that is mandatory if we are to be successful in either diplomatic or military operations. I see no evidence that the War Powers Resolution over the period of time has enhanced cooperation between the executive and the legislative.

And I honestly believe the heyday of U.S. foreign policy was the period right after World War II when we had both Presidents Truman and Eisenhower and we had mainly Democratic Congresses, but one Republican. The relationship between the White House and Congress in those days on foreign policy and military decisions was at its highest point. And I think it happens to be one of the most successful eras in American foreign policy. And all of that took place and transpired without the War Powers Resolution being on the books.

Now, let me go on, if I may. Since November 1973 when the War Powers Resolution was approved over President Nixon's veto, it is my understanding there have been 19 occasions where three Presidents, myself, President Carter and President Reagan, have reported. I reported on 4 occasions, President Carter on 1, and President Reagan on 14.

But the truth is in the 15 years of the war powers legislation, it has never been implemented. Never. It's a dormant piece of legislation for all intents and purposes. So, I think that is further evidence it ought to be repealed. And I strongly think it ought to be repealed.

And I must say that I recognize that as highly unlikely, but if it were repealed, it would still leave Congress with its traditional authority over foreign and military policy. For example, your House and Senate committees that have jurisdiction would have oversight and those committees, of course, include Appropriations, Armed Services, Foreign Affairs, Foreign Relations, Government Operations, and I assume the Intelligence Committees would also have some jurisdiction. So, there is plenty of opportunity for legitimate, bona fide oversight as far as foreign and military policy is concerned.

But even more importantly and probably more effectively would be the capability of the Congress to restrict funds from military operations precisely as it do so often, so frequently, during the Vietnam war. I can vividly recall—I was the Republican leader at the time—the legislation that would be put on an appropriation bill which would read something like this: "None of the funds appropriated herein can be utilized for any military operations 90 days after the date of the enactment of this provision." I may not be precise, but that is pretty close. So, Congress, with the repeal of the War Powers Resolution, still has that authority, and it certainly was effective, as some of us well know, during the last days of the war in Vietnam.

Now, let me say that if repeal is not likely—and I concur that the practicalities would argue that—certainly Senate Joint Resolution 323 would be a significant improvement over the current law. I have read carefully the consultation provision change. The basic law said the President must consult with the Congress. That is pretty broad. The new legislation, as I read it, says there shall be consultation with 6 House and Senate leaders with the added provision that if a majority of that group of 6 asks for an additional consulting group, then it I think adds about 20-some to the total. I think the refinement of the consulting process is helpful.

Second, the congressional action. I always vigorously opposed the automatic provision which said if Congress didn't have the wisdom or the will power to act in 60 or 90 days, then it could force the President to withdraw the troops. I thought that was pretty mealy-mouthed and ought to have been not included in the first proposal. So, I fully concur with the change that calls for a joint resolution for either approval of further engagement or approval of withdrawal. That is a major step in the right direction.

And, of course, I strongly believe that the change from a concurrent resolution to a joint resolution is a step in the right direction because it does include the President in the circuit with the possibility of veto which he never had under the concurrent resolution.

Well, let me conclude my observations in summary as follows. I believe the War Powers Resolution ought to be repealed. I have no apologies for it. It is consistent with my view when I was in the Congress. But if it is not going to be repealed—and I am practical. I don't think it will be—I certainly would support the kind of amendments that have been included in the Resolution proposed by Senator Byrd and others.

So, with those observations and comments, Mr. Chairman, I will be glad to respond to your questions.

Senator BIDEN. Thank you, Mr. President.

I would suggest in the interest of time and the obviously increased interest in participation here with your presence, that we limit ourselves to 5 minutes.

Mr. President, why is it that no President including yourself has used the 4(a)(1) provision which starts the clock ticking for the purpose of forcing a vote and thereby providing an expression of a unified foreign policy?

I can't think of any of those instances where the Congress would have not said, yes, we are with you, Mr. President, either because it lacked gumption to be against you or because it did agree with you. Why is it that Presidents have not utilized it to guarantee a unified Nation, a unified Congress and President on controversial issues?

President FORD. Well, first let me reiterate what I said earlier. I happen to believe we had the maximum cooperation and coordination certainly in this century of foreign and military policy in the days immediately following World War II and up through, we'll say, 1960. The cooperation between Presidents Truman and Eisenhower and the cooperation of people like Senator Vandenburg as a Republican with Truman and Sam Rayburn as a Democrat with Eisenhower was phenomenal. And I happen to believe that was the best period of U.S. foreign policy certainly in this century.

I think it has disintegrated since then primarily because of the lack of cooperation and the lack of mutuality, comity, whatever you want to call it, between the White House and the Congress. And I think it is tragic.

In my judgment Presidents are hesitant in the atmosphere that exists today and that existed when I was there to utilize the law or piece of legislation that they are hesitant because it somehow tends to constrict them and decisionmaking by them. It is an apprehension more than probably a reality.

Senator BIDEN. I agree with you that the heyday of bipartisanship in foreign policy was at the period you have stated. But I would argue that the reason it was is everything from the Marshall plan on through the——

President FORD. Greek-Turkish aid.

Senator BIDEN [continuing]. Was because the President didn't do any of those things. He didn't initiate any of them without first coming to the Congress, explaining in great detail, and getting cooperation ahead of time. That is why I would argue it existed. I may be wrong about that.

President FORD. I would argue a bit there. I don't think President Truman came to the Congress before he made the decision to proceed with the war in Korea.

Senator BIDEN. That is true. In fact, that's where things began to go wrong.

President FORD. I was in the Congress in my first term, and it was shocking. I happened to support him right from the beginning because I thought he was right.

But I think that case illustrates the point. Here was an invasion by North Korea of South Korea. I think it occurred on a Sunday, if my memory is correct. President Truman acted forthrightly, went to the United Nations, got their approval. As far as I know, he never had any consultation because of the urgency of the situation.

Senator BIDEN. I would agree, Mr. President. You are correct. There was, of course, was an international body—the UN—that stood with the United States. But it was also, I believe, the first time where the President, all on his own, initiated a significant military action that would have serious foreign policy consequences and asserted his right to do so.

Since I was here when the War Powers Act was initially enacted, I have always viewed it as the President's act, as strange as that sounds. I viewed it as an act that the President could easily utilize to do what I hoped would happen and believe needs to be done, and that is to begin to bring together at the front end a bipartisan foreign policy.

I think you mentioned Vandenburg. I think it was Vandenburg—I may be mistaken, and please correct me if I am wrong—who said to a President "If you want us in on the landing, Mr. President, make sure we are there on the takeoff."

President **Ford**. He said that.

Senator **Biden**. And that is what we are talking about.

President **Ford**. I can only reiterate. I believe Presidents feel that this is a basic constitutional encroachment, and they are hesitant to use something that may by their utilization create a precedent that would be a serious problem down the road. Now, I think the Presidents I have known felt that they could achieve the job better without the pressure of the War Powers Resolution by proper notification, consultation.

I as Republican leader can remember the instances where I, along with others, Democrat as well as Republican, were consulted by President Johnson. I can't recall how many joint leadership meetings were held in reference to the war in Vietnam and the action that President Johnson took in the Dominican Republic. There may have been several others.

Presidents, as far as I know, have always tried to be as cooperative as possible. I know there are instances where there will be a difference of opinion, but to the extent that I know, they have tried to be.

Senator **Biden**. Mr. President, I have a number of additional questions, but I will yield now to my colleague, Senator Pressler.

Senator **Pressler**. Thank you very much.

Mr. President, had I made an opening statement, I would have said that I think our country would have benefited from your reelection some years ago, but that did not come to pass.

But let me say that I agree with you very strongly. I have said here that I think we should repeal the War Powers Act, and in fact if we ever get some legislation to the floor, I shall try to get a vote on that. I would say it probably won't pass. So, realistically we are probably faced with keeping it as it is or making some adjustments in it, although I certainly agree with you that it would be healthy to repeal it entirely. I think there is sufficient power in the appropriations process and elsewhere for Congress to express.

Let me ask you this. Was there ever a moment in your Presidency when you did something different in foreign policy because of the existence of the War Powers Resolution, or was it merely a bothersome hindrance in carrying out what you wanted to carry out?

President **Ford**. I cannot, Senator, recollect any instance where I would have done anything differently without the War Powers Act there. I did what I felt had to be done, and as I said a moment ago, we did not concede that the War Powers Act was involved, and therefore what I did was done without any interference by the War Powers Act.

Senator **Pressler**. Do you know of any moments in any Presidencies lately when you think our foreign policy or the activities of the President in carrying out policy would have been different? Has the War Powers Act changed anything is what I am trying to say in substance?

President **Ford**. Well, in the 19 cases that I have looked at where, as I understand it, Presidents have reported under the War Powers Act, saying what they did was consistent with the Act, but not admitting it was applicable, I don't see where Presidents would have done anything differently; no.

Senator **Pressler**. Now, the rapid deployment force that we have—does it make sense to have a rapid deployment force if we also have a War Powers Resolution, and how are the two related in your judgment?

President **Ford**. Well, there is no question. I don't think we should have the War Powers Act, period. So, I think we certainly need the rapid deployment group, and that organization ought to be ready, willing, and able to perform what the Commander in Chief says is needed in the best interest of the United States. That group ought to exist even with the War Powers Act because in my judgment you have to have that kind of a military organization, period.

Senator **Pressler**. Now, when you were President you had to consult with congressional leaders in a structured way on a wide number of issues. In terms of security, in terms of keeping it away from the press, in terms of keeping it away from the enemy ultimately, would there have been any way you could have thoroughly consulted without calling them all back to Washington? It blows the cover. How did you feel about consulting, about that requirement?

President **Ford**. Well, because of my own experience in the Congress, I have always felt very strongly that Presidents ought to consult as often and as frequently as needed. And I think I bent over backward in that regard.

But there are practical problems. The illustration I gave at the time of our evacuation of Danang, Congress in congressional recess. Legitimately Members are traveling all over. But we had a problem. We had to evacuate U.S. military personnel, civilians, as well as allies. And we had to commit U.S. military personnel for that undertaking. So, it wasn't easy to notify. I guess notification would have been easy, but certainly consultation would have been difficult.

Senator **Pressler**. Now, as I understand, one of the proposed amendments being considered provides for consultation with six congressional leaders. Others have suggested a larger number of leaders. As a practical matter, we are not going to be able to repeal this War Powers Resolution. I would like to be able to, and I am going to make a motion to repeal it if we ever get around to legislating on it.

With that being said, how can we improve it legislatively?

President **Ford**. Well, based on my reading of the Senate Joint Resolution 323 I believe it is, I approve of those changes. I think the firming up of the consulting group is better than the language in the original act which says, as I recall the President must consult with Congress. That is 535 Members. I like the idea of six.

Second, I approve of the process whereby the group of six with a majority vote can ask for the larger group.

And I strongly approve getting rid of the nonvote provision that forces the President to withdraw forces if Congress in 60 or 90 days can't get around to either approving or disapproving the action of the President.

Those are the basic ones that I strongly feel, plus the change to a joint resolution from the concurrent resolution so the President has the right of veto.

Senator **Pressler**. Thank you, Mr. Chairman.

Senator **Biden**. Thank you very much.

Senator Sarbanes.

Senator **Sarbanes**. Thank you very much, Mr. Chairman.

Mr. President, I wanted just to pursue for a moment a subject that was raised by Chairman Biden. I can understand a President resisting the Congress when the Congress says, "Well, before you commit forces, you should obtain advance congressional approval." And I can see a President arguing an emergency situation where that is not possible. The example you cited of leaders dispersed around the world which made consultation in the circumstance very difficult. That poses some problems that one has to address as they consider the use of force.

What is more difficult for me to understand is why a President, once he has committed the forces on the basis of making the judgment that the situation requires that, and then not wanting to come to the Congress to say, "I have committed these forces. I made the judgment that that was necessary for the Nation's interest, and I am now putting the question to you, Congress, to either support me or to indicate that you don't believe that should be the national policy."

Now, I think as a general proposition, once that has been done, the Congress will probably be supportive. My own view is that it probably would not be only in a most extreme situation where it could be argued that the President has made a very bad judgment.

If the question were put and he received that answer from the Congress, then you have both branches of the Government in agreement on what the policy should be which seems to me to constitute a stronger national support of consensus behind what is being done.

I am sort of probing to find what the reluctance is to take that step. I want to leave aside for the moment the situation when Congress approves ahead of time. And we may differ on that—executive and legislative—and that needs to be worked out. But what is the problem with having done it and then saying, "Well, now the Nation would really be strengthened if it was clear that this was a policy supported by both branches of the government"?

President **Ford**. Well, if my memory is correct, that is in effect what President Truman did after he made the commitment in Korea and operated under the umbrella of the United Nations. That doesn't mean that everybody in the Congress was supportive, but we never had the disintegration of congressional support during the Korean war that we had during the war in Vietnam.

But if my memory is accurate, President Truman always came before the Congress in his State of the Union or other proposals and said I have done this. I need your help. It is in the national interest, and eventually we were successful in that area.

Now, again I believe that the Presidents that I am familiar with who committed United States combat troops to Vietnam, President Kennedy with the first 10,000 or 15,000, President Johnson, President Nixon—they all made efforts of one kind or another to try and convince the Congress that their actions as Commander in Chief were in the national interest and sought congressional support. It eroded, as we all know, very dramatically. But I think Presidents tried to do it to the best of their ability.

Senator **Sarbanes**. Well, my perception of that is that they never put the question as directly as President Truman did so that you really had a decision on his decision and then the Congress decided with him.

President **Ford**. Senator, if I could interrupt, they were different kinds of wars. And one went significantly longer than the other. Maybe we're comparing apples and oranges.

Senator **Sarbanes**. I take it that you would agree with Judge Sofaer who testified earlier that there are limits beyond which a President acting alone could not commit forces without coming to the Congress first. In other words, you have a range of situations where Presidents say, "Well, we assert a right to commit forces without going to the Congress," but you could move down that path and envision situations, for instance, in which there was no challenge, no threat, et cetera, in which a President could not of his own commit forces without the Congress beforehand agreeing to do that. Would that be correct?

President **Ford**. Well, I don't like to commit myself without knowing a bit about the specifics of what you are talking about. I happen to believe that a President in a crisis as Commander in Chief, after getting all the facts he can from State, Defense, Intelligence, et cetera, after he has had the maximum advice from his top people, may have to in that kind of a crisis commit U.S. military forces without consulting with Congress.

Senator **Sarbanes**. But that is assuming a crisis.

President **Ford**. That's right. I assume that crisis.

Now, as I understand, what you are talking about is a different kind of a situation. And those things do happen and because we have an intelligence capability electronically, et cetera, we can to a degree forecast the possibility of a crisis. We can see, hear, what have you, a buildup by an adversary which would necessitate a comparable process building up our forces. In that kind of a situation where you see the situation developing, absolutely I think a President in sound judgment ought to consult with the Congress, certainly the kind of consultation envisioned by the new bill.

Senator **Sarbanes**. Well, my time is up, and I thank you very much, Mr. President.

Senator **Biden**. The Senator from North Carolina, Senator Helms.

Senator **Helms**. Thank you, Mr. Chairman.

I think it is fairly obvious, Mr. President, that there never would have been any War Powers Resolution had there not been the Vietnam war and the controversy surrounding that. And so, that is one of the additional tragedies on top of having to send all those men over there to fight a war they were not allowed to win.

But having said all of that, do you have any opinions satisfactory to yourself as to what message was sent to the Vietcong when the Nixon veto of the War Powers Resolution was overridden by the Senate?

President **Ford**. I have no inside information as to what the direct message was. I suspect that the Vietcong probably believed that their persistence and their military efforts over a period of time had paid off, and they were more likely to be stronger in their efforts than they had been in the past.

Senator **Helms**. Well, there were reports, commentaries. Of course, I guess nobody knows except the Vietcong that there was joy in those circles because that was a signal to them that we were going to pull out, which we did after some time.

Well, tell me. How would you as President under the War Powers Resolution deal with a harsh, extreme terrorist situation that would come up, say, on the Easter weekend as you referred to? How would you deal with it as President? Would you go ahead and do whatever is needed to do, or what?

President **Ford**. Senator, it would depend, of course, on the kind of terrorist actions. There are two kinds. One, there are terrorist acts that are planned, executed by governments per se.

Senator **Helms**. Right.

President **Ford**. And there are terrorist activities that are undertaken by irrational, undisciplined groups.

If you had a case of a government-undertaken act of terrorism that could be justified as a threat against the national security of the United States and immediate action was mandatory, if I were in the White House, I would act immediately. Now, there are so many qualifying phrases in what I said, but under those circumstances, I would act very promptly and as effectively as I possibly could.

Now, it is a lot different ball game when you are talking about these sort of unorganized, undisciplined terrorist groups. That is a different situation.

Senator **Helms**. Well, I was speaking mainly of government-promoted acts of terrorism.

I guess this is a general question, and you will have to give a general answer. You and I have come along at a time when the spirit of comity existed between the President and the legislative body. I have often thought that if Franklin Roosevelt had been required to prosecute World War II under the limitations of the War Powers Resolution, that the war would have been lost. And maybe the French would be making their vichyssoise out of sauerkraut today.

Is it really possible in your judgment to have the President and the Congress share absolute equality in the conduct of American foreign relations?

President **Ford**. How do you define "equally"? I think each can play a very critical role in the development and execution. I firmly believe that Presidents have to take the initiative in the formulation of foreign policy, and they have to do the execution on a day-to-day basis. But you can't conduct the foreign policy if you don't have money, and the Congress has that responsibility and properly so. So, Congress does have a responsibility either in the annual appropriations for the departments or foreign aid or what have you. So, it is a joint operation, Senator, and they better get together and work together.

Senator **Helms**. Well, you picked up on the followup question I had intended. I said between the two branches, one has to take the lead in foreign policy. And that clearly is the executive branch.

Thank you, Mr. Chairman.

Senator **Biden**. Senator Helms, we have all been talking about bipartisan foreign policy, and I am sure that President Carter would have been happy had we viewed it that way when the Panama Canal treaties and the Taiwan Relations Act were considered. And I am sure President Reagan would have been happy had I sided with his position on Nicaragua. So, maybe during the next administration you and I will be able to be more bipartisan than either of us have been in the last 10 years.

Senator **Helms**. Well, the executive process is that the President had to send up those treaties on the Panama Canal to give it away. He would have had no choice about it. I am convinced if he didn't have to send it up here, he would have given to Rios with a red ribbon around it.

And I think that what he did to Taiwan and what Congress helped him to do was a travesty.

Senator **Biden**. I am not arguing the issue. I am just pointing out that that's a foreign policy.

Senator **Helms**. But those were in the process. That would have happened regardless of the War Powers Act, as you know.

Senator **Biden**. I thought we were talking about the larger scope of foreign policy.

Senator Adams.

Senator **Adams**. Thank you, Mr. Chairman.

Mr. President, it is a pleasure to see you again. I enjoyed serving with you in the House.

President **Ford**. It is mutual, Senator.

Senator **Adams**. Mr. President, we both lived through the Vietnam war together in the House, and I heard you use the word "war" in conjunction with Vietnam. I don't remember President Johnson from February 1965 through the 1970's ever calling it a war. It was always an incident; was it not?

President **Ford**. Well, my memory is not that good, Senator. But I suspect that there was a tendency by the President and others in the White House to do as you have said. But the facts of the situation were it was a war.

Senator **Adams**. That is what bothers me, Mr. President, and why I support the War Powers Act. And I am not saying it is a perfect statute. But it is a method of uniting the American people when we come to a point of commitment of people who lose their lives or are injured. The Treasury will be used and the American people need to be mobilized in support, and that we know that we have that goal.

The reason I support this so strongly is that I feel that we need a mechanism. In Korea we were in with the United Nations. We had a policy. The country was in it. But I would like to tick off to you what happened in Vietnam when we did not call it a war but rather a Presidential action going forward.

We lost the draft. We no longer have that.

We had the last balanced budget. We never had another one of those.

We didn't get a tax to pay for the war.

We started into an inflationary spiral.

And we never had stated for our troops in the field that we really were involved in a war and that the victory was to win the war.

The final result in foreign policy was that we lost all of what was then Indochina.

Now, I am not saying that we should not have been in Vietnam. But what I am trying to ask you is why is there such an objection to the President coming to Congress when the use of military force goes beyond crises or rescue of American citizens?

When there is a commitment involving a lot of money and military strength, the Congress should vote on it. Then we are in it with you. If we oppose it, you beat us around the ears and we know where we are.

The War Powers Resolution says to the whole world, particularly all these potential third-party worlds, that we are not with a king or with a single person that can make war. It is a congressional matter. And it is congressional plus Presidential. We will defend ourselves, but before we commit to long-term occupation or long-term use of our forces, the whole Nation will be behind it. And the Congress is the only one I know that can vote for it. That is what we have been trying to accomplish.

And I would like to know from your point of view—we have given the 48 hours, we have 60 days to talk about this before anything happens—why we don't move to unite the Nation's foreign policy when it is using its military arm.

President **Ford**. Well, first let me indicate some difference of opinion in your interpretation of what the process was during the war in Vietnam. We were both in the House at the time.

Every year, whether it was President Kennedy, who submitted a budget for combat forces in Vietnam, who submitted a proposal to help the South Vietnamese with military and economic assistance, or whether it was President Johnson who did the same, or whether it was President Nixon who did exactly the same—in other words, every year you had a military appropriations bill. Every year you had a foreign aid appropriations bill that included military, as well as economic assistance. And every year you had the appropriations, and if my memory is correct, you had equally authorizations.

So, you had two chances in the House and/or the Senate to vote on whether you were going to supply military funds for our forces and for the Vietnamese forces in Vietnam. There is no question about that. We could go back and check the rollcalls. I don't know how you voted, but the chance was there for us to vote yes or no. And up until about 1971, those bills went through without any major opposition.

Starting about 1971, we had the limitations or restrictions on authorizations and appropriations bills.

Senator **Adams**. Wasn't that after 1969, Mr. President, when it was determined that we were not getting the right numbers on Vietnam and we were all of a sudden starting to run a terrible deficit? In other words, it was being buried in O&M, and all of a sudden Vietnam was not a line item. The military budget was a total item, and not isolated.

And therefore, it came upon us only after thousands of casualties and no real knowledge of how many ships and so on we were losing. A whole group of us went to President Johnson and said you have to have a surtax because we are going to break the budget badly and will for 4 or 5 years. In other words, this thing had built up on us, had it not, because we were not saying, as we had in other wars, Vietnam, this amount of money.

President FORD. You may be right. It might have been 1969 rather than 1971, but it came during that relative period.

So, I have never agreed with those that they didn't have a chance to express themselves either in the debate of the floor of the House and or the Senate or by voting yes or no on the necessary legislation to authorize or to fund those programs.

So, I still think the Congress with those tools of legislation that has to go through has an opportunity on any foreign or military policy problem to express itself. I, therefore, do not think that the War Powers Resolution is needed.

The people who opposed the war in Vietnam finally by these limitations forced us to quit. There is no question about that. They said there couldn't be any funds spent 60 days after this date. There weren't any funds. So, we quit. That is what happened.

So, the tool is there without the War Powers Resolution to achieve a certain result. I opposed all of those limitations. I felt very strongly, but the will of the Congress finally prevailed.

Senator BIDEN. Thank you, Senator.

Senator Evans. If we could try to stay within the 5-minute rule, it would be helpful because we have another meeting.

Senator EVANS. Thank you, Mr. Chairman.

Mr. President, it seems to me that if we start long before the War Powers Resolution—and I think we all must—with our Constitution, as I remember the words—I don't have them in front of me, but Congress is clearly given the power to declare war. They are not given the power to declare limited hostilities or a police action or any other thing. They are given the power to declare war. They are not even given the power to not declare war except by absence of any action. So, the one action Congress can take is to declare war.

In your view is our current action in the Persian Gulf a war as far as the United States is concerned?

President FORD. Well, based on what I am personally familiar with, it borders on, but I don't think it is a war in the traditional sense such as World War I, World War II. There are sporadic head-to-head military confrontations, but it is not a war in the sense that we have lived through in this century in two cases.

Senator EVANS. What about the action in Libya? Would that be a war in your view?

President FORD. You mean the President's action?

Senator EVANS. Yes.

President FORD. I don't think that could fall under the definition of "war," no.

Senator EVANS. It is very interesting to me that at the time the War Powers Resolution was passed, it was titled "War Powers," but it turned right around and it talks constantly about hostilities and not war. And it seems to me there is a significant difference between the two in definition. If there wasn't a significant difference, we wouldn't have two words. And it seems to me we start from that fundamental question.

Then in the War Powers Resolution—you have stated very clearly your opposition to the entire War Powers Resolution, but it seems to me that there are some extraordinary flaws within the War Powers Resolution if we were to examine it piece by piece.

In your view, do we miss covering the entire gamut of potential events when the War Powers Resolution states that the constitutional powers of the President as Commander in Chief to introduce U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated are exercised only in three ways: a declaration of war, which much come from Congress; specific statutory authorization; or a national emergency created by attack upon the United States, its territories, or possessions or its Armed Forces? Aren't there other circumstances that might well call for reaction by the United States, prompt action or reaction, that are excluded by this particular provision?

President FORD. Well, that is why I, among other things, think the War Powers Resolution is unnecessary. You cannot define every possible contingency that might arise in this day and age. And when you do, you get in trouble.

I strongly—and this is a repeat of what I have said before—we don't need this legislation. Presidents I personally feel will exercise the proper restraint and judgment and Congress can, on the other hand exercise its proper role if and when such a situation arises.

Senator EVANS. In the testimony of Mr. Sofaer this morning, which I did not have a chance to listen to, but I read his testimony. And he has an interesting proposition that does deal with what you had talked about as a limitation on Presidential authority, and that is the power of the purse, where he says, "Congress has broad power to control the expenditure of funds, however, may not use its funding power to restrict or usurp the independent constitutional authority of another branch. We understand that fully and we don't attempt to interfere with the judiciary in terms of carrying out its function."

He says, "By the same token, Congress could not lawfully deny funds for the Armed Forces to compel the President to cease exercising functions that are lawfully his as Commander in Chief, such as defense of U.S. vessels from attack on the high seas in a particular region." It seems to me he is—and is saying, "Congress would also exceed its authority by ordering the President to conduct a particular type of military operation in a specific manner. The power to control spending cannot properly be used to interfere with the President's discretion or the conduct of military operations." That seems to me to indicate to me that he is suggesting at least that the power of the purse of Congress runs up against the constitutional authority of the President to carry out his functions.

I don't know if you would care to tell us where you think that line belongs.

President FORD. I am not sure I would go as far as Mr. Sofaer has indicated. I don't think Congress can use the power of the purse to tell a President that he has to use this weapon system or that weapon system in the actual undertaking of the national defense of the United States.

I happen to believe that what was done during the Vietnam war limiting funds for the further activities there was constitutional as long as it was passed by a majority of the Members of the House and Senate and not vetoed by a President. I think that is proper, but to try and minimanage the use of weapons in a war or vessels in a war I think is going too far.

Senator **Evans**. Thank you.

Senator **Biden**. Thank you.

Senator Simon.

Senator **Simon**. Thank you very much, Mr. Chairman.

First, as I indicated to you earlier, I heard Hubert Humphrey say what a tremendous contribution Gerald Ford had made in restoring confidence in our Government, and I really believe it was a major, major contribution.

If I may follow my colleague, Dan Evans, here when he says the Constitution says Congress is granted the power to declare war, but it is very interesting what follows that. It says, "to declare war, make rules concerning captures on land and water."

Then there is the only limitation that is made on appropriations, the only one in the Constitution. It says, "to raise and support armies, but no appropriation of money of that use shall be for a longer term than 2 years."

Clearly, the message of the Constitution is that restraint has to be used. And somehow I think that is what we are all trying to strive for is a sensible use of restraint.

If I can use an example from just 2 days ago. We had a resolution—I think I may be a cosponsor on it too—to impose sanctions on Iraq for the use of chemical warfare against the Kurds. George Shultz testified before the Judiciary Subcommittee on Immigration, but we got into the Iraq situation. And George Shultz told us, he said, "Let's be careful. Let's make sure we know what the facts are before we pass any legislation."

Now, in the case of economic sanctions, we have time to find that out. If instead of economic sanctions we were talking about the use of personnel and weapons, we might not have that time. And a second voice saying hold on, let's find out what the facts are, I think is a very healthy thing.

Now, one of the things that struck me about your testimony, Mr. President, was that I think you used six illustrations when you were President. Four of the six involved evacuation of American personnel. I wonder if an exception should be made in the War Powers Act where there is evacuation of personnel. Realistically you want to repeal the whole thing. That isn't going to happen. Does that strike you as a sensible exception that should be made in the War Powers Act?

President **Ford**. I can see where that might make sense because under the current phraseology, it includes both initial actions as well as any others. And certainly an evacuation is in a different category whether it is our troops from Danang or Saigon or Phnom Penh. It is a different kind of a military engagement. That is a thought that ought to be examined.

Senator **Simon**. And in the case of an evacuation, there you have to move very, very quickly.

President **Ford**. Sure. We had people on the beaches who were sitting ducks that if we didn't move our ships and our other forces into that position, those who were trying to get out were just pawns in the hands of the enemy.

Senator **Simon**. Well, it seems to me that this suggestion—and, Mr. Chairman, you are drafting legislation—that this may be an exception that we ought to put into the law. If, on the other hand, we want to use troops in Iraq or someplace else, then that restraint ought to be there.

I have no further questions, Mr. Chairman. Again, I just want to thank President Ford for being here and thank him for the great contribution he has made to our Nation.

President **Ford**. Thank you.

Senator **Biden**. Senator Kassebaum, last but surely not least.

Senator **Kassebaum**. Thank you, Mr. Chairman.

President Ford, I remember you giving a very eloquent argument, the Landon Lecture Series at Kansas State University, I think in 1977 or 1978 against the War Powers Resolution. And it was the first debate really I heard that triggered my interest in this issue, and you persuaded me at that lecture that, as a matter of fact, that it should be given some very careful thought to what the War Powers Resolution was about and wasn't about.

And it seems to me in listening to some of the testimony here and through past hearings we have had, which have been very interesting, that perhaps it came about in our frustration between the executive and legislative branch to really define what we were doing because I am one who believes that Congress does have the power and the means to influence whatever actions are being taken. The power of the purse is a very strong and I think persuasive power that we have.

And we have had past actions going much further back. And I think Senator Adams' illustrations were interesting, but I don't think that is what has caused necessarily our debt problems. I think that throughout history we have had Presidents who have undertaken actions when they have felt it was important, and we have never had really Congress saying, "Well, where were we."

I think what has changed—and as you go back and analyze the Vietnam period—is a lack of comity or more importantly consultation between the executive and the legislative branch. I don't think the War Powers Resolution necessarily makes that possible. And I think one of the things that we really should consider is why this is broken down.

Some of it I think is just the process both in Congress with the diffusion of committees and subcommittees, with the chairmen no longer the strong chairmen that they were when you go back in talking about President Truman and his relations with Congress; and in the executive branch, the diffusion there, the National Security Council playing a significant role, the Defense Department, the State Department, the President listening to all of these advisors. And I think it is this diffusion that has really not lent a clarity of purpose. Now, there can be disagreement, but one has to have some clarity of purpose on all sides or else it does get very fuzzy.

And I think to a certain extent, we might have turned to the War Powers Resolution somewhat as a happiness and security blanket. We felt it gave us then in more clearly defined terms responses that we had to make and said to the President he had to ask us. All of that is really there if we want to exercise it. It is just that we have failed I think to exercise in many ways the responsibilities and the voice that we do have.

That is more of a statement than a question, Mr. President, but do you think that perhaps some of this has come about because of just the changes that have taken place in the structure of the executive and legislative branches?

President FORD. That opens a wide door, Senator. And I do think that there has been some structural changes in the executive branch that have contributed, but I also think there have been some serious changes in the Congress that have had an impact.

I believe the proliferation of subcommittees is a problem. I happen to believe that the change in the seniority system has been a factor. I see some disintegration of leadership in both parties because of the orgy of reform that took place in the 1960's and in the 1970's. So, I think both the executive and the legislative branches have gone through a transition that makes it less likely that they can get the job done. I mean, that is my own feeling.

I remember the days when Sam Rayburn used to go down to the White House and meet with President Eisenhower, and he would come back on a foreign policy matter. And he was usually in agreement with the President or they were in agreement with one another. The press always used to ask him, "Well, have you consulted with the troops." And Sam Rayburn used to say, better than I can, "Well, I decided that." So, he didn't have any disintegration among his troops, and Joe Martin had much the same circumstance.

Now, that is pretty authoritarian, but you have I think better results.

If I can throw in another plug on a different subject, but I think it is in somewhat the same ballpark. Congress better undertake a massive examination and change in the Budget Reform and Anti-Impoundment Act. That piece of legislation has been a disaster. You only have to look at the record, but that is another subject.

Senator KASSEBAUM. Thank you.

Senator BIDEN. Thank you very much, Senator.

You know, Mr. President, when I first got here, I was 29 years old and that seniority system looked awful. [Laughter.]

Now that I am chairman of the Judiciary Committee and the No. 2 guy on this committee on our side, I really think there is such incredible wisdom in the seniority system, and I am beginning to see your point of view much more clearly than I did 16 years ago.

President FORD. Well, when I first ran for Congress, Mr. Chairman, I was 35, and there was an incumbent Republican who was 65 who had been here 10 years. I thought he was much too old, doddering, to perform his responsibilities in a proper way. But times do change your thinking. [Laughter.]

Senator BIDEN. They sure do, Mr. President. But some things don't change. When I got here when I was 30, they made it pretty hard for me to get on the elevator. It was a big deal to get in the Senators' elevator. I was in the hospital and at home for 7 months this year, and when I came back to the Senate, the first day I got back, they tried to deny me access to the elevator. [Laughter.]

So, how quickly they forget you around this place.

But we haven't forgotten you, Mr. President.

President **Ford**. Thank you.

Senator **Biden**. We truly appreciate your testimony and look forward to visiting with you after the hearing.

President **Ford**. Fine. Thank you all.

Senator **Biden**. The hearing is recessed.

President **Ford**. It is a real honor and a privilege to be here.

Senator **Biden**. Thank you, and the subcommittee is adjourned.

[Whereupon, at 12:28 p.m., the subcommittee was adjourned, to reconvene at 10:15 a.m., September 16, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

FRIDAY, SEPTEMBER 16, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 10:15 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Joseph Biden (chairman of the subcommittee) presiding.

Present: Senators Biden, Sarbanes, Simon, Adams, Pressler, Evans, and McConnell.

Senator **BIDEN**. The hearing will come to order.

Once again we have a very distinguished panel. We welcome both Secretary Vance and Secretary Richardson.

The Special Subcommittee on War Powers today resumes hearings directed at answering the critical question: Can the War Powers Resolution of 1973 be amended, repealed, or replaced so as to improve the effective cooperation of the President and the Congress in national decisions concerning the deployment of American forces in situations of actual or likely hostilities?

The previous hearings have delved into that question, and the subcommittee has heard from various legislators who were involved in the origins of the War Powers Resolution, from distinguished American historians, from former military leaders, and, yesterday, from the State Department Legal Adviser and former President Gerald Ford.

Today, the subcommittee will receive testimony from two men of particular distinction.

Elliot Richardson has served in many high level posts, including Secretary of Defense.

Cyrus Vance was Secretary of State through most of the Carter administration.

These men share a distinction of having engaged in perhaps the two most dramatic resignations for reasons of principle in our modern public life. They are both thoughtful and conscientious public servants and can, I am sure, contribute significantly to the subcommittee's effort to develop insight as to how the law might be improved.

As I have said at each of our hearings, the question of the war power is a topic that is both intellectually complex and emotion laden. It also bears fundamentally on the U.S. national interest and, accordingly, warrants the most thorough and dispassionate consideration we can give it.

It is my hope that this subcommittee will provide a forum for that kind of deliberation, leading toward the improvement in law and an end to the current constitutional stalemate, which is the goal before us.

I welcome both of our witnesses and I invite them, if they have opening statements, to proceed.

Please proceed.

But first, would my colleagues like to make an opening statement?

Senator **SARBANES**. I ordinarily would not do so, Mr. Chairman, but I may have to leave and would not have the opportunity subsequent to the statements to say anything.

I simply want to underscore a comment you made in your opening statement and that is that we are very privileged to have before us today two men who have set a standard of public service, a standard of a commitment to principle and of integrity, which is deserving not only of our recognition, but, really, it behooves us, in effect, to follow the example which they have set.

We are very pleased to have both Secretary Vance and Secretary Richardson with us today.

Senator **BIDEN**. Thank you.

Senator Evans, do you have a statement?

Senator **EVANS**. No. I am anxious to listen to our distinguished guests.

Senator **BIDEN**. Senator Simon.

Senator **SIMON**. Very briefly, Mr. Chairman, I regret that the minimum wage is going to be up on the floor in about 10 minutes, and I am going to have to be over on the floor.

I concur in the statements of my colleagues.

The two of you in the dramatic resignations that the chairman referred to have dealt with this question of Presidential restraint.

Presidents have to make some very, very tough choices. Judgment calls are made. The Constitution clearly suggests that that should be a collective judgment if U.S. troops are to be involved.

The Constitution, I think clearly, suggests that there should be some Presidential restraint.

I cannot think of two witnesses who have had to struggle with this more and who have done it with great distinction. History is going to be very, very kind to Cy Vance and Elliot Richardson.

I am very pleased that you are here.

Senator **BIDEN**. Thank you.

Secretary Vance.

STATEMENT OF HON. CYRUS VANCE, FORMER SECRETARY OF STATE

Former Secretary **VANCE**. Thank you very much, Mr. Chairman.

I feel privileged to be able to meet with you today and to talk about this very important subject.

I am delighted to be able to be sitting at the same table with Elliot.

Fifteen years after the War Powers Resolution was passed, it continues to influence our Government's policymaking processes. Some of its effects were intended; others were not. Some of its goals have been achieved; others have not.

Wary of the time limit on the commitment of troops unauthorized by Congress and of the Congressional veto provisions of section 5(c), a President contemplating armed action must weigh in advance the likely political reaction. The Resolution reinforces Presidential self-restraint and serves as a constant reminder that policies involving the use of force overseas must garner support beyond the short term.

There is one important aim, however, that the War Powers Resolution has singularly failed to achieve. That aim is to require the President to consult with the Congress "in every possible instance" before introducing forces into hostilities or into situations where hostilities are imminent.

History demonstrates that Presidents have repeatedly failed to consult meaningfully with Congress or the congressional leadership about actions that could lead to the involvement in hostilities abroad. In short, the goal that the President and Congress should form a "collective judgment" about the wisdom of such actions has not been realized.

That goal, it seems to me, is a contemporary reaffirmation of the Framers' conviction that, while sometimes awkward and inconvenient, a system of political principles, including especially effective "checks and balances" is a necessary precaution against the abuse of unfettered power in the hands of any one individual.

I believe that the "consultation" required by the War Powers Resolution means, first, that the congressional leadership should be given all information about a planned action that is material to a judgment about its advisability; second, that the congressional leadership should receive that information sufficiently in advance of the planned action to permit a reasonable opportunity to absorb the information, consider its implications, and form a judgment before irrevocable decisions are made by the President; and, third, that the congressional leadership should have a real opportunity to communicate its views to the President.

Presidents are served by officials who, for a variety of understandable reasons, sometimes find it difficult to express frank and forceful disagreement with the President's views.

Presidents, despite themselves, sometimes have difficulty separating national security considerations from domestic political considerations in assessing proposed military actions. And Presidents, mired in the Executive responsibilities of Government, sometimes lose touch with the tide of domestic political opinion.

The unadorned views of wise individuals outside the executive branch can play an important and useful role.

In my view, the War Powers Resolution is sound in concept. With minor modification, it could more effectively achieve its goal of requiring genuine consultation between the President and Congress.

I have four specific recommendations.

First, I would add a statutory definition of the term "consult" as it is used in section 3 of the Resolution. The definition would make clear that what is required is the timely sharing of information and views among the President and the congressional leadership concerning a proposed deployment.

I favor a definition along the lines originally proposed by Senator Eagleton, which would require the President to "discuss fully and seek the advice and counsel" of a defined group of congressional leaders. In my opinion, the group of congressional leaders to be consulted should be composed of the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the majority and minority leaders of both Houses, and the chairpersons and ranking minority members of the Armed Forces, Foreign Relations, and Intelligence Committees of both Houses.

I do not share the judgment of those who argue that genuine consultation is not feasible because congressional leaders may be unavailable during a crisis, because they will breach the secrecy on which an operation's success may depend, or because they will merely respond to the President's plans in terms of partisan politics.

My experience has persuaded me that such fears are unfounded. A group of leaders, such as I have mentioned, or a meaningful number of them, will almost always be within reach of the President and will keep confidences. Moreover, in my experience, partisanship is not the characteristic response of congressional leaders whom the President takes into his or her confidence on high matters of state.

As I have observed it, on those occasions each leader thinks for himself or herself with the best interests of our Nation in mind and responds accordingly.

In addition to defining "consultation," I would make two further amendments to the Resolution, both designed to broaden the category of cases in which the President is required to consult.

Presidents have often avoided the prior consultation obligation of section 3 by construing planned military actions as not involving "hostilities" or as not being "situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The Danang, Phnom Penh, and Saigon evacuations and the Grenada invasion, for example, were all styled as humanitarian rescue or evacuation operations, rather than as the introduction of troops into potentially "hostile" situations.

I would make the section 3 consultation obligation applicable to all of the actions now listed as reportable events under section 4(a)(1): namely, one, the introduction of forces into hostilities or imminent hostilities; two, the introduction of forces into foreign territory, airspace, or waters when such forces are equipped for combat; and three, the introduction of forces in numbers that substantially enlarge U.S. forces equipped for combat that are already in a foreign country.

I also support the suggestion others have made that section 4(a)(1)'s recitation of reportable events be amended to add the requirement that the President consult before and report after introducing U.S. forces "into any situation in which there is armed conflict."

Whether an action is subject to consultation and reporting should not turn on whether other parties to an existing conflict take it on themselves to attack U.S. forces when our forces are placed in their midst. No narrow interpretation of our forces' mission should disguise the fact that there are hostilities and that our forces have been introduced into those hostilities, if only by physical proximity.

Finally, I would support an amendment designed to withhold funds that have already been appropriated from any Presidential use of force that lacks congressional authorization under the War Powers Resolution. Funds could be used, however, to remove forces already deployed in such a situation.

Thank you.

Senator **Biden**. Thank you.

[The prepared statement of Secretary Vance appears in the appendix.]

Senator **Biden**. Secretary Richardson.

STATEMENT OF HON. ELLIOT L. RICHARDSON, FORMER SECRETARY OF DEFENSE

Former Secretary **Richardson**. Mr. Chairman, members of the committee, it is a great pleasure to appear once again before this distinguished continuing body on the issue of war powers. I last testified on this subject before this committee in March 1970.

I looked briefly at my testimony then and it turns out, not to my entire surprise, that my views have evolved very little in the interval.

It is a pleasure to appear again before this committee with Secretary Vance, a man whom I admire very much and with whom I have had frequent occasion to work on matters of common interest and concern.

I, therefore, find myself in a somewhat unusual position today of disagreeing fundamentally with the point of view you have just heard expressed.

Both of us I am sure appreciate the very kind and generous remarks that you and Senator Sarbanes made upon our appearance here this morning. And, in a very real sense I believe the problem before us can directly be traced to a series of events that have tended to erode trust in the manner in which Executive powers have been used and abused.

There is a certain common denominator among Vietnam, Watergate, and the Iran-Contra situation. In each case, the perception that there has been overreaching by the executive branch or, in the latter situations, actual subversion of the constraints appropriate to Executive power has been met by proposals that seek somehow, through legislation, to supply the lack of trust.

The Ethics in Government Act is one such example. Indeed, I have long thought it might well be called the "No Ethics in Government Act," since this appears to be its premise.

The special prosecutor law is another such reaction.

While I do not strongly feel that the law should be repealed, I also think, nevertheless, that it is a pretty sorry commentary on the erosion of trust in the executive branch that there should exist permanent legislation to address situations in which the President and the Attorney General cannot be relied upon to assure the faithful execution and enforcement of the laws of the United States.

The War Powers Resolution is a similar reaction to a failure adequately to do those things that the executive branch should do in order to seek to keep the comity of its relationship with the Congress of the United States in good repair.

I fully endorse and support everything that Secretary Vance has said about the process of consultation. I think it should take place in exactly the manner he described, and I agree with him that there is no reason, from the perspective of the executive branch, why this cannot effectively and continuously be done.

The issue, however, is whether in reaction to the perception that this has not adequately been done it makes sense somehow by legislation to order it to be done. This attempt I believe suffers from two fundamental defects.

In the first place, to the extent that it purports to have any binding impact, it is unconstitutional. I do not normally feel adequate in taking clear-cut and dogmatic positions on issues of constitutionality; but I really do not see how this conclusion can be avoided in the case of the War Powers Resolution.

Recalling my testimony before this committee in 1970, and particularly a colloquy with Senator Javits, I had occasion to say that this committee and the Congress may well feel that it is useful to spell out what it believes to be requirements with respect to the process of consultation and the limitations appropriate to the exercise of Executive power in a situation short of war.

But, quite plainly, no legislation can redraw the line or readjust the balance between the Executive and the legislative power.

In the case specifically of the War Powers Resolution, as my prepared statement more fully points out, there is the defect with respect to section 5(c) that it nakedly purports to avoid the presentment clause.

It is understandable enough, of course, that the Congress should wish to find a way of checking the exercise of Presidential power that would not be subject to Presidential veto. But to do that by a concurrent resolution that, by definition, cannot reach the President, is, in effect, to try to do indirectly something that should, at the very least, be directed to him on a basis comparable to other legislation.

Apart from the violation on its face of the presentment clause, there is the more fundamental problem of the extent to which the Resolution, under both sections 5(c) and 5(b), attempts to redraw the line between the Executive power and the responsibilities of the Congress.

My statement deals at some length with the various headings under which these exercise powers bearing on hostilities. But I think the whole history of the war powers under the Constitution and, indeed, practical commonsense require the conclusion that the President must have some powers, short of a situation in which Congress has the constitutional right to declare war.

Where the line is between the power of the President and the power of Congress is, by definition, a question that cannot be made subject to any clear-cut statutory determination. One could write revisions in great detail drawn from the experience of the past and then find oneself in a hopeless predicament in seeking to apply that detailed language to an unforeseen, new situation.

The corollary of that is that there is no substitute for consultation undertaken in a true spirit of comity. That part of my testimony addresses the kinds of situations in which consultation is needed and calls attention to rather obvious considerations bearing on the character of the action contemplated by the President and the time available in which to take it.

But, consistently with such practical considerations, I think the President and his colleagues in the executive branch should try to err in the direction of more, rather than less, consultation, for all of the reasons that Secretary Vance has already touched upon.

But my conclusion that an exercise of such writing addressed to this purpose has been reinforced by a quick look at a draft Use of Force Act that apparently has been developed for our consideration by the committee.

This, on its face, purports to authorize the President to use force abroad in situations falling short of one calling for a declaration of war.

The question, thus, obviously arises what gives the Congress of the United States the idea that it can authorize the President to use force in situations short of war. Surely this is an intrinsic power of the President, arising from his role as Chief of the executive branch but, more particularly, from his role of responsibility for the conduct of foreign policy.

There are many situations in which the credibility of diplomacy rests upon a belief by the other side that we are prepared to use force and the preparedness to use force should not, from the point of view of an adversary, depend upon the conclusion that may be reached by the Congress with respect to its wisdom, certainly not on the belief that the President has to be given specific permission to do it.

The question arises, of course, when given the maximum good faith in consultation and the willingness, as Secretary Vance has urged, to take appropriate account of the judgment of the congressional leadership and the key individuals in the relevant committees, the President, nevertheless, disagrees with that conclusion. He must, in given cases, then be able constitutionally to go forward, notwithstanding that disagreement.

The Congress then, to be sure, has powers of its own that may check the President's action. But to try to enact legislation whose fundamental premise is that the President has no powers in situations short of war, except those specifically delegated to him by the Congress of the United States, cannot be right, and that notion, given substantial support, would seriously erode the conduct of foreign policy.

Finally, Mr. Chairman and members of the committee, I think, as I said at the outset, that we should be given pause by the attitude reflected in this, but not only in the present war powers legislation but, more especially, in the provisions of the contemplated legislation.

It does, as I said at the outset, reflect a fundamental lack of trust. If, in matters of the ethics of the holders of public responsibility, if, in respect to the exercise of Executive powers, and if, in respect to the conduct of foreign policy, we have reached a point where the people do not trust the Congress and the executive branch, and the Congress does not trust the President and the President does not trust the Congress, then our system has reached a perilous state.

Any serious study of the work of the Framers of the Constitution underscores the fact that they recognize that a fundamental bedrock of our system has to be the confidence that those who undertook public responsibility would be doing so with an eye steadily fixed upon the public interest and with a willingness and an ability to subordinate their private interests, but this applies in the context of personal ethics and applies equally to the relationship and responsibility of the President for the conduct of his powers and his dealings with the Congress.

I would suggest that we all drop back, reexamine the situation we are in, and perhaps call for some kind of quiet series of conversations between the leadership of the Congress, including particularly of this committee and the Senate Armed Services Committee and the new President of the United States and his senior advisers to see whether they cannot get off at the beginning of the next administration to the kind of relationship that has been historically characteristic of the Government of the United States and without which the Government of the United States is in serious trouble.

Thank you, Mr. Chairman.

Senator BIDEN. Thank you, Mr. Secretary.

I would suggest to my colleagues, in light of our having a little more time today, that we have a 15-minute rule and that each of us have an opportunity to ask questions for 15 minutes.

Senator ADAMS. That would be fine, Mr. Chairman. I have to leave at 11 o'clock to go to the Commerce Committee.

Senator BIDEN. Well, then, Senator, you can go first and I will go last.

Former Secretary RICHARDSON. Excuse me, Mr. Chairman. I forgot one thing.

You have before you my rather long, prepared statement. I would like to ask permission to have a subsequent, somewhat revised and abbreviated version, inserted in the record and not this particular statement itself.

Senator BIDEN. Whichever you prefer. Without objection.

[The prepared statement of Former Secretary Richardson appears in the appendix.]

Senator BIDEN. In light of your schedule, Senator Adams, why don't you begin in my stead, and then we will go to Senator Evans, and then I will ask my questions.

Senator ADAMS. I would assure my colleague and dear friend, Senator Evans and Senator Biden, that I will be very brief. I have two quick questions.

It is not my lack of interest in this subject nor the scars that I bear from having dealt with it that lead to my brevity today.

Mr. Secretary it is a great pleasure to welcome two old and dear friends to the committee in whom I have a great deal of trust and who have been through this at great length.

I am willing to compromise on the present wording of the War Powers Resolution. I want to state that so that my colleagues understand it.

My concern is that, having been in the legislative branch, I find that we need in these bodies, and particularly in the Senate, some form of process by which everybody knows what they are supposed to do when a crisis occurs. Without that process, there is a grave inability of communicating with the executive branch.

I have had the great pleasure to serve with you, Secretary Vance, as a member of the Cabinet, and I hope you agree with me that trying to communicate as an administration with the Congress, unless there is a definite system of plugging in, is most difficult.

Is that not correct?

Former Secretary VANCE. That is correct.

Senator ADAMS. I have viewed this Resolution, Mr. Chairman, as a method carefully crafted by, I think, some very excellent people as a way of doing just that. I want to state to both of you, preliminary to my question, that I have endeavored to use this in the last 2 years with a great deal of difficulty to accomplish that purpose.

There is presently in place a unanimous consent request of last December that at least allows the Congress after a limited period of debate—and I think that is incredibly important—to decide whether or not there are hostilities.

Now, having said that, I divide the War Powers Resolution into two parts. I would like to have the two of you suggest—and I think in your papers you have maybe given an answer—how the Congress should deal with it. The first is on consultation.

I am in complete support and I think it is absolutely essential that there be a requirement of consultation as Presidents start these actions.

I am willing to support a consultative group, and this deals basically with the 48-hour provision of the Act.

I think the criticism of this act is unjustified, that it does not allow the President freedom to carry out immediate defensive actions or to rescue people and so on.

The part of the Act that I feel is not working and it is absolutely essential that it does work—and I ask you the question of how to accomplish it—is when Presidents make a decision similar to that of a king, where the lives of our people, the Treasury, the entire tension of the United States will be focused on an engagement that, as a matter of foreign policy, may involve military force for a sustained period of time.

Now, you can refer to Korea, Vietnam, Lebanon, the Persian Gulf.

In these cases, it is this Senator's opinion that the Constitution requires within the war power—that is different than a crisis act—that the Congress give approval to that. I would like either or both of you to address the system, and I will say to you as a fact, so that you understand that money alone is not it, that we have had many votes on this. They were all procedural. We have never, to this day, received a bill for the Persian Gulf. We have never received in advance notice that we were going to move from protection of just American vessels to other vessels. We heard about that as an aside.

I just want to know how in these long-term, long-running engagements we can have the country unified. That means the Congress and the President, must act through some system, so that the power to declare war and do all of the other things is appropriately used.

Secretary Vance, you had great experience with this in Vietnam. We never called it a war, though we do now.

I would appreciate any suggestions because I know the chairman is in the process of drafting, as are several others of us. If we do not use this act, how do we say to the American public that the Congress does exist in the use of military force for foreign policy?

That is the only question that I will have, Mr. Chairman. Thank you.

Senator BIDEN. You're welcome.

Former Secretary VANCE. Senator, let me say that the issue which you raise, of course, is the heart of the problem.

I, before you came in, made four specific suggestions with respect to amendments which I believe are necessary in order to have a more effective mechanism for dealing with these issues. Three deal with consultation and changes in language that ought to be made.

Senator ADAMS. I think we can accept those, Mr. Secretary. Please go to the fourth.

Former Secretary VANCE. The other dealt with the question of the power of the purse, an amendment to deal with that issue.

Now, coming back to the other parts of the problem which you raise is the question of how do we set into effect a mechanism that will, indeed, bring the Congress into the process of making a decision whether or not war will or should be declared, or whether the involvement in hostilities can be permitted to continue.

My own view is, contrary to that of Secretary Richardson, that this can be done and is done under the current statute. I do not share his view that the current statute is unconstitutional.

The legal experts differ with respect to that particular issue. I think the better view is that it is constitutional. As Professor Henkin, one of the real scholars in this area has said, these are shared powers and the shared powers involve shared responsibilities and, therefore, they should be exercised together.

I would be willing, however, if this is the only way you can do it, to accept the suggestion which is contained in the Byrd-Nunn-Warner-Mitchell proposal, that the statute be amended to provide that there must be a concurrent resolution, rather than having automatic action as currently is provided for under section 5.

Senator ADAMS. An automatic vote, Mr. Secretary?

Former Secretary VANCE. What?

Senator ADAMS. An automatic vote? Our problem has been that we have never been able to get to a vote on the substance of the issue.

Former Secretary VANCE. I think that this should be left up to the Congress, to provide for a concurrent resolution, and that it should be so specified, that there should be a concurrent resolution one way or the other. I think that is what is provided for and that, to me, would be acceptable, if you can get what is required also under consultation.

Does that answer your question or not?

Senator **Adams**. Yes. The other may be procedural.

Thank you very much, Mr. Secretary.

Former Secretary **Richardson**. May I add a few words, Senator Adams?

Senator **Adams**. Please.

Former Secretary **Richardson**. First, I think it should be noted that the situations of protracted conflict, that you referred to, whatever else may be said about them, were not situations in which there was a lack of consultation or a lack of information.

In general, there were some late aspects of the war in Vietnam where the Congress did not feel it was being given enough information and there is controversy to this day as to what exactly was communicated to whom.

But, in general, the Congress dealt from the outset, including the Tonkin Gulf Resolution, with the conduct of that war.

In my testimony, I allude to various points at which this occurred.

In June 1969, a sense of the Senate resolution was adopted, dealing with the proposition that a national commitment of the United States results only from affirmative action taken by the executive and legislative branches of the U.S. Government, and so on. There was the Cooper-Church amendment, and I remember having to deal with that in some respects, in 1970. There was the Mansfield amendment in 1972. Then there was the cutoff of funds for combat in Cambodia and Laos and the eventual, so-called compromise of July 1, 1973, in which funds for military action in Laos and Cambodia were totally cut off—as of August 15, 1973.

Korea, of course, was a war in which the Congress had to take action to bring about a rapid expansion of U.S. forces and military production.

The question whether or not a war should be declared is presumably a question of judgment, to be discussed between the congressional leadership and the executive branch. I don't know all of the considerations that led to the conclusion that a declaration of war would not be forthcoming in those situations. But, in any event, whether or not that formal step was taken did not affect the relationship between the Congress and the executive branch.

The real problem I think concerns situations that do not involve protracted conflict and fall somewhere in between specific, immediate actions, such as the strike against Libya or the somewhat larger scale operation against Grenada, and that entail substantial use of United States force over what looks on its face like a potentially protracted period. The commitment of U.S. naval forces to the Persian Gulf was that kind of situation.

But, even there the Congress had plenty of time to think about it and concurrent resolutions were introduced and a decision not to press forward with a resolution, for example, that would have endorsed the suggestions Cy Vance and I made for U.N. flagging were not pressed for what seemed like good considerations at the time.

In short, I do not see what legislation accomplishes in this situation that cannot be done as well, or better, in other ways. I think it tends to mislead and complicate situations and to draw attention to itself, rather than to the process of consultation.

I agree with the exchange that you and Cy Vance had at the beginning about the need for clear understanding as to the terms and arrangements for consultation with Congress. But it does not follow that the best way to accomplish this is by statute.

Indeed, if you had the kind of understanding arrived at through quiet discussion and communication at the beginning of an administration that I referred to earlier, some arrangements of this kind might well be reflected in an exchange of letters.

I think that would, in fact, be far more consonant with the kind of relationship between the executive branch and the Congress contemplated by the Framers. I think it would be far more conducive to the development of the kind of relationship that would be likely to succeed.

Senator ADAMS. Thank you.

Former Secretary VANCE. Mr. Chairman, may I just add one word to that?

Senator BIDEN. Certainly.

Former Secretary VANCE. It seems to me that the concurrent Resolution does not have to come to the conclusion of yes, we'll declare war, or no, we won't. What does have to come to a conclusion is either yes, we will permit troops to remain and to be in the area and to become involved in hostilities if that is necessary, or no.

I think, in a way, we get hung up by the title "War Powers Resolution," because it deals with not only situations where there is clearly a war but also with the gray areas, where you are on the fringes of that.

Former Secretary RICHARDSON. But, of course, you do not need to legislate in advance to terminate the involvement of United States forces, as the experience in Cambodia and Laos makes clear.

Former Secretary VANCE. But that only comes about, Elliot, when you invoke the automatic provisions under section 5(c), I believe it is, which say that within 60 days the President must withdraw, unless there has been an affirmation for keeping the troops there, and then he can request another 30 days, so it is an action that can go to 90 days.

If you change that to what is contained in the Byrd-Nunn-Warner bill, you would not run into that problem.

Senator ADAMS. Thank you, Mr. Chairman.

I appreciate your responses and I thank you both. I look forward to discussing this further.

Senator BIDEN. Senator Evans.

Senator EVANS. Thank you, Mr. Chairman.

I guess I have to start with a question to each of you. Let me begin with Secretary Vance.

I would ask really what our constitutional forefathers meant when they gave Congress the power to "declare war." It seems to me that that is at the heart of all of our difficulty on these war powers.

The Congress, in the period of President Nixon's weakness and in the aftermath or the frustration of the Vietnam war felt that they had been cheated of their responsibility to declare war in what clearly was a war.

Would you categorize the strike on Libya as a war?

Former Secretary VANCE. No. But it comes awfully close to it.

Senator EVANS. Would the flagging of American vessels in the Persian Gulf be a war.

Former Secretary VANCE. No.

Senator EVANS. Or would it be subject to a declaration of war.

Former Secretary VANCE. It is not, but it could lead to hostilities in which we could become involved.

Senator EVANS. It seems to me that that is where I have difficulty with the War Powers Resolution because, as you so accurately pointed out, the title itself may be somewhat misleading.

We are dealing with that situation where there is no clear constitutional provision for a congressional involvement, and that is what, I guess, we are searching for. At least I don't see one in the Constitution.

Former Secretary VANCE. I do think there is a problem with the title "War Powers Resolution." It does deal with the problems where the President decides to use military forces in order to advance national interests of the United States, as the President perceives them, in a situation where hostilities are involved or where they may be imminent, once the troops are deployed.

That being the case, it seems to me that we have to have a mechanism which can deal with both kinds of issues. It seems to me that the Congress ought to be involved in both of those kind of situations.

They don't have to declare war, but they can say this really affects the vital national interests of the United States and we, therefore, believe that we want the forces to remain there, as the President has committed them, or no we don't, we want them to come back and so do by a concurrent resolution.

Senator EVANS. The question of a concurrent resolution does bother me.

As I understand it, you believe that the concurrent Resolution, not presented to the President, is a constitutional, congressional right?

Former Secretary VANCE. Yes, I do.

Senator EVANS. I presume then that if it is right in this case, it is right in almost any case, if they choose to use that as a mechanism.

Former Secretary VANCE. Yes, because I believe this is a shared power.

Senator EVANS. Well, aren't all powers shared powers? All legislation has to be presented to us.

Former Secretary VANCE. No. There are some that are specifically enumerated and granted to one or the other. But this area that we are talking about is that twilight zone, in which there are shared powers.

Senator EVANS. Aren't there a lot of other legislative actions that could be concluded to be shared powers and the Congress, in an attempt to avoid the use of a Presidential veto, would simply opt for a concurrent resolution of disapproval as a way to get around a Presidential veto?

Former Secretary VANCE. If the only way one could reach agreement on this were to submit the concurrent Resolution to the President, he would be entitled to veto it. That is one route that one could go.

If he vetoes it, then the question is can the Congress override the veto.

Senator EVANS. Clearly.

That, it seems to me, is a clearly provided constitutional way of doing things. The concurrent Resolution is a way to avoid a Presidential veto. At least, I cannot find any constitutional support for that concept.

Is there any? Presumably you believe there is.

Former Secretary VANCE. I believe that there is in this kind of situation, where you are dealing with a situation which is one which is perhaps war or, if not, is very close to it.

Senator EVANS. "Perhaps war." If Congress feels that it is war——

Former Secretary VANCE. Then they ought to act if they believe that.

Senator EVANS [continuing]. Then they have the right. I am not sure that this has ever been clearly established. I have not read back through each of the previous declarations, few as they have been, as to whether that declaration of war must be presented to the President or that that is a singular power that constitutionally is given to the Congress and, therefore, by joint resolution or concurrent resolution, or in whatever form, Congress itself could declare war without Presidential action.

Former Secretary VANCE. My understanding is that it can.

Senator EVANS. That it can.

In the odd case—and Secretary Richardson, any commentary from you here as well would be welcomed.

Former Secretary RICHARDSON. May I address the point which you have raised?

Senator EVANS. Yes, please.

Former Secretary RICHARDSON. I don't want to do so at length, although I easily could.

You will find in my testimony, starting on page 27 of the present version, the fruits of a lot of very thorough research by my learned associate, Brad Larshan, who is sitting behind me, which I have cheerfully adopted. It addresses at some length the history of the power to declare war and points out that the original draft of the Constitution spoke in terms of "making war."

It also quotes Rufus King, at a late stage in the debate, on page 35 of my statement, saying that he agreed that Congress' power should be restricted to a declaration of war because making war "was an Executive function."

The situations in which hostilities were being conducted without a declaration of war were addressed early on, as noted with a reference to *Talbot* v. *Seemans*, decided by the Supreme Court of the United States in 1801, which addressed a situation in which the United States and France were in partial war.

Senator EVANS. I read it, and, in fact, I thought that section of your paper was a very interesting one.

Former Secretary RICHARDSON. I thought it was interesting, too.

Senator EVANS. What it has led to is the next element of the question.

If, in fact, Congress has the clear constitutional power to declare war and if, in fact, that original intent was to divide the responsibility because making war was an Executive function—the President was Commander in Chief and once the appropriations were made, he presumably had the right to carry them out to make war—what is your view, then, of what happens if a Congress did declare a war that the President thought was a bad idea?

He has the power to make war. Is he living up to his constitutional responsibility if he refuses to prosecute that war?

Former Secretary **Richardson**. Well, I think you have a real hangup in that situation. It is like the obverse, in which the President believes that we should be making the war, whether or not declared, and the Congress then cuts off funding.

You achieve an impasse, and it only underscores the proposition that the responsibilities of leadership on both sides ought to be directed to arriving at some kind of general understanding as to what is in the interest of the United States.

The separation of powers always recognized the potential for stalemate or paralysis. It was a conscious price paid for the avoidance of tyranny.

Senator **Evans**. I suspect there was also a little bit, during the Constitutional Convention, of a decision to get a constitution written, and when the arguments and the difficulties got too big, they left the ambiguities for another generation to figure out. I suspect that is why we are here.

Former Secretary **Vance**. It was a different world at that time.

Senator **Evans**. That's right.

Former Secretary **Richardson**. But some ambiguities are inherent, as I have tried to say.

Senator **Evans**. I understand.

Former Secretary **Richardson**. The question of what the President should be able to do in an exercise of intrinsic power, the conduct of foreign policy and so on, and where the line is between that intrinsic power and things he should not be constitutionally deemed to have the power to do is like all hard constitutional questions.

My professor of constitutional law was Thomas Reed Powell, who taught a whole course dedicated to the proposition that all hard questions of constitutional law are questions of degree, and that is the beginning of wisdom in this context.

Senator **Evans**. Secretary Vance, I would be interested in your opinion here.

Former Secretary **Vance**. Yes, if I could comment on what Elliot has just said, I agree with what he said about the power of the purse, which remains in the Congress to deal with the kind of situation I think we are talking about.

Senator **Evans**. While I was not here for the testimony of Judge Abraham Sofaer, I did read his paper——

Former Secretary **Vance**. I think he is wrong.

Senator **Evans** [continuing]. And he suggests that even the power of the purse is not absolute.

Former Secretary **Vance**. I know the Legal Adviser well. I admire him. He is a fine lawyer, but lawyers differ sometimes, and I think he is just dead wrong on that.

Senator **Evans**. You think he is stretching on that point?

Former Secretary **Vance**. He and I have argued this position before.

Now, I do want to come back to the question of "making."

I think the word "making" was intended to cover how the war is conducted, what the tactics are, what strategy is used, what kinds of equipment. That is what the Framers were talking about, and not about actually saying this is a war or not a war.

Senator **Evans**. I wonder if you would respond to this, to the same question I asked earlier. If Congress, under its clear constitutional power, declares war which a President thinks is a foolish idea, and in his concept of making that war he thinks that he ought to keep the troops home, is he clearly—I mean, he has that responsibility. The Congress has the responsibility to declare war in that separation of powers. Is he abrogating his constitutional oath by taking no action or that kind of action for "making war"?

Former Secretary **Vance**. I think he has to convince the Congress that they are wrong. Otherwise——

Senator **Biden**. Be impeached.

Former Secretary **Vance** [continuing]. Risk impeachment.

Former Secretary **Richardson**. Otherwise, there is the question of how much he does. He may say "Oh, I have been making war very conscientiously. I believe that we should be using limited forces in this situation" and, of course, at some point in that argument, the Congress either has to acquiesce or impeach him.

Senator **Evans**. Sure.

But it takes more to impeach him than it does to declare war in the first place.

Former Secretary **Richardson**. But let's face it, you've got a mess on your hands in that situation. The system has broken down, and the system can break down.

Senator **Evans**. I am only using this example to point out that it seems to me sometimes we overplan for unusual events, and I think the War Powers Resolution is a classic example of trying to overplan for events, each one of which will be unique, each one of which is almost totally unpredictable, and we'd probably be better off utilizing the Constitution rather than a War Powers Resolution.

There is one other element of the War Powers Resolution, however, that if we were to engage in this kind of thing, which calls for consultation—and that is right at the beginning of the War Powers Resolution; that is one of the elements, as I understand it, that brought about the War Powers Resolution, to make sure that Congress got involved—it comes down to what does "consultation" mean.

We specifically say well, consultation can be with a limited number in Congress, number of leaders, but that is not what the War Powers Resolution says. It says the President, in every possible instance, shall consult with Congress before introducing U.S. Armed Forces into hostilities—shall consult regularly with the Congress until the U.S. Armed Forces are no longer engaged in hostilities.

Well, this one Member of Congress does not feel consulted with if all that are talked to are the top 6 or the top 12 or some leadership group. You are not consulting with Congress. You are consulting with a small group of Congress, an element of Congress, who may or may not represent the group of Congress as a whole.

How do you respond to that?

Former Secretary VANCE. I would respond to that by saying that what is being suggested there is that before any deployment, there has to be a consultation with this small group, who are the leaders of the Congress.

Presidents can say I hear what you have to say, but I am not going to follow up and go ahead. You cannot stop him from doing that.

Then there has to be a report that goes forward. At that time, it goes before all of the Congress, and you deal with it as a body.

Senator EVANS. But if you are going to write a clear resolution and if we are going to amend this Resolution, would it not be more accurate to say that specifically, that the President shall consult with X leadership or describe who he should consult with, rather than say consult with Congress, because if we are going to pass this——

Former Secretary VANCE. That is what I would recommend, that that specifically be included.

Senator EVANS. If you don't do that, somebody, when this War Powers Resolution was passed, as a Member of Congress perhaps voted for it on the basis that he or she, as a Member of Congress, would be consulted. And now, with the way it is carried out, they are not consulted at all.

Former Secretary VANCE. In today's world, it is quite clear to me that that initial consultation cannot be had with the whole Congress.

Senator EVANS. I understand that.

Former Secretary VANCE. It has to be with the leadership of the Congress and that ought to be made clear by amendment.

Senator EVANS. I agree with that.

Former Secretary VANCE. But let me say how important this is.

I can think of several situations where, if there had been consultation in the true sense of the word, between the President or among the President and the congressional leaders, there might not have been the deployment that took place.

If the wisdom of the Congress were brought to bear, meeting in the Cabinet Room of the White House with that group of men, those kind of things can really turn momentum and events around, and frequently, I think, that may be to the benefit of the Nation.

Senator EVANS. I thoroughly agree with you.

Former Secretary VANCE. There is nothing to be lost by consulting with people of great experience, such as we have on the Hill.

Senator EVANS. I could not agree with you more. But does that not come out of wisdom, rather than statute?

Former Secretary VANCE. But I think you have to set up a mechanism for doing this to make sure it gets done.

Senator EVANS. Yes, elect a wise President.

Former Secretary VANCE. Let me say just one other thing.

Presidents—and I have served with some of them—are reluctant, in a situation like this, to consult. They don't want to consult. So, they find ways to get around it by saying that it really isn't "hostilities," or "hostilities are not imminent," and that kind of thing, and they go ahead and act. Therefore, they consciously decide that they are not going to and do not consult, in order that they won't be forced to sit down and hear what others have to say on this critical issue.

Former Secretary RICHARDSON. May I add a word from the somewhat different perspective that I have earlier expressed?

Secretary Vance referred to situations in which had the President consulted, some acts involving the utilization of U.S. military forces might have been averted. But, of course, one can think of other situations in which, had the President consulted the Congress or indeed any group of intelligent advisers, the action that he took might have been averted.

That is true of almost everything that we call "Watergate." It is surely true of the Iran hostages deal.

But those situations illustrate surely the proposition that it would not make sense to pass a law saying the President shall surround himself with wise advisers and he must on Mondays and Fridays consult them, and reserve at least an hour in his calendar on each of those occasions to do so.

There can, as I suggested, be some understanding arrived at early-on as to the kinds of situations in which the Congress legitimately expects consultation. As Cy says, maybe the President does not like it. But if some mutual understanding can be reached on that score and the President then violates that understanding, Congress has means of making its displeasure known.

I do not really see what is achieved by attempting to address through permanent legislation in abstract terms a relationship that has to develop on a footing of comity.

Former Secretary VANCE. May I just respond?

Senator BIDEN. Sure you can.

Former Secretary VANCE. I don't want to extend this unnecessarily.

In the kind of situations, Elliot, that you were talking about, where it was absolutely essential to go forward, the President, even if he has consulted, can decide to go forward, and that would be the case for Franklin Roosevelt and what he did with respect to Iceland and Greenland and with respect to the lend-lease operations. He can go forward and do what he wants to do.

Former Secretary RICHARDSON. I don't favor any less consultation than you do.

Former Secretary VANCE. Well, I am not sure, then, what you do suggest here.

Former Secretary RICHARDSON. As I have been saying all along, I agree with you on the proposition that there should be consultation, as I thought you had stated very well in your opening statement——

Senator BIDEN. But just not legislated.

Former Secretary RICHARDSON [continuing]. Prior consultation.

I simply feel that it is a snare and a delusion to attempt to legislate it. It is like legislating morality or trust.

Former Secretary VANCE. I would just add one final word, if I might.

I think that it would be a snare and a delusion to expect that all Presidents, that in the future you are going to get Presidents who are willing to agree to those kinds of consultations, and it is better to have it as the view of the Congress that this is what it should be. They do have the power, under article 1 of the Constitution, to make laws that affect the conduct not only of themselves, under their powers, but other officers of the Government, including the President, under, I think, a proper interpretation of that section of the Constitution.

Senator **Biden**. Thank you, gentlemen.

I have found it interesting over the years that so few Washington officials reach out beyond their inner circle of advisers in time of crisis, or even in less critical situations.

The tendency is, in times of difficulty, to turn inward, not outward. I don't know of anyone with whom I have served in Washington, DC, who has looked outward instead of inward, in times of crisis.

I know from my 9 years on the Intelligence Committee, that there have been cases where, as a consequence of having to explain it in a different forum, the President has changed his mind—not because he was fearful that any of us would walk out of the room and say that we disagree; not merely because he was fearful that if it failed, there would be something on the record where it said well, they told me beforehand, although that may have been an element; but, in fact, because elements of the plan turned out to be and were able to be seen to be, after a discussion and exchange, to have been flawed.

I don't know many intelligence officers who, once they find the flaw, run to the President and say: "Mr. President, I made a serious mistake here in judgment." I don't know of any Cabinet members who have ever done that. I know very few have even done what the two of you have done when you have thought a serious mistake was being made—to resign.

The primary reason for consultation, beyond the hope and prospect that maybe there is a little wisdom that might be brought to bear on the subject, was to have a united nation. The only time in modern history we have been badly hurt is when we have been badly divided. I cannot think of an occasion when we have been united that we have been hurt, that we have "lost" in any sense of that word.

I would add one other thing.

It seems to me that what has changed so drastically since our Founding Fathers drafted the document of ambiguity is that the Nation has changed, not merely in sociological and economic terms, but its place in the world has fundamentally changed.

We are a great power. We were an insignificant power when the document was written—a proud power, a noble power, but an insignificant power.

Second, we have responsibilities that exceed any nation in the world, in the history of the world, including the Roman Empire, including any other empire that could be named, in terms of the depth, breadth, and scope of those responsibilities. And the risk of mistake carries with it the possibility of annihilation of mankind.

Secretary Richardson, you are absolutely right, the War Powers Resolution grew out of a lack of trust. Everyone avoids saying that. But that is really what it was, a lack of trust.

In addition, it has continued, not because we have not trusted subsequent Presidents, but because there has been an increased realization that a fundamental mistake in the implementation of a policy can have consequences that we cannot back away from.

If a President commits troops in Xandu—there is no such country that I know of.

Senator **Evans**. As of yesterday, at least.

[General laughter.]

Senator **Biden**. If he commits troops, he may very well find, because there are Soviet troops in a neighboring country of X, that there may be a direct confrontation between United States and Soviet troops which could spark off a confrontation of unimaginable consequences.

That is why everybody is concerned.

Let me make one interjection first. Everybody knew what "Congress" meant when the War Powers Resolution was written. "Congress" is a term of art. When we say "consult with Congress" in any way, we know that that means Congress will provide its own rules to determine who among us will be consulted.

So, everybody knew what "Congress" meant. No one ever contemplated, nor do they now, that that means 535 Members would sit down and say "OK, now, Mr. President, tell me, what is that thing you are about to do?"

No one ever thought that. Nor does anyone think that now. It is a red herring, quite frankly, in my view, to raise it. But if it makes people feel better to have in the legislation the mechanism which Congress itself separate from that legislation can set up, then I'm all for it.

Mr. Secretary Richardson, what kind of confuses me is this concern that you have about institutionalizing consultation.

Do you think there is a constitutional prohibition on mandating it?

Second, what is the danger of mandating it?

Former Secretary **Richardson**. Well, I think that is a very fair question, Mr. Chairman.

Let me first say that I wholly agree with what you have said about the dangers that arise from a situation in which someone holding great responsibility comes to feel reluctant to broaden the base of those whose judgment is sought. I think that is a real problem and a real danger.

I would like to make one brief comment also on what I think you said extremely well about the changed responsibility of the United States in the world.

I think what you said on that score is clearly true. But I think it is also true that the consequence cuts in both directions. There can be situations in which a failure to act promptly, a failure to display resolve and the willingness to fight—the Cuban missile crisis is probably the best possible example on that score—might have led to war. So, the very portentiousness of the responsibility that the United States holds may mean, on the one side, that the executive branch should be given pause through the consultative process; but it could also mean that too burdensome requirements of that kind could prevent the very decisive actions needed to head off a crisis.

I would not argue, nevertheless, even having made that point, that this was the principal basis for resisting the statutory framework mandating consultation.

My basis for resisting it is essentially what I said at the outset, that it distorts the foundation on which that process should rest.

I cannot do better than to restate the point that it is an attempt to legislate trust. Trust should arise out of a human relationship in which it develops through the willingness to confer trust. Consultation is a part of that process.

The leadership of the U.S. Congress and the key committees and the President, whoever he is, ought optimally to develop along the kinds of lines that Speaker Rayburn always developed with the President of the United States.

I think it is fairly clearly demonstrable that where you have that kind of relationship—for example, it existed between Secretary Acheson and the leadership of this committee—the system works best, and that by passing legislation, you are, in effect, confessing, asserting, indeed, the belief that it is not going to work, that it won't happen unless you order it.

I think that is the flaw of the legislation.

Senator **Biden**. If I can make a very homely analogy, I have two lovely sons, whom I trust greatly. They have never let me down, to the best of my knowledge. Yet they had better be in by 1 o'clock. I trust them a great deal. They have given me no reason to believe that they would do anything beyond that hour. But I know there is not a whole lot to do in Wilmington after 1 o'clock, except to get into trouble.

When Bobby Inman came to our committee, he could say that the moon is made of green cheese and he would start off with the supposition on the part of the committee that he is probably right. He would be given the presumption of being correct because he is such a brilliant, honorable man, as were you, too, when you came before this Congress.

So, I don't see how the requirement for consultation hurts when there is already a relationship of trust. But is does not always work out that way. It is essential when there is no trust, as, with all due respect, when Bill Casey came before the Intelligence Committee.

Former Secretary **Richardson**. May I make just one quick comment.

Senator **Evans**. Mr. Chairman, that was a fascinating example of father and sons. We are talking here about the trust and the relationship between Congress and the President, and I would be fascinated to know whether the President represents the sons or the father.

Senator **Biden**. I acknowledge that it was a homely and trivial analogy. I could not think of a better one at this moment. But it was about trust. And I guess probably he is the father.

Senator **Evans**. It probably could have been husband and wife.

Senator **Biden**. Yes, husband and wife is fine, too.

Senator **Evans**. That is a different relationship.

Senator **Biden**. Oh, it depends on what time anybody comes in, I guess.

[General laughter.]

Senator **Evans**. What time do you have to be in?

Senator **Biden**. Oh, I have to be in early and often. [General laughter.]

Let me move on, if I may.

I would like to focus on the question of constitutionality and in particular on sections 5(b) and 5(c) of the War Powers Resolution.

Section 5(b) is the one that establishes the 60-day time period beyond which further authorization is required. Section 5(c) provides that Congress may terminate an action even within the 60-day period by concurrent resolution.

Secretary Vance, you have argued in favor of the constitutionality of both these sections.

Former Secretary **Vance**. Yes.

Senator **Biden**. Secretary Richardson, you have argued that both sections are unconstitutional.

Now I have reached no final conclusion on the matter. But my current thinking leads me to come down somewhere between you two, and that is to conclude that, in principle, section 5(c) is unconstitutional, but that section 5(b) can be justified constitutionally.

Let me tell you my thinking because I would like to discuss this a bit. It goes beyond this issue.

The President has definite, though I think limited, inherent authority to engage in hostilities under certain circumstances, but his inherent authority under the Constitution does not extend, I should say, to engaging in sustained hostilities.

It is hard for anybody to argue that "sustained hostilities" is not war.

And so, accordingly, it seems to me constitutional for Congress to recognize and explicitly affirm a variety of circumstances under which the President may use force for a limited period, even to authorize him to do so under circumstances in which he would not derive authority from the Constitution.

For example, we could authorize him, in advance, and generally, to commit U.S. forces to military actions for a specified period of time following any unanimous decision of the United Nations Security Council regarding peacekeeping efforts.

I think we have the authority to do that constitutionally, and he does not have any inherent right in the Constitution, necessarily—unless there is an emergency, where forces are under attack or U.S. citizens are in danger.

But in all cases, he would have to obtain further authorization to proceed beyond a specified period, and for one of two reasons: Because any inherent constitutional authority he might have had would have evaporated as the hostilities became sustained; or because the noninherent authority Congress had granted to him was granted only for a specific period.

In sum, I think it can be argued that, in principle, the timeclock in section 5(b) is constitutional; that we can stipulate a period of time beyond which a President requires further, specific authorization to engage in sustained military hostilities. At the same time, however, it seems to me that *Chadha* and its emphasis on the presentment clause of the Constitution point to the unconstitutionality of section 5(c), which contains a mechanism by which Congress can withdraw authority by concurrent resolution.

It would not seem to me constitutional that we could do that either with regard to inherent Presidential powers, which he has or does not have, or authorities we have granted him, for example, the U.N. authority that I have hypothesized.

I would appreciate your commenting on that.

Former Secretary VANCE. I agree with your analysis of section 5(b) and, therefore, would move on to section 5(c).

I would suggest that, not only is the *Chadha* decision distinguishable on the facts, both as a one-House veto and also as a matter arising in a domestic context—we know the *Chadha* court was concerned with the principle of separation of powers, that it would be determined by the delegation of broad, discretionary lawmaking authority to the executive branch, coupled with congressional veto over the administration of such law by means of a legislative veto; in contrast, the legislative veto contained in the War Powers Resolution does not undermine the principle of separation of powers. It does not accompany a delegation of lawmaking authority to the executive branch, and it is not an attempt to interfere with the administration of the law.

Rather, it is an attempt to assert the authority of Congress in an area where legislative and Executive functions are not susceptible to sharp delineation and where powers are shared, rather than separated.

Senator BIDEN. Secretary Richardson, would you care to comment at all?

Former Secretary RICHARDSON. Yes. Thank you, Mr. Chairman.

I agree with your result, as you would expect, as I had already said with respect to section 5(c), and I think there the result is not controlled by *Chadha* but by the language of the presentment clause itself.

On section 5(b), I think you stated, as well as I can imagine there being stated, the possible basis for justifying the constitutionality of the subsection.

But I think equally one could find various conjectural situations in which the inference that Presidential authority had evaporated was not justified; that you had a situation subject to chronic flareup, for example, and that the very circumstances that have led to a limited deployment of U.S. forces at the beginning of the period still persisted.

In any case, I find intrinsic difficulty with the notion that there is entailed somehow a form of delegation to the President to deal with an emergency that can be withdrawn by the Congress.

I think the shoe is on the other foot. The President has whatever power he has and it is not subject to limitation by congressional statute in the abstract and in advance.

Senator BIDEN. You have both indicated that you think the War Powers Resolution is a bad title.

I have begun to circulate in a very small circle—and you now have copies—a possible alternative to the War Powers Act.

I will not ask you about that now, but I would appreciate over the coming weeks your taking a look at it and giving me your views.

But you will notice the title of the new act that I am proposing is the "Use of Force Act."

Former Secretary VANCE. Yes, I noticed that.

Senator BIDEN. Now, I am a little bit puzzled by what seems to be a matter of widely accepted conventional wisdom these days, that it is impossible to devise, to define the circumstances and purposes for which the President should be empowered to use force without specific authorization.

With your assistance, I would like to think this through a little bit here in the next few minutes. I realize that I am trespassing on your time, but I would appreciate it if you would be willing to stay just a little bit longer.

Let me list six authorities which I think are fairly encompassing, and then I would like to ask you all, either now or for the record, if either of you can imagine any conceivable circumstances not covered by these six authorities which we could hypothetically grant the President.

They represent an amalgam of authorities that inhere in the Constitution and that the Congress I believe could grant by statute.

Let me just read them for the record and maybe for your possible response now.

One is to repel an armed attack upon the United States, its territories, or its Armed Forces.

Two is to respond to a foreign military threat that severely or directly jeopardizes the supreme national interest of the United States under extraordinary emergency conditions that do not permit sufficient time for Congress to consider statutory authorization.

Three is to protect the lives of citizens and nationals of the United States located abroad in situations involving direct and imminent threat to their lives, provided they are being evacuated as rapidly as possible.

Four is to forestall an imminent act of international terrorism known to be presently directed at citizens or nationals of the United States or to retaliate against the perpetrators of an act of international terrorism directed at such citizens or nationals.

Five is to protect, through defensive measures and with maximum emphasis on multinational action, internationally recognized rights of innocents and free passage in the air and on the high seas.

Six is to participate in emergency actions undertaken pursuant to the approval of the United Nations Security Council.

It may be a little unfair to ask you to respond now, unless something immediately comes to mind. The mere fact that you cannot think of an exception now does not mean that they do not exist.

If you would like to respond now, or in writing, I would appreciate it.

Former Secretary RICHARDSON. In my case, Mr. Chairman, something does come immediately to mind, but not in addition to the list.

Listening to you and reading it concurrently, it impresses me as pretty exhaustive. I would be glad to give it further thought and would certainly communicate to you any suggestions for addition or modification that might occur to me.

But what I do want to say now is it seems to me an extraordinarily presumptuous exercise.

Senator **Biden**. That is not an unusual occurrence on the Hill here, as you have observed, Mr. Secretary, nor in the White House, as I have observed.

Former Secretary **Richardson**. That, of course, is one of the reasons why the Framers created a system of checks and balances.

The preliminary clause says the President is authorized to use force abroad in the situations enumerated. That, of course, invites the question what gives Congress the idea that it is empowered to grant any such authority?

I think even the advocates of a weak version of the Presidency in Philadelphia would have been surprised by the notion that the President of the United States lacked any of these powers by virtue of his authority as the Chief Executive.

I think it would be a flaw of our constitutional system if they had thought otherwise.

Surely he must be able to take these actions. The implication is that if Congress had not passed this law, he would be helpless. Clearly that must be wrong.

Senator **Biden**. There is a great deal of legislation that is passed that, in effect, reaffirms a power that already exists in the judicial or executive branch of the Government, but is done for the purpose of clarifying what has been a matter of significant dispute and national division up to that point.

All of us would agree that there has been significant debate on whether or not some of these powers are inherent to the President. There was debate here on the Hill as to whether or not the response to the acts of terrorism against American citizens outside of the United States and outside of Libya warranted or gave the President the right to respond as he did.

There was debate and there is debate right now as to whether or not the President has the constitutional authority to take the position he has taken in the Persian Gulf in terms of the deployment of forces, and so on.

So, whether or not he, in fact, has these rights inherently, it may be useful to articulate and clarify them, implicit in this is the recognition that some of these powers are inherent. My draft legislation does not say "is hereby authorized." It says only "is authorized," leaving open the question of what presidential authority is inherent and what would be authorized by that law itself. In other words, it would include all the powers that are regarded as inherent while not trying to distinguish just where the dividing line is.

Can you think of any circumstance which would warrant the President being able to use force that is not covered in the prospective authorities I have cited?

That is the purpose of my question.

Former Secretary **Vance**. Senator, I would like to study the text of your draft and then respond to you. It looks to me to be a very comprehensive list.

The first three I think clearly already exist, either by statute or by judicial precedent.

It seems to me, with respect to four, that recognizes a new reality in the world today and it seems like a reasonable addition.

With respect to the latter two, I would like to think more about it, and I would like to think more about the question that Elliot raises, if you try to enumerate all of these at this time, are we helping ourselves or making it more complicated.

It is a very interesting proposal and I want to study it.

Senator **Biden**. I want to emphasize that this truly is a draft, put out there for discussion.

As early as my first month in the U.S. Senate in 1973, I came down on the side of Senator Eagleton and others, whose greatest worry was that having a War Powers Act was going to grant to the President authority that was not inherent in the Constitution, that he did not have, and that we were, in fact, "giving away" or "enhancing the power of."

I acknowledge that when you attempt to enumerate, you run the risk of doing that also, as well as leaving pieces out.

But the most important thing that I think everyone, particularly you two men this morning, has emphasized is that we are badly in need of either an era of trust. We need a mechanism that does not thwart the possibility of building that trust, but also protects both branches in the absence of trust, for the ultimate purpose of having a consensus in the conduct of foreign policy and, specifically, in the use of force.

I know you, Mr. Secretary, as Secretary of State, and I recall you, Secretary Richardson, as Secretary of Defense. I recall that that was one of the main elements of everything you would do when you would come to the Hill, a recognition of the need for trust.

There is the old expression "If you want us in, Mr. President, on the landing, we must be there on the takeoff."

My experience with both of you has been that you have acted in just that way, because it is just a sound way to conduct foreign policy.

Let me ask one concluding question that spins off that.

It has puzzled me since the Act has been in place. When the War Powers Act was approved, I viewed it as a Presidential act rather than a congressional act. This is because it seemed to me that there were very few, if any, situations in which the President, having committed U.S. forces for a 60-day period, would find a Congress willing, either through its nonaction, or in its affirmative action, to come forward and say: "Mr. President, bring those troops home."

I think the only time that occurs and has occurred in our history is when that time period has been elongated to the point that it becomes clear that it is a messy undertaking.

So, one of two things happen. Either the President, in that 60 days, goes in and gets the job done and everybody in Congress, in both parties, says "Yes, he did the right thing," even though they believe they would have been against it in the first place. Or, the President is in the middle of a conflict and "American boys" are under fire and the call goes out to rally round the flag, and few, if any, Members of the Congress are willing to stand up in that kind of atmosphere and say bring them home.

So, my question is this.

In your times in the White House, was there any reason, beyond the worry of establishing the constitutionality of the Act, why a President would not have made a report under 4(a)(1), starting the clock ticking, knowing that he was likely to be able to bring the Congress in, and everybody in, on the takeoff—the flip side of that being that Congress cannot criticize if there is a crash?

Why haven't Presidents used this to their advantage?

Former Secretary VANCE. The constitutionality is the main issue raised by Presidents in deciding not to consult.

On the other hand, as I indicated before, there is a reluctance to consult sometimes because the President does not want to hear what he may be told by the leadership in Congress.

Senator BIDEN. Mr. Secretary, if I could be more specific, there is a provision in the Act in which the President would send up a report, having nothing to do with consultation, that would start the 60-day clock ticking.

We have received reports, but these reports have said: "We're telling you what happened," but it really doesn't fit with the legal requirement. [Pause.]

Senator BIDEN. I don't recall the exact language of section 4(a)(1), but the report is to the effect that "I have introduced the forces into hostilities or imminent hostilities," and that starts the clock.

No President—except for President Ford, and that was in *Mayaguez*—ever did that and that had already been done. In other words, by the time we got that report the whole exercise was over or just about over.

Presidents have avoided confronting the constitutionality of this Act by never sending up a report clearly labelled as a section 4(a)(1) report.

My point is that it would seem to me by sending up a report and starting that clock running, what you would have up here is a lot of Congressmen and Senators breathing hard. Those who were opposed to the action would have to oppose it in an atmosphere that was "rally round the flag," and those who supported the action would be in a very solid position of characterizing it as "total congressional support."

Let me make one last comment and then ask you to comment.

To be very honest about this, there are clear reasons why the War Powers Act has not been invoked, as Senator Adams has wanted, on the Persian Gulf. Probably one-third of the Members of Congress believe it is unconstitutional and wrong and that there should be no act. So, they don't want to acknowledge that it even exists or has a right to exist.

Probably 40 percent believe that it should be invoked but they can't get it up because of procedures here.

All the rest in the middle are hoping that it won't come up because then they are going to have to vote, and if they vote, they are either going to have to go on record as saying President Reagan is right in what he did or President Reagan is wrong in what he did.

That portion, 20 percent or so, is sitting around, having the best of both worlds.

If it goes badly they can say: "I told you we should not have done that." If it goes well: "The President made a proper decision here."

That is the honest to God truth, in this Senator's opinion, why we have not been able to get a vote under the Act.

I would assume Presidents, being savvy politicians, would understand that and capitalize on that for the purpose of establishing a consensus, not unlike the Gulf of Tonkin at the time.

Former Secretary **VANCE**. I agree with what you have said. That is the way I look at the Act.

Let me just state for the record to make sure it is complete that another issue raised by Presidents has been the question of secrecy: If I talk to the people on the Hill, including even the leadership, is it going to leak?

All I can say about this is from my experience, and I go back to that period of over a year when we had our hostages in Tehran, held by the Iranians. At least 4 days a week Warren Christopher and I went to you, alternating with the Senate side and the House side, and met with the leadership and brought them up to date on what was happening.

We told them I think everything that was taking place and there was not one leak over that extended period of time with respect to any of the very sensitive materials that were being discussed.

Former Secretary **RICHARDSON**. I would add just one further comment, Mr. Chairman.

I agree with the analysis that you have just set forth and I think your exposition of the attitudes of the Members of the Senate certainly sounds not only plausible, but convincing.

I think, from the President's side, on the other hand, an attitude related to the issue of constitutionality in a formal sense is a feeling that it is essentially inappropriate for him to acknowledge the legitimacy of Congress' purporting to regulate the relationship, that it is OK, given the point that Secretary Vance made earlier, that there is a degree of overlap and mixture between the executive and legislative branches in the context of war powers, that there should be communication and cooperation and mutual understanding, so far as possible, but don't tell me that I have to do it.

That, as I have said, I guess repeatedly, is to me what also tends to undercut the very opportunity to develop an appropriately cooperative relationship.

Senator **BIDEN**. I thank you very much. I think that is an insightful comment.

You know, when you think about it, gentlemen, one of the reasons why the Constitution has functioned as well as it has for so long is because the men who wrote it were keen observers of human nature.

Former Secretary **RICHARDSON**. Absolutely.

Former Secretary **VANCE**. Indeed.

Senator **BIDEN**. They had a pretty good idea how people thought and reacted.

As Emerson once said in another context, "Society is like a wave that moves on; but the particles remain the same." Not much has changed in the millennia in terms of how humans look at their self-interest.

Well, I have trespassed too long on your time now. You fellows do, in fact, make a living and have other responsibilities, but you also have remained public servants in the best sense of the word.

Thank you.

Former Secretary **Vance**. Thank you for asking us to come to testify on this important matter.

Senator **Biden**. You have provided us great insight. Thank you.

Former Secretary **Richardson**. Thank you, Mr. Chairman.

Senator **Biden**. Thank you very much.

This hearing is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene at 10:19 a.m., September 20, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

TUESDAY, SEPTEMBER 20, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 10:19 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Joseph Biden (chairman of the subcommittee) presiding.

Present: Chairman Pell, and Senators Biden, Helms, and McConnell.

Senator **BIDEN**. The Special Subcommittee on War Powers today resumes hearings directed at answering the critical question: Can the War Powers Resolution of 1973 be amended, repealed, or replaced, so as to improve the effective cooperation of the President and the Congress in national decisions concerning the deployment of American forces in situations of actual or likely combat?

In previous hearings, the subcommittee heard from legislators involved in the origination of the War Powers Resolution, from distinguished American historians, from former military leaders, from the State Department Legal Adviser, from former Cabinet officials of both parties, and from former President Ford.

Today the subcommittee will receive further significant testimony from a distinguished panel, constitutional of scholars. We had expected to hear from Mr. Caspar Weinberger, who served as Secretary of Defense during most of the Reagan administration, but a scheduling problem has prevented that.

I have said at the outset of each of these hearings that, while the war powers issue is both intellectually complex and emotion-laden, its fundamental importance to the U.S. national interest requires that we bring to bear upon it the most thorough and dispassionate consideration.

It is my hope that this subcommittee will provide a forum for that kind of deliberation, leading us toward an improvement in the law that ends the current constitutional stalemate.

At the same time, I recognize that we face a paradox. Because there is no current war powers dispute of great interest to the public, we find ourselves able to conduct our proceedings with the necessary dispassion of which I spoke, but also in a political context that might fairly be described as lethargic, in that it contains little sense of urgency compelling us toward any substantive action.

Nonetheless, the subcommittee's goal of improving the law in this area is critically important, and, with that goal in mind, I welcome our distinguished panel of witnesses.

Before I go to the witnesses, I would yield to my distinguished colleague, the ranking member of the full committee.

Senator HELMS. Mr. Chairman, thank you very much. I will be brief.

I thank the panel of distinguished attorneys, who have come to help us consider what I have always felt was a bad idea. I voted against the War Powers Act.

I have said many times that I recall calling Senator Ervin the morning following the evening that I had taken the proposed legislation home to study.

I said, "Senator, can I come over for just a minute," and he said, "Sure."

I went over and I tossed the proposed legislation on his desk and asked if he had looked at this. He said, "Of course I have." He said, "What do you think of it" and I said that "I think it is unconstitutional." I said that "I'm not a lawyer and am kind of proud of it, but if this is not unconstitutional, I can't imagine anything that is."

He said, "Well, you may not be a lawyer, but you understand the English language."

So, in reflection, the War Powers Resolution, which is commonly called the War Powers Act, was a reaction, I suppose, a misguided one, to a controversial war. It was a reassertion of power by an assertive Congress over a weakened President. Nobody knows that better than Secretary Weinberger, and I suspect that he will say something like that when he comes.

Last week, former President Ford was here and I was impressed with his testimony. He operated from notes. He did not read a prepared statement. He was thoughtful and persuasive, at least with this Senator.

President Ford said that the War Powers Resolution undermines peace in the world. That's what he said. The War Powers Resolution destabilizes the foreign policy of the United States.

Now I know that there are many who will not agree with him, nor will they agree with me for agreeing with him. But I think he hit the nail right on the head.

Now the prominent gentlemen before us, Mr. Chairman, three of whom are law professors, I hope they will tell us why a plainly unconstitutional statute is still in effect after 15 years. I wonder why the courts have not done something about it. I have urged, encouraged, the Reagan administration to try to get this thing into the courts so that we could finally get it settled. Maybe we can have some discussion about that this morning. We are still debating this issue after 15 years.

Now, interestingly enough, there is not much interest in these hearings. But I am glad to see as many people here this morning as are here.

I noticed, following President Ford's appearance here last week, there wasn't a line in most of the papers—nothing. So, it is being ignored in 40 languages.

I don't think the public is interested in these hearings. I have to be honest, I'm not particularly interested in these hearings, either. [Laughter.]

Anyway, Mr. Chairman, thank you very much.

I am looking forward to hearing our witnesses.

Senator BIDEN. Well, I'm delighted you are here. I assume, then, that it is just a personal testimony to me that brings you here, Senator.

Senator HELMS. Absolutely. [Laughter.]

Senator BIDEN. I truly appreciate that.

Senator HELMS. You're my buddy and I want to be with you anytime I can. [Laughter.]

Senator BIDEN. Don't laugh, folks. We're trying to work out a wholesale furniture trip to North Carolina.

Senator HELMS. That's right. [Laughter.]

Take money and keep North Carolina green. [Laughter.]

Senator BIDEN. I am also sure that President Ford, notwithstanding at this late date, is happy to hear that you agree with him. He would have liked that in 1976, he told me.

As you say, the press hasn't been much interested in these hearings.

But maybe that gives us an opportunity to do something that we so seldom have a chance to do here, and that is just the simple, hard, boring work that is required to deal with some obviously important subjects.

Although I have conducted hearings and been involved in hearings that have excited my passions more than this hearing, I don't think there is any that I have been involved with that dealt with a subject matter that is fundamentally more critical to this country than the one we are here to discuss.

I truly am delighted to have such a distinguished panel.

As a matter of convenience, maybe we could hear testimony in the order in which you were listed: Professor Chayes, Professor Franck, Mort Halperin, and Professor Rotunda, unless you all have decided there is a more convenient way for you to do it.

Professor Chayes, we would be delighted to enter your entire statement into the record if you don't want to read it all. If you wish to read it, please go right ahead—any way you would like to proceed.

STATEMENT OF ABRAM CHAYES, FORMER LEGAL ADVISER, DEPARTMENT OF STATE, CURRENT FELIX FRANKFURTER PROFESSOR OF LAW, HARVARD UNIVERSITY LAW SCHOOL

Mr. CHAYES. Mr. Chairman and members of the committee, it is, as always, an honor as well as a pleasure to appear before you.

I believe that the War Powers Resolution of 1973 is constitutional, except for section 5(c), which, as I think everybody agrees, is invalid under the rule of the *Chadha* case.

It is obvious from the text of articles 1 and 2 of the Constitution that the design of the Framers divides the power to use the Armed

Forces of the United States between the President and the Congress. I believe even executive branch lawyers would recognize that.

The Constitution does not specify the precise line of division. In the 18th century, the functional importance of a declaration of war was much greater than it has become since, and the Framers relied heavily on that device to ensure that Congress had a coequal role.

The erosion of the technical requirement of a "declaration" should not fundamentally alter the constitutional structure.

The proposed scheme of shared and divided power was to ensure that, as in the case of ordinary legislation, both of the political branches of Government were in agreement as to any major military action by U.S. Armed Forces, save perhaps for self-defense, or which such agreement could be presumed.

Agreement is not less, but more necessary today. Bitter experience has shown that the commitment of U.S. troops to action abroad cannot be sustained over any significant period without widespread public support, registered through Congress.

The War Powers Resolution, I believe, establishes a reasonable, simple, and workable procedure for exercising the shared powers of the two branches. I would be opposed to amending its operative provisions either to loosen or tighten them. I do not think there is a political consensus for more stringent limitations on the President's powers. And, in any case, the proposals for accomplishing this goal increase the complexity and detail of the procedures under the Resolution and raise many new and difficult questions of interpretation.

Likewise, I would oppose relaxing the requirements of the present War Powers Resolution by eliminating the automatic 60-day period for withdrawal of troops in the absence of congressional approval. The draft put forward by Senator Byrd would require affirmative legislation to mandate the withdrawal of troops committed to action by the President. There is no need of a special resolution to accomplish that result.

In my view, the power of Congress to enact binding legislation forbidding deployment or requiring withdrawal of troops from foreign combat springs directly from the Constitution. If the President were prepared to ignore such legislation, he would surely not be deterred from doing so simply because Congress had acted pursuant to a previously adopted resolution.

What the constitutional provision for congressional declaration of war envisions is something more: Affirmative concurrence by Congress in any commitment of U.S. forces to major military action, other than in self-defense.

Senator Byrd's draft does not effectuate that requirement.

More broadly—and here I agree with Senator Helms—I believe the difficulties that have arisen under the War Powers Resolution over the past 12 years cannot be cured by tinkering with its substantive provisions. The Resolution would provide an effective framework for joint exercise of the war powers by the two branches, if they were prepared to operate in accordance with its terms.

The reason the Resolution has not worked as it was intended is not that either branch is out to usurp power. It is that each occasion for invoking the Resolution becomes an occasion for a battle between the branches about the constitutional allocation of power between them.

In the absence of an authoritative outside decisionmaker, there is no way to resolve this controversy, except for one side or the other to give in. It is understandable that, in such circumstances, neither side is willing to do so, because that might be to abandon power that rightfully belonged to it under the Constitution.

You will recall that Harry Truman, on principle, refused to seek formal congressional approval of the commitment of troops at the outset of the Korean war. He feared that it would set a precedent diminishing the constitutional power of the Presidency.

A number of congressional resolutions have been enacted since then—Formosa, Lebanon, Cuba, Tonkin Gulf. I have been in on the drafting of some of them from the executive branch side, and I can testify that in all of them, the object of executive branch lawyers at the drafting level was to make sure that the language did not imply that congressional approval was constitutionally necessary.

The usual recourse in our system when there is a controversy over the division of governmental powers is to the courts. That is where I agree with Senator Helms. The judiciary, on the whole, has been loath to resolve interbranch conflicts, particularly in the area of military and foreign affairs. It has been content to let the Executive and Congress work out their own accommodation and resolution of the ambiguities.

This prescription has not worked in the context of the War Powers Resolution. In fact, it has made matters worse.

Every time the Resolution has been invoked, it has unleashed a debate about the respective powers and duties of the President and Congress under the Constitution, rather than about the wisdom or the propriety of the particular military action.

I believe, therefore, that the best way to improve the War Powers Resolution is to provide for judicial determination of the constitutional and interpretive questions it raises. I think this can be done by statute, because it seems to me that judicial abstention in the war powers cases reflects, for the most part, not inherent limits on the judicial power under article 3 of the Constitution, but so-called prudential considerations.

Congress can, by legislation, resolve those considerations in favor of adjudication. It might even be that the executive branch would agree to such a course of action in order to avoid the debilitating constitutional arguments that have attended every previous effort to invoke the War Powers Resolution.

Senator Byrd's proposal points in that direction.

Section 5(c) of his draft resolution authorizes any Member of Congress to sue to enforce certain limited provisions.

I know it is a controversial question whether a Congressman has standing to sue to enforce a statutory limitation on the basis that this is necessary to prevent dilution of his or her vote. On the whole, the courts have not been hospitable to such actions.

But an act of Congress, simply by establishing a cause of action in favor of particular persons, can create standing where none existed before, at least in some circumstances. That was the case under the Freedom of Information Act, which establishes in every person a right of access to Government documents, whether or not that person has any special or particularized interest in the documents sought.

Similarly, the National Environmental Policy Act gives rise to a private right of citizen action that, in turn, supplies the standing requirement.

Some of the war powers cases suggest a more stringent standing or "ripeness" requirement in that context. They look for evidence of a genuine conflict between the branches, not just a difference among Members of Congress that can and should be settled by voting.

Justice Powell rejected Senator Goldwater's effort to test the constitutional power of President Carter unilaterally to terminate the Mutual Defense Treaty with Nationalist China on this ground. Again, it is not clear whether the courts have seen this requirement as a constitutional one or as merely prudential.

In any case, institutional action would clearly fulfill such a requirement. Congress, by concurrent resolution, could authorize suit to resolve any controversy arising under the War Powers Act.

A single House resolution could authorize suit to be brought in the name of that House. In either case, I think it clear that standing to raise the issue would be present. I believe the same would be true if, by legislation, an appropriate group or committee of Members were empowered to authorize suit on behalf of the Congress.

The permanent consultative group established in section 3(c)(1) of Senator Byrd's draft resolution could be such a group.

In *Burke* v. *Kline,* 759 F.2d 21, 33 individual Congressmen sued to challenge an asserted exercise of the pocket veto. The Senate was allowed to intervene under a resolution authorizing the Senate Legal Counsel to take the necessary steps.

The Speaker of the House and the House Bipartisan Leadership Group, made up of the majority and minority leaders and whips, intervened successfully to "assert the rights and privileges of the House of Representatives."

In this case, the court suggested, as I have here, that the usual prescription to let the two branches fight it out between them might be worse than the disease.

If the War Powers Resolution were amended so as to establish standing to raise constitutional and interpretive issues arising under it and to indicate generally that Congress, and the President by approving this amendment, invited judicial resolution of these issues, I believe the courts would be prepared to adjudicate. With the courts available to settle these otherwise irreconcilable issues, the executive and legislative branches would be free to move forward and actually operate under the War Powers Resolution to secure the necessary commonality of purpose in those grave and difficult situations where U.S. military action is a possible response to foreign policy problems.

Thank you.

Senator Biden. Thank you very much, Professor.

[The prepared statement of Mr. Chayes appears in the appendix.]

Senator Biden. Our next witness is Professor Franck.

STATEMENT OF THOMAS M. FRANCK, PROFESSOR OF LAW AND DIRECTOR, CENTER FOR INTERNATIONAL STUDIES, NEW YORK UNIVERSITY SCHOOL OF LAW; AND EDITOR IN CHIEF, THE AMERICAN JOURNAL OF INTERNATIONAL LAW

Mr. **Franck**. Thank you, Mr. Chairman.

It is a great privilege to be here again and a pleasure to see you so evidently recovered and back in the saddle.

Senator **Biden**. Thank you.

That maybe is one of the reasons why I am happy to be here. I don't find these so boring. I have been away for 7 months.

Mr. **Franck**. One's mind is wonderfully focused by a health crisis.

I would like to ask for permission to have my testimony reprinted and I will give you only an abridged version of it at this time.

Senator **Biden**. Your entire statement will be placed in the record.

Mr. **Franck**. Thank you.

I think the committee and the committee staff are to be commended for examining this issue at a time when, to borrow Senator Helms' words, it "is boring," because the alternative is to consider the division of authority between the President and the Congress in the midst of war or in the midst of conflict, which is the worst time in which to address these sorts of issues.

We have now had three Republican and one Democratic administrations functioning under the War Powers Act. The experience of those administrations transcends and encompasses conflicts in Indochina, Iran, Libya, Lebanon, Grenada, Nicaragua, the Persian Gulf, and Chad.

No fewer than 18 reports have been filed by Presidents Ford, Carter, and Reagan, ostensibly under or in compliance with the War Powers Resolution. So, we have a considerable paper trail with which to begin an evaluation of its effectiveness.

Clearly, one undesired and undesirable side effect of the War Powers Resolution, to which my friend and colleague, Professor Chayes, has already alluded, is its tendency to envelop foreign policy in a legal miasma. It has transformed argument about the political wisdom of being involved in military encounters in the Gulf of Tonkin or the Persian Gulf or the Gulf of Sidra into an arcane debate about the legality and constitutionality of various foreign policy initiatives.

This impoverishes the marketplace of ideas and shrinks the dimension of public comprehension and participation. It simply leaves most Americans bewildered.

The War Powers Resolution's effect on the public life of our Nation should be to resolve the constitutional issues with sufficient simplicity, clarity, and certainty that the decks can be cleared to permit a concentration on the policy debate about the wisdom or the folly of any particular engagement of the Armed Forces. Only if Congress can make sufficiently clear what is legal can we concentrate on what is wise.

The first objective of the law, then, should be to establish as clearly as possible the respective authority of Congress and of the President. The point of clear legislative definition is not merely to clarify and invest with greater certitude the distribution of powers, but also to reclaim those powers of Congress which have been abdicated by congressional inaction in the face of Executive initiatives.

To define successfully is to limit. As Justice Jackson said in his "Youngstown" concurrence: "Congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility."

Yet another reason to define clearly the applicable law is to help courts to decide to decide. In *Baker* v. *Carr,* Justice Brennan, while denying that "every case or controversy which touches foreign relations lies beyond judicial cognizance," nonetheless noted the difficulty judges encounter when the issues "turn on standards that defy judicial application."

As the War Powers Resolution is currently drafted, it contains no standards whatsoever, no guidance to the President, the courts, or to the public, as to when, in what circumstances, the President must obtain congressional concurrence before taking the Armed Forces into combat or anticipated combat.

Section 2(c) at first appears to provide such guidance, but it fails: First, because it is a purely prefatory clause, and, second, because the House-Senate conference report actually states that it does not govern the rest of the Act.

If it were intended that 2(c) restate Congress' notion of the extent and limits of Presidential power, it would be fatally flawed as such a restatement. No provision, for example, is made for Executive action to rescue Americans imperiled abroad, which is clearly, it seems to me, within his prerogative powers.

Thus, the first object of a revised War Powers Resolution should be to establish in law Congress' view of when the President may use the Armed Forces without its consent. These circumstances are fairly limited: To repel an armed attack or imminent attack on the United States or its Armed Forces; and to effect the speedy and safe evacuation of U.S. citizens from the high seas or foreign territory if the government or the country of the ship's flag is unable to provide the requisite standards of protection required by international law.

These standards, in approximately similar form, are spelled out in House Joint Resolution 462, introduced by Congressman DeFazio. These are the circumstances in which a speedy response is likely to be most needed in the foreseeable future.

In Senate Committee Print 1, Senator Biden's draft bill, section 4 also attempts such an enumeration, and I think that that is commendable in its intent, but it needs fine tuning. It seems to me that subsection 2 of section 4 is overbroad, that section 4 would be covered by the provision concerning the right of the President to respond to an armed attack or imminent attack, and that section 5 is also overbroad in giving the President carte blanche to respond with unilateral force and without congressional concurrence.

That provides for the President to have unilateral power to protect, through defensive measures, and with maximum emphasis on multilateral action, internationally recognized rights of innocent and free passage in the air and on the high seas.

It seems to me that that is either redundant or overbroad in the sense that if there were an actual attack on an American ship, it would be covered by the provision to repel an armed attack upon the United States, its territories, or its Armed Forces. If there were simply a closing of a strait, then I would think that the first thing the United States might do to ensure the openness of the strait would be to ratify the Law of the Sea Treaty and then to declare a dispute under the Law of the Sea Treaty and go through the adjudicative procedures that are provided for there, and then seek to incur collective measures if it wins a favorable decision, followed ultimately, if collective measures do not work, by unilateral action perhaps.

But the reach here of section 4, subsection 5 is, I think, much broader than either the Constitution or international law warrants, let alone mandates.

Once Congress has legislated a clear definition of when the President is authorized to respond militarily without the prior specific consent of Congress, a discernible boundary will have been established. But how can such a boundary be defended?

The President, not Congress, speaks for the Nation to the world. He, not Congress, controls the Armed Forces. He has demonstrated occasional willingness to act, even in the face of specific and unambiguous legal prohibition, as best exemplified by President Ford in the *Mayaguez* rescue.

Who is to invigilate even the clearest of boundaries between permissible and impermissible Presidential use of military power?

The answer is that Congress, short of deploying either the Sergeant at Arms—too little weight, I think—or the impeachment power—too much weight, I think—has only two potential allies who could help it defend its boundaries of authority once those have been clearly marked. One is the Federal judiciary, as Professor Chayes has already stated; the other is the U.S. Treasury.

Both should be utilized and both are utilized in Committee Print 1, as well as in part in the Byrd-Warner bill.

The procedures for their utilization should be spelled out in the law. This, commendably, is attempted in your Committee Print 1, though I think those provisions also need fine tuning.

It is by no means certain that the Federal courts are willing to defend even a clearly marked boundary. But an effort should be made to give them the optimum opportunity to see it as both in the interests of the Nation and of the judiciary that they should do so.

To this end, the legislation, in addition to spelling out clear, applicable standards, should specifically authorize the courts to umpire and create the procedural requisites for a case or controversy between Congress and the President.

Can the legislature tell the courts to umpire? It can probably create standing, as Committee Print 1 does, but jurisdiction is another matter.

The courts have used the political question doctrine as a shield against involvement in interpreting the War Powers Resolution. The most recent instance is the judiciary's specific refusal to consider a complaint by 110 Members of Congress that deployment of U.S. forces in the Persian Gulf triggered the reporting requirements, and by implication, the 60-day limit of the War Powers Resolution sections 4(a)(1) and 5(b). That, of course, was *Lowry* v. *Reagan*.

Yet that is not necessarily the last word. Congress has not spoken to the judiciary by law on this jurisdictional matter and it should now do so. Judges ought to listen to a law that authorizes them to decide, and have done so in comparable circumstances.

In *Banco Nacional de Cuba* v. *Sabbatino,* the courts had refused to apply international law to decide on the legality of acts by foreign governments involving expropriation of U.S. assets. Thereafter, Congress enacted the Hickenlooper amendment to the Foreign Assistance Act of 1961, which mandated the courts to decide such cases "on the merits giving effect to the principles of international law."

So ordered, the Federal judiciary complied.

In *Banco Nacional de Cuba* v. *Farr,* the district court, acknowledging Congress' "considerable measure of power with respect to the courts," concluded that "when Congress, dealing with subject matter within the powers delegated to it by the Constitution, speaks with respect to a voluntary judicial policy of self-limitation, the courts are bound to follow its directions unless compelled not to do so by the Constitution."

The court's use of the political question doctrine, like their use of the Act of state doctrine in the *Sabbatino* case, is constitutionally based on separation of powers fastidiousness. But, as with all disputes turning on distribution and separation of powers, the courts are bound to give weight to the legislatively expressed views of Congress.

Equally, Congress can improve the prospects of judicial umpiring by addressing the issue of ripeness.

In *Goldwater* v. *Carter,* Justice Powell, in his concurring opinion, expressed the view that the courts should decide disputes between the executive and legislative branches, but only when they "reach a constitutional impasse" and "final disposition of the question presented would eliminate, rather than create, multiple constitutional interpretations."

To meet that test, he suggested, Congress should have "challenged the President's authority" by "appropriate formal action," and the resulting uncertainty would have to be perceived by the judiciary to have "serious consequences for our country."

Using Justice Powell's signposts, the Congress' revision of the War Powers Resolution could include an amendment to its rules of procedure which would provide, for example, that, on motion by any 10 Members of each House and utilizing accelerated procedures, a vote could be taken on an unamendable resolution of disapproval which would signify the existence of a constitutional impasse.

The Resolution would stipulate that the specific Presidential use of force had been found to constitute a violation of the limits on his sole authority to initiate the use of armed forces in, or imminent anticipation of, combat.

Besides ripening the constitutional dispute so as to make judicial umpiring more likely, the same procedure could also begin the process of bringing into play the assistance of the Treasury, over whose expenditures the Congress has undoubted supremacy. The War Powers Resolution could provide that if the aforementioned Resolution of disapproval were passed by the Senate and the House and the President, nevertheless, persisted, a point of order, movable by any Member, would lie to foreclose consideration of any bill authorizing or appropriating funds for the Department of Defense.

Both Chambers would amend their rules of procedure to implement the effect of a concurrent resolution of disapproval. If further fiscal clout were needed, the War Powers Resolution could provide, as amended, that no funds previously or thereafter authorized or appropriated by any law could be used by the President to pay for the use of the Armed Forces or other forces under his command for purposes incongruent with his authority, as stated in the Constitution and the War Powers Resolution.

The combined effect of these several provisions would be to ripen a political confrontation into a judicially cognizable dispute, and, simultaneously, to draw shut the pursestrings when the President exceeds his constitutional and legislatively ordained authority, and if the courts were to refuse to adjudicate.

The proposed revision might also make provision for suspending the fiscal remedy, as long as the judicial remedy were being pursued.

My proposal, it seems to me, is fairly simple and clear. It would legislate guidelines for use of the military on Presidential initiative. It would set in place procedures by which Congress, if those guidelines are ignored by the President, could ask for the help of the courts. If that help is not forthcoming and the Presidential warmaking continues, funding, both retrospectively and prospectively, would cease.

This envisages a scenario of interbranch conflict, which the law is primarily designed to avoid.

The primary mission of the War Powers Act should be to improve the prospects and procedures for encouraging policy consultation in place of confrontation.

Senate Joint Resolution 323 and Committee Print 1 are both helpful in this respect. The consultation of all those in Congress is so patently impossible that it provides the Executive with an undeniable reason not to consult with any.

I agree that the bill's proposed process of prior and continuing consultation with the House and Senate leadership and the leadership of its Foreign Relations, Intelligence, and Defense Committees can help to avoid the sort of legal confrontations over distribution of powers which has hitherto been all too common and has marked America as a divided, uncertain, and unreliable actor on the world stage.

Although the Resolution of disapproval herein proposed would take the form of a concurrent resolution, which does not require submission for Presidential signature, this does not mean that its validity is in any doubt by operation of the Supreme Court's decision in *I.N.S.* v. *Chadha*. The proposed Resolution of disapproval, to which I have made reference, is not intended to have the force of law. The essential purpose of such a resolution would be procedural: To ripen the controversy between the branches, in order to conduct to a litigated solution, and to bring into operation certain House and Senate procedures pertaining to Defense Department money bills. For neither purpose need Congress resort to lawmaking.

Congress will have done all that is legislatively possible, once the war powers law has clarified its view of the limits of Presidential authority, has created the requisites for judicial enforcement of those limits, has brought its undoubted power of the purse to bear, to get the attention of the Executive, and has set up reasonable and effective procedures for interbranch cooperation.

The stage will have been set for voluntary compliance, for negotiation, for adjudication, and, if all else fails, for Congress to confront a heedless President as expeditiously as possible and on its home ground, which is the power of the purse.

There remains much dead underbrush to clear from the existing War Powers Resolution. The concurrent Resolution procedures under sections 5(c) and 7 are clearly invalid under the *Chadha* case and should be repealed.

Section 5(b), more significantly, which automatically terminates ongoing conflicts that have not been approved by Congress, has never been invoked and is both unwise and, in part, perhaps unconstitutional. Its unwisdom is in alerting every enemy to the advantages to be gained by prolonging a conflict and exploiting our constitutional divisions. This being widely perceived, it has not been particularly costly for the Executive to ignore the reporting requirements imposed by existing section 4(a)(1), which start the 60-day clock ticking.

After 60 to 90 days, section 5(b) appears to require the recall of U.S. forces from combat, even when their dispatch by the President was constitutional and lawful. It is difficult to sustain the argument that Congress can terminate what it concedes the President could initiate on his own initiative.

The District of Columbia Circuit Court, in *Mitchell* v. *Laird,* in 1973, said that once U.S. forces are engaged, the President's constitutional duty, even in the face of an effective congressional withdrawal of authority for the war, cannot come to more than "trying, in good faith and to the best of his ability, to bring the war to an end." It seems to me that commonsense is on the side of that dictum.

This does not mean that Congress can compel hostilities to cease by a legislated date certain, a surmise which is dictated not only by the Constitution but by commonsense and by a notion of national survival.

The 120-day limit on hostilities contained in Committee Print 1 seems to me to suffer from the same frailty.

In summary, my impression is that it comes to this: The legislature cannot implement or enforce the laws it writes; it can only seek to enlist the support of the courts, the U.S. Treasury, and the public. Clarity and simplicity are essential to enlisting the support of each. The law can only establish procedures for consultation and for responsible congressional participation in a genuine partnership with the executive branch if the mutual will exists.

So far, the partnership created by the War Powers Resolution more closely resembles the partnership between a horse and a rider.

The War Powers Resolution was a good idea; but its drafting and execution were faulty. Instead of authorizing the President to use the Armed Forces in limited circumstances for as long as necessary, it authorized their use in unlimited circumstances for a fixed period. This stands the Constitution on its head.

Moreover, it struck a bad deal. In return for giving the President what was taken to be carte blanche as to the circumstances in which he could utilize the Armed Forces, he never once gave the Congress what it had asked him for in return, the report which would trigger the 60-day limitation on that exercise of force.

Today, the Senate has the benefit of hindsight and the opportunity which the beginning of a new administration may present. Congress can and must do better if the policymaking process is to disentangle itself from those legal knots which divert our attention from the crucial war peace issues and undermine our credibility as a reliable world leader.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Franck appears in the appendix.]

Senator **Helms** [presiding]. Thank you, Mr. Franck.

Dr. Halperin.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, ALLAN ADLER LEGISLATIVE COUNSEL, AND GARY M. STERN RESEARCH ASSOCIATE, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION, AND DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Dr. **Halperin**. Thank you, Senator Helms.

It is a pleasure to be here.

I want to say, sir, while you and I don't always agree, I do want to echo your statement of a few minutes ago that you are not a lawyer and you are damn proud of it. I am neither, as well, and I testify in that spirit.

I approach the question of the War Powers Resolution with the notion that it is not only constitutional and fully consistent with the purposes and intent of the Constitution, but also fully consistent with the national interests of the United States. This is because I think it stems from the basic notion that, in a democratic society, it is not only constitutionally wrong, but a mistake to commit the Nation to war without a consensus in the country that we ought to go to war.

That was the principle which Mr. Weinberger stated while he was Secretary of Defense, when he laid out some criteria for when he would support the use of American power. I think it stems from the notion which, if we did not learn from Vietnam, we should have learned from events since, including Nicaragua, that the worst situation for us to be in is one in which the Nation is at war, but we are divided among ourselves about whether or not that war is just, whether or not that war is sensible, and whether the spilling of that blood is necessary for the American interest.

Those are debates that we ought to have before we go to war and not during the war. I think that was the intent behind the War Powers Resolution.

I think the Resolution has failed for several reasons.

First, there were some compromises made before it was enacted which produced the not unusual event of a structure which lacked coherence as to its purpose and its intent, and has left us with a scheme which I think is simply one that does not work.

Second, all of the Presidents who have served during the period of the War Powers Resolution have been opposed to it and have functioned as if it was something to be avoided.

This has meant, among other things, that we have designed our operations so that lawyers could tell Presidents that they need not invoke the War Powers Act.

It is hard to imagine a more perverse result of legislation, so that what we do in the world is not based on the best judgments of our diplomats and soldiers and others about what we should do. It is based on what the lawyers say to the President he can get away with without the War Powers Act actually being invoked.

Finally, there has simply been a lack of congressional will. Congress, having passed the War Powers Act over the Presidential veto, has, since then, run away from the responsibility and authority which it sought to give itself in that act. I think there has been no clearer example of that than the desperate efforts of the Senate to avoid voting on the question of whether or not the American military presence in the Persian Gulf constitutes an act within the War Powers Act.

One has to ask, I think, how many Iranian ships we would have had to fire at, how many airplanes we would have had to shoot down believing they were attacking us, before the Congress would have been willing to say that this comes within the definition of "imminent hostilities," within the meaning of the War Powers Act.

Now I would urge you, as I think most of the witnesses before this committee have, to revise the legislation. Clearly, in its present form, it is not functioning.

I want to suggest several principles that I think Congress ought to keep in mind in doing this.

First, whatever legislation you enact I think ought to cover all potential American uses of military force, all situations when we are either using force ourselves or directly facilitating others to do so. I would include here not only what is normally covered under war powers but arms transfers and covert paramilitary and military operations.

All of these have the same essential element, that we are getting ourselves involved in a situation of potential or actual conflict, of potential or actual controversy, and the decision and debate within the United States on those issues ought to occur before we start, rather than after.

I think it is important to cover all of those elements because we have already seen that if you close one avenue of operation, the executive branch will use another. If we mean to say to a President don't start a war in most circumstances without consulting with the Congress, we need to say you can't start it by hiring an army to do it as well as by using the American military forces to do it.

The second principle that I would suggest is that prior consultation ought to take place whenever the President is contemplating action in this general area.

One of the problems with the War Powers Act is that it attempted to specify very precisely when consultation had to take place and has led to this linedrawing by the executive branch. I think what the President needs to be told by the Congress simply and clearly is that when you begin to seriously consult with your advisers about some use of military force, some new dispatch of American troops, some contemplated paramilitary or military operation, that is the time to consult. What you don't need is a legal opinion from your lawyers that you have not yet crossed some line drafted in a statute about how imminent the hostilities are. If you are doing something that is in that general area and if the question gets raised about whether you have to consult, then you should have to consult.

The consultation process, in other words, should be based on the recognition of a shared congressional and Presidential obligation and responsibilities in this area, rather than on some legal line-drawing, which will always be subject to manipulation.

Third, I think Congress needs to set up, as there now appears to be a consensus, some new mechanism which will enable the President to consult with the Congress. That needs to be some kind of small leadership committee with some kind of small staff, in my view, which the Congress clearly tells the President this is the group of people to talk to when you are contemplating some kind of military action.

Finally, I think the legislation needs to provide that, except for genuine emergencies, of the kinds that have been suggested here—the rescuing of Americans held hostage, an attack on American forces, an attack on American territory—except for those genuine emergencies, prior consultation should be followed by explicit congressional approval before we begin to use or support military force.

Now, as I suggested at the beginning, my view is that this is not only clearly constitutional, but clearly is based on Congress' power of the purse and the other powers that it is granted under the Constitution. But, at least as important, it is fully consistent with the spirit of the Constitution, with the intent of the Framers, that, in a democracy, the decision to go to war was too important to be taken in secret, too important to be taken without the concurrence of two branches of the Government. Moreover, that in the kind of world in which we live, given the lack of consensus to be taken for granted on foreign policy matters, it is essential to get that consensus before we start. It is far better not to intervene, even though some people think we should intervene, than to intervene and then be forced to withdraw because the consensus is not there to sustain the operation.

I think we have learned again and again that we may be able to hold on for a while; but, in the end, if there is not a consensus, we will withdraw and withdraw in ways that are worse for our national interest than if we had not gone in at all.

I think it is also clear that that consensus can be gotten only before we start. To quote Senator Vandenberg's famous phrase: "If Congress it not in on the takeoffs, it will not be in on the landings."

Mr. Chayes. The crash landings.

Dr. Halperin. Yes, on the crash landings. And it is too late, after three engines have gone out and the plane is on its way down, to call the Congress and ask it to share the responsibility. That has to occur before the plane takes off.

Finally, Mr. Chairman, I would suggest some skepticism about the attempt by people who have testified before me and others to rely on the courts to solve this problem.

I am very skeptical that, no matter what the Congress does, no matter what it tells the courts about its responsibilities and obligations and powers under the Constitution, that a court will get in the middle, between the Congress and the President, on issues of war powers and the use of military force.

I also have to say that I am doubtful whether it should get involved in those issues. We rely on the courts to settle a whole range of issues that we should rely on the political branches of the Government to settle, and it is hard for me to think of one more appropriate for settlement by the political branches and not by the courts than the question of the use of military force.

Mr. Chairman, now that you are back, I wonder if I may close, rather than open, with a personal remark.

I want to say how delightful it is to have you back here. I have missed you, the ACLU has missed your leadership on civil liberties questions.

Senator BIDEN [presiding]. Do you hear that, Jesse? [Laughter.]

Dr. HALPERIN. It is therefore a special pleasure for me to testify once again before this committee.

I would like to ask that my full statement, with its attachments, be made a part of the record.

[The prepared statement of Dr. Halperin appears in the appendix.]

Senator BIDEN. I am delighted that you care and I am delighted that the ACLU missed me, and hopefully others maybe have, too. But I think you just blew my furniture deal. [Laughter.]

That, of course, was a joke.

Thank you very much for the kind words, Dr. Halperin.

Last, but not least, is Professor Rotunda.

We are anxious to hear your testimony.

STATEMENT OF RONALD D. ROTUNDA, PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS COLLEGE OF LAW, CHAMPAIGN, IL

Mr. ROTUNDA. Thank you.

I am Prof. Ronald D. Rotunda of the University of Illinois College of Law in Champaign.

I would like to submit as part of my written testimony a chapter of my three-volume treatise on constitutional law with the 1988 pocket part.

Senator BIDEN. Without objection.

[The information referred to appears in the appendix.]

Mr. ROTUNDA. Thank you.

It is hard to get to here from Champaign. I had a long flight last night. I left about 5 p.m. last night to get here this morning. We had a lot of muggy weather, but I really appreciate the hospitality of Washington, DC. When I arrived, I learned from the cabdriver that Congress has named a building after me, right in the center of town, and I appreciate that. [Laughter.]

The notion of a broad Presidential power and Presidential discretion with respect to the war powers used to be a very liberal cause, for example, under Franklin D. Roosevelt. Typically now it is considered more liberal to limit Presidential power in the area of foreign affairs.

No one wants an overzealous President to involve the United States in unnecessary hostilities. The issue is not that, I think.

The issue really is this: Is the War Powers Act the most legitimate, the most constitutional way to meet that shared goal?

On that score, I think I end up concurring with my former mentor, Senator Ervin.

A wise President should normally consult with congressional leaders when involving the United States in hostilities. But, as Dr. Halperin has pointed out, is legal linedrawing the most constitutional, the most effective way to go?

Historically, we know that Presidents of both parties have asserted a broad war powers. They have involved the United States in foreign hostilities about 200 times in 200 years using American forces abroad in order, among other things, to protect U.S. citizens abroad.

We know that only Congress can declare war. But, the Framers rejected the notion that only Congress can make war.

We know in modern times that the decision whether to call for a formal declaration of war is, in a very real sense, a political question. It may call into play various formal treaties. It is symbolically significant for the United States to be the first major nation since World War II to have a formal declaration of war.

That is why I think all of the Federal courts that have been presented with the issue during the Vietnam era refused to judge the constitutionality of the Vietnam war. That is why all the Federal courts that have been presented with the issue under the War Powers Act have, for one reason or another, refused, as a political question or lack of standing, to reach those issues.

The cases often point out that the President has unique knowledge, perspective, and authority to make those decisions; that for political reasons it is important for the United States to speak with one voice when dealing with people abroad; or that, even if the President makes mistakes—he is a human being and we expect mistakes—the remedy lies with Congress and not with the courts.

In *Baker* v. *Carr,* for example, the court said that the guarantee clause was not justiciable, even if Congress told the President what to do and declared it to be justiciable. Chief Justice Warren said that the courts should not intervene in that area.

I think the political nature of the war powers problem is underscored not only by the decision uniformly of all the lower Federal courts not to allow litigation on that question, but also by the fact—and I think Dr. Halperin mentioned some of these points, and I agree with him on this—that the War Powers Resolution tries to convert important policy issues into technical, legal questions.

I think courts have no legal standards to judge when are hostilities imminent enough or when is the emergency genuine enough. At the trial, will the President be called to reveal the sources of his clandestine knowledge in an effort to persuade a trial judge that it is appropriate for the President to avoid setting into play the procedures of the War Powers Resolution?

The War Powers Resolution was intended to reassert congressional prerogative. I think it is important for Congress to assert its prerogatives, but I don't think the War Powers Act is the best way or the constitutional way to do it. What it is, is an attempt by Congress to provide for huge delegation of powers to the courts. It is an effort by Congress—in its efforts to strengthen itself, instead of weaken itself—to try to shift those policy or legal questions to the courts. The courts, thus far, have been wise enough to reject this delegation because they are ill-equipped to decide the foreign policy issues.

The Constitution does give Congress a way to respond to Presidential decisions. It has the spending power. It has its political power. It has the power of publicity, the power to seek to persuade.

If the courts would undertake to decide these issues, I think it would weaken Congress and delegate to the least democratic branch the decision that should really be decided by the Democracy itself, the decision to involve the United States in some kind of hostilities.

Another problem, I think, with the War Powers Act is it allows the executive and legislative branches to blame each other for possible leaks, for failure of will, for exercise of judgment. It obscures blame. It muddies responsibility.

It is better for people to know where the responsibility lies. When a mistake is made, we will know who to blame, and if there is credit, we will know to whom we should give kudos.

The Congress, I think, is not reasserting itself with the War Powers Act. In fact, it is trying to delegate these powers to the branch least able to decide them fairly and properly.

I conclude with a comment that I found particularly appropriate, although written over 200 years ago, by Hamilton, in the Federalist Papers, No. 25. He said that it was obvious that nations, and I will quote, "pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed."

The point is—and he was talking in that paper about the war powers—that it is proper for Congress to reassert its prerogatives, and the way it reasserts those prerogatives is not by delegating the authority to the courts, a delegation, I believe, which the courts will not accept.

Thank you.

Senator BIDEN. Thank you very much.

We have 15 minutes in which to make this rollcall vote.

Senator HELMS. No. It's 7½.

Senator BIDEN. Yes, you are correct.

I suggest that we recess for the next 10 minutes in order to go and vote and then come back and start our questioning of the whole panel.

We will recess for the next 10 or 12 minutes.

[A brief recess was taken.]

Senator BIDEN. The hearing will come to order.

Senator Helms, who always accommodates me, has another engagement, but he wants to question the panel, so I will yield to Senator Helms for as long as he needs at this time. Then I will pursue my questions.

Senator **Helms**. Mr. Chairman, thank you. I appreciate that.

This has been very interesting testimony this morning. As I listened to it, I thought there was one ingredient lost in the mix somehow, which convinces me that this is not so much a constitutional argument as a political argument.

I think it is necessary to go back in time to the circumstances that led up to the War Powers Resolution. The trouble with it is that it is sort of the illegitimate child of the political decision to send hundreds of thousands of American fighting men to the other side of the world to fight a war that they were not allowed to win.

And, of course, there was the protracted nature of it on television, every night, in not unbiased reporting, which created a resentment and hostility which developed into demonstrations, antagonisms, political conflicts, and all the rest of it.

That is how and why the War Powers Resolution was born.

I guess the question that I would want to lead off with is this. I will start with Mr. Rotunda.

Incidentally, you said that there is a part of the Capitol named for you. There is also a part of the Capitol named for a singing group around here, called the "Capital Steps."

Mr. **Rotunda**. There are a lot of monuments in this town; yes. [Laughter.]

Senator **Helms**. I was going to ask Cap Weinberger, and I will ask each of you, and you can elaborate to whatever extent you want to, this question. Is not the basic problem with the War Powers Resolution the fact that it is political in its origin?

Now, I don't think anybody here this morning would disagree that the War Powers Resolution would never have happened had it not been for the circumstances of the Vietnam war, which was a war that our people were not allowed to win.

So, the question is are we talking law or are we talking politics?

Mr. **Rotunda**. Senator, the thrust of my remarks is that we are talking politics, and that is why the court I do not think will, and in any event should not, get into it. The courts should not be deciding these issues. These should be fought out between Congress and the President, using the tools that Congress has, rather than trying to delegate a lot of powers to the courts, which are ill-equipped to handle them.

I think all the commentators agree that the War Powers Act was a reaction to Vietnam, a war that lasted for about 7 years under two or three different administrations.

Senator **Helms**. Correct.

Professor Franck.

Mr. **Franck**. Senator Helms, I don't think there is a distinction in terms of either historical development, historical origin, or in terms of subject matter between politics and law. The difference is in how the problem, the facts, or the history are addressed. They can be addressed through a political institution; they can be addressed through a court.

The question of whether the President has the right to terminate the treaty with Taiwan, which was a case on which I worked for Senator Goldwater, was a political question. We tried to have the courts determine it because we felt that the Constitution had something to say about it. The court decided that, under the circumstances, the issue had not been sufficiently focused—at least that was the swing vote on the Supreme Court—that the issue was either too political or that there was not a sufficiently clear confrontation between Congress and the Presidency to cause the courts to invoke the legal process.

But I don't think there is any magic about that. The same issues can be handled in a political forum or in a legal forum. The courts of the United States sometimes refuse to address a question because they think it is too political. But that is more a handy flagging of things they would rather duck, and it depends, to a very considerable extent, on how the issue arises, as to whether they would rather duck it.

If the issue arises with a fact pattern that is unclear, or with a standard that is too vague, or with the actual ripening of the controversy not fully established—for example, that it is not absolutely clear that Congress really sides with Senator Goldwater and thinks there is a real conflict as to who gets to terminate a treaty—then the court will duck it and call it a political question.

But there is nothing magical about that.

Mr. ROTUNDA. I would add a point here, though. In *Goldwater* v. *Carter,* it is interesting that the Justice considered the most conservative at the time, Justice Rehnquist, and the Justice considered most liberal at the time, Justice Brennan, thought that was a political question which the courts cannot decide, period.

Mr. CHAYES. I'm sorry. I'm sorry.

Mr. ROTUNDA. It is a question of the power of the President to recognize foreign governments. It was a recognition power. And so, while some people like Justice Powell suggested that the court would decide it in a different circumstance, other Supreme Court Justices thought this was a case, this fact pattern, that they would not decide, period, because it fell within the Presidential prerogative.

Mr. CHAYES. I think the fact is that Justice Brennan did, in fact, write a dissenting opinion resolving the issue and resolving it in favor of the President because it was connected with a recognition issue.

He was the one person who wrote an opinion on the merits in that case.

So, I don't think Justice Brennan agreed with Justice Rehnquist, as he then was.

Am I correct about that, Tom?

Mr. FRANCK. Yes.

Mr. ROTUNDA. The result is exactly the same. You've got one Justice saying we can't decide these issues because they are political, and another justice saying we decide these issues and the issue we are deciding is Presidential prerogative.

The end result is Presidential prerogative.

That is the fundamental agreement.

Mr. CHAYES. Well, I was going to answer the question. But it seems to me it is a very different thing when the court says we can't decide whether the President has the constitutional power to do this, on the one hand, and, on the other, when a Justice says I think the President has the constitutional power to do this. Those are two quite separate things. At least I teach them separately.

What I wanted to say, Senator Helms, was of course the War Powers Act emerged from a political controversy and a political situation. So did the Constitution of the United States emerge from a political controversy and a political situation.

But one of the things that we do in this country, and that you do quite a lot of, sitting where you do, is to turn political controversies into controversies that can be managed and ruled upon by courts, by providing a framework within which the court can decide.

Now, in this case, it seems to me that, like many others, it is a situation where you think the War Powers Act is unconstitutional and I think it is constitutional. You and I can sit here and argue for a long time and argue reasonably and rationally, with lots of support on both sides. But in the end, we can't resolve that issue between us, and, even if I were the President, we could not resolve it between us because we don't have the authority to say that, finally.

So, I think—and I thought you had raised that question in the first place—that if we could organize this question in a form that the courts would be prepared to decide and would decide it—and I think that can be done—there would no longer be any question.

I think that Congress and the President would abide by what the court said, just as in the *Chadha* case, where we were talking about that in the interim, the court said 120 statutes were unconstitutional, providing for congressional veto, and nobody murmured about it. Congress accepted that as a limitation on its power and went about its business.

Dr. HALPERIN. Senator, if I may add a word on that, I am not sure how we got to the *Goldwater* case from your question, but I do want to say, for the record, that, notwithstanding what I said before, the ACLU thought that Senator Goldwater was right, and, had the court taken the case, we would have filed a brief in his behalf. We think the court should have decided the question and that, on the merits of it, he was right that the President did not have the right, unilaterally, to abrogate that treaty.

On the question that you raised, there are a lot of lessons about Vietnam, and most of us draw lessons from an event which conforms to what we believe before the event took place.

But let me try to suggest another set of lessons about Vietnam that I think we can all agree on.

First is that the American people are no longer willing to stop debating the propriety of a military operation once it begins; that the consensus that existed in World War II, and, really, in the Korean war, that once you start fighting it is time to start debating, just did not hold anymore. Second, the differences about how to fight the war—some people thought, as you have suggested, that we should have done more and some people thought we should have done less—will eventually force the withdrawal of the United

States from the military operation. Third, that if that occurs, we are far worse off than if we had not gotten in at all.

This seems to me to suggest a political lesson. And I agree with you that the war powers issue is largely, though not entirely, a political matter and we ought to make sure that we don't get in before we find out whether or not we have that consensus. We certainly ought to make sure that we don't get into a military conflict where the President knows there is not a consensus and gambles on the notion that if he just gets us into the conflict, people will then stop debating and we will be able to go forward.

So, the lesson I would draw from this is that we need to be sure Presidents are forced publicly to explain what they want to do and get a public, a congressional commitment to it before we start the operation.

Senator HELMS. But you can't do that. Though, in so many cases we have reached a point where everything the President tries to do in terms of what he considers, as Commander in Chief, to be in the best interests of the security of the United States. Then the media comes, the politicians come who say "Oh, boy, you've got to stop that." Circumstances do alter cases.

I don't retreat from the unique circumstances that evolved from a protracted Vietnam war. For example, Harry Truman, as one of you pointed out this morning, moved in Korea. He did what he thought was right.

I happen to think that maybe he made an error. But there was not the hue and cry about Harry Truman.

I'll tell you this much. I'm old enough to remember World War II and a lot of the things that Franklin Roosevelt did.

If Franklin Roosevelt had had to prosecute World War II with the circumstances that have been hanging over Ronald Reagan for the last 8 years, we would have lost that war. As somebody has said, the French people would be making their vichyssoise out of sauerkraut today.

So, I think this is largely a political issue. But it is in my judgment, and in the judgment of many others, Mr. Chairman, an invasion of the constitutional prerogatives of the President of the United States.

Well, I have to go, Mr. Chairman.

I wonder if we might have an understanding that some Senators, even some who are not here, may have two or three questions which they would wish to file in writing. I may want to do that.

Senator BIDEN. Without objection, any member of our panel is invited to do so.

Senator HELMS. Thank you.

I would say to our witnesses if you will respond, I would appreciate it. You have made a substantial contribution to the dialog on this thing and I appreciate your coming. I really do.

And I appreciate the professor's students coming. I found out that that is his cheering section, back there [indicating].

Senator HELMS. I asked them to grade the professor on his testimony and then I was told that they had counted on his appearing a little bit later and they did not hear him.

So, the best laid plans of mice and men go awry sometimes.

Thank you, Mr. Chairman, and thank you, gentlemen.

Senator BIDEN. Thank you very much.

Let me start with you, Professor Franck, if I may. Then I am going to ask each of you to respond to the two questions I have for Professor Franck. Then I have several more questions.

On page 14, Professor, you say that the timeclock provisions of the War Powers Resolution are "in part perhaps unconstitutional."

By way of explanation, you say, "It is difficult to sustain the argument that Congress can terminate what it concedes the President could initiate on his own initiative."

But why is that such a difficult argument to sustain?

Let me raise four points and then ask you to respond.

First, you say that "the prerogative power of the President becomes a limited one once Congress has spoken in law." Does that not apply to the use of force for a limited specified period? If Congress specifies in law a period during which a President is authorized to use force for certain purposes, why does that not become a limitation of the President's prerogative power, of which you spoke?

Second, is it not true that a military involvement can undergo a qualitative change? Hostilities that began as a hostage rescue, for example, might expand into something much larger and more sustained; it might expand into all-out war.

What you have said seems to suggest that once the President has gotten into hostilities under a legitimate authority, he then has the authority to pursue any military objective for any length of time unless Congress passes a direct contrary law.

I would like to know if that is your position?

Third, your position regarding the timeclock seems to suggest that the President's power is binary; that is, it either exists in a given case and is unlimited or it does not exist at all. Isn't the war power more properly viewed as a concurrent power, one in which the President may have certain authorities, but in which those authorities are subject to regulation, to limitation, and to contrary and opposing action by the Congress?

Finally, do you believe that the 1983 resolution authorizing the deployment of U.S. forces in Lebanon was unconstitutional? That contained a timeclock. Does it differ from the timeclock which Congress establishes generally for precisely such situations?

Could you respond to each of those questions?

Mr. FRANCK. I'll try, Senator. If I miss some of the specifics, please pull me back to them.

I acknowledge that I have a certain degree of ambivalence about the timeclock matter because the courts have not ruled, and, so, we are all in the area of conjecture.

I do believe that, if there is a prerogative power of the President, which is inherent in the Presidency, to rescue Americans abroad, for example, Congress could not constitutionally pass a law saying that he must have them all rescued within *x* number of days. Although I do believe that if the operation turned into something else, such as an occupation of the island for purposes of altering its government and bringing about a change in the fundamental democratic structure or instituting a democratic structure, Congress could then legislate to say that the operation must now cease because all the Americans are out.

You will remember the story about the last American in the Dominican Republic, who was not allowed to leave the Dominican Republic despite the fact that he had all his luggage packed and was down by the ship because the State Department felt that if he left, the justification for the operation would cease because they were there to protect the Americans in the Dominican Republic.

I think Congress could legislate on that question. But as long as the President actually, bona fide, is rescuing Americans abroad, he is, I think, engaged in a prerogative operation which is not subject to ordinary legislative constraints.

However, I think if the power of the purse is involved, you could cut off funding for any further operations by the State Department or the Defense Department, whatever, and that those, in fact, could limit the exercise of the prerogative powers. But I don't think you can tackle the prerogative power through ordinary legislation. I think you can tackle it through an appropriation.

Senator BIDEN. Why is that, since the effect would be the same, or ostensibly the same?

Mr. FRANCK. Well, what we are doing here, really, is sitting as if we were a group of lawyers trying to design the best possible strategy for winning a hypothetical future case. I guess all I am really saying is if I were arguing a hypothetical future case, I would much rather assert that what Congress had done was to exercise its power of the purse because I have a lot of precedent there that I can use.

Senator BIDEN. Even to affect the prerogatives of the President?

Mr. FRANCK. Yes.

For example, the Carter Presidency accepted the fact that Congress was able to exercise its appropriations power to force the closure of the Rangoon Consulate General, even though we think of the power to send and receive Ambassadors as being a prerogative power of the President.

I think if we had legislated, if you had legislated, to require the opening and closing of specific consulates, you would be in a much weaker position.

Senator BIDEN. Can Congress legislate time limitations on authority that is not a prerogative that the President has, but one that we have granted to the President?

Mr. FRANCK. I think there is no question that you could do that. I just think it is unwise.

Senator BIDEN. Why do you think it is unwise?

Mr. FRANCK. I think it is unwise to tell the other side in an actual conflict on which day you are going to stop fighting them.

In other words, I think that time limits impose a military strategy on our side, which leads to carpet bombings and such things, in order to get it all in, to expend all of our firepower before the end of the 60-day period, or whatever is the agreed number of days. It also makes the other side a good deal more obdurate because they know that after 60 days, they are home free.

Senator BIDEN. How about the situation that I mentioned with regard to Lebanon? Is it your position that the Resolution authorizing the deployment of U.S. forces in Lebanon was a legitimate congressional constraint, not a prerogative power that the President had? Is that how you would see it?

Mr. **Franck**. Yes. That would be my position, that the President was not exercising a prerogative power.

The War Powers Resolution covers much more than the prerogative powers of the President. I could make the argument that there are no prerogative powers of the President. I just prefer not to. But I think that that is an open question.

But such prerogative powers as there are are extremely narrow. I was simply referring in my paper to the fact that I think those could not be terminated.

As far as the termination of nonprerogative powers are concerned; that is, powers which are given to the President by the War Powers Resolution itself or by act of Congress or because Congress has not acted, perhaps, as to those, the only problem with a timeclock is the one that I suggested in the *Mitchell* v. *Laird* case, where the court could say all right, you have let the President get into this situation, now you can't compel him to pull out by a day certain. You must allow him to pull out by a reasonable date.

You can compel him to pull out, but you can't do it by telling him that he must be out by Friday. That is a different kind of problem with the clock because it deals essentially with his capacity as Commander in Chief to perform effectively the Commander in Chief function under orders of Congress to get the troops out. But it must be within his discretion to decide how quickly that can be done.

Senator **Biden**. Would the rest of you like to comment on all or any of those issues?

Mr. **Chayes**. Well, I don't have any problem with the timeclock provision. In the first place, if you are talking about prerogative powers, I don't think it is true that whatever prerogative power the President has is unlimited, even within the range of the prerogative power.

I was interested to hear Senator Helms a minute ago—and I'm sorry he is not now here—talking about the President as the Commander in Chief sort of on the bridge of his ship, looking all around and seeing where he needs to use force in order to safeguard the interests of the United States.

I don't think that was the original conception of the Commander in Chief power, and in fact, I think it contradicts the original conception, which was not to create a kind of, you might say, well, like the king, who did command the troops in exactly that way. That is what they were trying to get away from, and it was only at the last minute that they put the President back into the picture in the Constitutional Convention.

So, what I think the prerogative power extends to is a kind of emergency power, where the President must act in circumstances that do not permit advance authorization for a variety of reasons.

I am a little dubious about the effort to spell out all of the circumstances in which that might be true. But it does seem to me that, once the situation has extended itself in time, it becomes a situation on which the Congress can deliberate. And, as I think you said in the beginning, the Constitution views this as a concurrent power.

Now, it's true that Congress, once it is presented with a fait accompli, may reach a different conclusion in its deliberations than it would if it had been in on the takeoff. That is, it might decide that it is unwise or impossible to withdraw the troops or to stop the hostage rescue, or whatever it is. But, if, at the end of the deliberative process, Congress does so—and, remember, this would have to be by a vote sufficient to override the President's veto; that is, a two-thirds vote because, presumably, the President is insisting that this should go on—so, if the deliberative process results in that outcome, I think that process is the one that is designed to prevail.

Now, as to the timeclock, which gives a date certain, I agree with Professor Franck that, obviously, the President can't blow a whistle and say "about face" on the 60th day. If it turns out that the clock has ticked or the alarm bell has rung and particularly if that is done by a court—which might not even permit the whole 60 days in terms of warning—then the President's Commander in Chief power comes into play again. But what is the Commander in Chief power?

At that point, it is the power to get the troops out as quickly as possible with due regard to their safety. It is not to bring the war to an end as soon as possible because that is something that the President might define differently from what the Congress has.

Congress has said "The war is over, get the boys home."

Now you don't get them shot up in getting them home. You do what you can to get them out.

One final point which bothers me a little bit about this, and I may not have an adequate supply of cynicism about the actors in these events. But I honestly do think that Presidents who have acted in these circumstances that we are talking about have acted in good faith in the belief that they had the power to do what they were doing, and despite the congressional legislation, because they believed that the congressional legislation was unconstitutional.

That is why I think the arrangement for a judicial resolution of the issue is so important, because once it had been made clear that they did not have the power, or vice versa, the parties, the sides would act within the framework of that decision, and you would not have this sort of having to dot every I and cross every T for fear the other side is going to do something to sneak through the loophole.

Senator Biden. I would like you to comment also, but I want first to follow up on one point.

When Judge Sofaer was before us, I pressed the second point you raised, which was the prerogative powers. The rationale for the prerogative powers, as I understand them, is that they derived from the fundamental concern that a Congress, as a whole, would not be able to act rapidly enough to protect the interest of the United States. Therefore, in order for there to be a prerogative power, it had to be one that ran with an emergency. Absent there being an emergency and given the existence of an opportunity for "the deliberative body to make its opinion known," there would be no prerogative power.

As I understand the debates and the Federalist Papers, there seems to be no question that the prerogative powers exist for emergency situations. The rationale of the Framers was that emergency situations require the President to be able to act.

I wonder if my interpretation is correct.

Mr. **Chayes**. In the first place, I will defer to my more learned brethren here, but I don't think the Constitution talks about prerogative power and it does not talk about emergencies.

Senator **Biden**. No, it doesn't.

Mr. **Chayes**. And I don't even think the debate does very much. It talks about a Commander in Chief.

Senator **Biden**. But debate took place as to what was meant. You can infer from the debate.

Mr. **Chayes**. Yes. I think it is more inference, and it is inference in the light of subsequent experience.

That's what I think it is—inference.

Second, it seems to me that one can say you don't have to leave it to a case-by-case determination of when is an emergency over. Of course, if you said an emergency is over in 3 days, I think that might be a problem. But if you, say, take a 60-day period, it is obvious that if there is not a nuclear catastrophe, that is time for Congress to assemble, it is time for Congress to debate, it is time for Congress to consider the circumstances, and if, after doing that, Congress decides not to be in this situation—which I am telling you is not going to happen very often; in fact, the shoe is mostly on the other foot, that Congress may be somewhat more bloodthirsty than the President.

Senator **Biden**. It's called "stampeded."

Mr. **Chayes**. Yes. But if, given all of that, the Congress does come out the other way, my view is just what Mort said: "We shouldn't be in that if two-thirds of the Congress are against it. I don't care what the President thinks, we shouldn't be in it."

Dr. **Halperin**. Let me say that my problem with the time period is not that it is unconstitutional. I don't think it is. My problem is that I don't think Congress will ever use it.

Senator **Biden**. Perhaps. But let's make a distinction here.

One issue is constitutionality: Is the timeclock constitutional or not?

Assuming it is constitutional, then there is a second question: Is it wise? Is it appropriate: Does it make sense? Is it functional? I would be happy to have you comment on that.

Dr. **Halperin**. I would draw the distinction that has already been drawn between those cases which do not arise out of the emergency situation. Here, it seems to me, there is absolutely no question, and what you want to think of it is as an advance authorization. You are saying, in effect, to the President you may if you choose, and I think it would be a mistake to do so. But the Congress is saying you may choose, if you wish, to use this authority to fight for 60 days, with the clear understanding that at the end of the 60 days you cannot go on, unless we give you a new authority. That I think is clearly constitutional.

Senator **Biden**. But how about in the emergency situations?

Dr. **Halperin**. In the emergency situations, I must say that I have very real doubts about whether it is constitutional for the Congress to—well, take the case where there is an attack on the United States, which is the one case that I think clearly was contemplated, you know, the British invade and the President starts fighting. Whether the Congress has the right to terminate that conflict I think is, at best, a debating issue.

Senator BIDEN. Let me divide up that question.

It is debatable, in your mind, whether the Congress can, in advance, by legislation call for the termination of a conflict, the invasion of the United States, within 60 days.

OK.

Now, there is a separate issue. Were there no War Powers Resolution, could the Congress, by ultimately a two-thirds vote, overriding the President's veto, say to the President even if the United States were invaded, if Mexico invaded New Mexico, notwithstanding that this is an invasion of the United States of America, that we believe to pursue this conflict may result in the beginning of World War III, a nuclear holocaust; therefore, we command the President to cease and desist?

Could we do that constitutionally?

Dr. HALPERIN. I would want to think a lot more about that before I gave you a definitive answer.

My inclination would be to say "No," but to say that the Congress could cut off the funds for the operation. Then if you were to ask me what is the distinction between those two things, I'm not sure I can give you a good answer.

Senator BIDEN. Well, how do you cut off the funds? How do you say the funds that have been appropriated that allow you, Mr. President, to control the existing MX missiles, cannot be used?

Dr. HALPERIN. You arrange for the invasion to occur early in September, so that on October 1 the money runs out.

Senator BIDEN. I realize this is kind of humorous and the hypothetical is a bit bizarre. But I think it is the best way, at least for me, to understand just how constitutional scholars view the ability of the Congress to affect the President's prerogative, his inherent authority under the Constitution to take immediate action: that is, we are being invaded, the President can counter, immediately.

I would like the rest of your views, and maybe start with you, Professor Franck, and go down the table in this way [indicating] since we have not heard from this end of the table in a while. Could Congress pass such a resolution?

Mr. FRANCK. I agree with Dr. Halperin that what you are postulating is, of course, a situation which is so extreme that it does not readily test the hypothesis because the President, in that situation, would be on incredibly strong ground simply in asserting—you know, Abe Chayes would be his Legal Adviser and he would write a brief saying that this is a prerogative power of the President; New Mexico has been invaded; our people are being killed in New Mexico; we didn't touch Mexico; we did not provoke this; and Congress has no authority.

The question then for me, as Legal Adviser to the Senate Foreign Relations Committee, is how are we going to deal with the fact that Abe Chayes has made this very cogent argument based on his reading of the Constitution and the constitutional history that the President's constitutional powers cannot be aborted that way if they are prerogative powers, as long as the conditions remain within the definition of the prerogative.

Senator BIDEN. You are being extremely practical and I am attempting to be professorial and impractical.

Why don't you answer my question as though I had just submitted it to you on a law exam. I want your rationale for why it would or would not be unconstitutional for the U.S. Senate or the Congress as a whole, by a two-thirds vote, to command the end of hostilities, notwithstanding the fact that we had been invaded?

Mr. **Franck**. Well, it is hard for me not to be practical because my answer is the same as Dr. Halperin's; that is, that it would be constitutional to refuse an appropriation, and it would not be constitutional to pass a law over the President's veto.

While that sounds like nonsense, I think there is a practical explanation for why that is the right tactic; that is, that if I were advising your committee, I would say let us proceed with the appropriations bill. And I don't think you have to wait for a new appropriations bill; you can tack it on to something else and rescind the use of funds already appropriated.

It takes the same majority. It puts you on much stronger constitutional grounds because we have cases in which the appropriations power has gone to what appear to be otherwise prerogative powers of the President.

Whereas, if you want to do it the other way, you have to break new ground. I think that you are posing a situation in which the breaking of new constitutional ground would be very difficult.

Senator **Biden**. All of you said it in your statement in one form or another, that what this is all about is working out the shared concurrent power of the President and the Congress in a way that facilitates more cooperation and, hopefully, ultimately sounder policy.

What I am trying to do is to figure out whether there are grounds upon which all authorities could agree and whether there is basis for compromise.

That is why I asked what otherwise would appear to be an extreme question. The practical fact of the matter is that Professor Chayes is right. If a President commits forces anywhere, for any reason, at any time, the immediate reaction will be for the Congress to rally round whatever the President has just done.

I cannot contemplate the circumstance under which two-thirds of the Congress, within a very short period of time, would come after the President and attempt to deny him the authority to do what he did.

This leads me to believe that maybe, instead of having a 60-day timeclock, if it is constitutional, it should be a 180-day timeclock.

Again, as you pointed out, Professor Rotunda, when I was in undergraduate school in the early 1960's, all of my liberal professors argued that we had to allow the President more power and flexibility. Every single one.

Mr. **Rotunda**. Yes.

Now, we are kind of in a similar situation. Fifteen years ago the liberals in Congress decided to try to limit the President and thought that it made sense to keep the timeclock shorter, if it were constitutional.

Now some of us are saying that maybe the only practical thing to do is to make it longer, because in 60 days, he is either in and out and everybody is happy that it is over and does not want to fight about it after the fact, or he is in and it is not enough time for the Congress to muster the nerve to be sure that it is not working and to try to pull them out.

And so, it takes about 180 days for it to go to hell in a handbasket, if it is going to go, or it is going to be over. I am being practical again. At least that is the result of my 16-year experience up here.

We have not been able to focus on what are the constitutional limits of power for the President to use force abroad, what the President can and can't do. It is very hard, as you said, in this esoteric debate to get anyone out there to understand why are we talking about war powers.

Senator **Biden**. Let me now ask to Professor Rotunda to comment on anything I have just said, and then we will go to you, Professor Chayes, and then back to you, Mort.

Mr. **Rotunda**. In 25 words or less?

Senator **Biden**. Well, 10 would be preferable. [Laughter.]

A smart answer like that again and you are down to five.

That was a joke. [Laughter.]

Mr. **Rotunda**. I agree with Professor Franck. I think that the President has the power to defend New Mexico. One of the problems with extreme hypotheticals is that there is very little in precedent that you can turn to. To the extent that there is language, it is obviously dictum because nobody is thinking about this particularly extreme hypothetical.

But I think the President has the constitutional power to defend the invasion of New Mexico, though I think that the issue will probably never arise because, the time two-thirds of both Houses of Congress think it is such a bad idea, by that time the political process will have persuaded the President, unless he is an absolute dunce, that you have to get out of there.

So, those legal issues never arise. But it certainly is appropriate to talk about them.

The Congress, just as much as the courts, take the oath to uphold the Constitution. And, although Congress may not be the ultimate arbiter of the Constitution, that should not be a reason to abdicate its responsibility to the courts. It should independently decide these issues and then the courts will either decide that they are political and so they are not going to decide them or will decide what the issues are. But Congress should not abdicate its responsibility.

Mr. **Chayes**. I agree with that.

I think obviously Congress has the responsibility of making the judgment about the constitutionality of every statute it passes and should not be passing a statute that it regards as unconstitutional.

But this does not mean that it must be convinced absolutely that it is constitutional because on most important issues, there are lots of arguments about constitutionality.

I was going to say, Senator Biden, that you missed your calling with that hypothetical. You should have been a law professor.

Senator **Biden**. With my grades, I think maybe I did the right thing. [Laughter.]

Mr. **Chayes**. Maybe and maybe not.

But that is what we do all the time. We put to the students very extreme cases and make them try to face up to them.

Senator **Biden**. You see, I gave practical answers and I got C's. That was the problem.

Mr. **Chayes**. Everybody tries to squirm out of it. Nobody wants to say here, at this point, it is my opinion that the President would have to give up if Congress told him so. On the other hand, nobody wants to say that Congress doesn't have the power to do this.

We both know, we all know, that you could make very strong arguments on both sides. In the end, you have to come down on the question of where you think the ultimate power of the democracy lies on an issue involving not civil liberties or something like that, where we have said the ultimate power lies, but on an issue involving perhaps the life of the country.

As you say, I don't think that is a practical problem at all. But my notion at that point—and I am not a very strong congressionalist in general—my notion at that point is that the ultimate power of the country should lie with the Congress.

Dr. **Halperin**. Senator, being neither a lawyer nor a law professor, let me, if I may, give you a piece of practical advice.

I think it is a mistake to rely on any time limit, whether it is 60 days or 6 months. I think you ought to divide the cases into those in which the Congress authorizes the President to act because there are emergencies—I think that is the right concept—and then to simply authorize the President to pursue that operation until the objective, which gave rise to it, is accomplished, whether it is rescuing troops or protecting troops, and no further; and that you ought, in all other cases, require the President to get the prior approval of the Congress.

But, once the Congress has authorized a military operation, whether by putting it in a category where you authorize the President to act in an emergency or authorizing it by resolution before the President starts the particular operation, I think you ought not to provide in any way for the termination of that operation under the War Powers Act, recognizing that Congress, when it comes regularly to appropriate, can, by a majority vote, in fact, of either House, simply refuse to provide the money to continue the operation. That is the appropriate time to consider the possibility of forcing a termination.

Senator **Biden**. A practical concern that everyone has up here, regardless of what their ideological bent may be, is that in today's world, it is all over by then; that if, in fact, you rely on the appropriations process to terminate the involvement in hostilities, you end up in a situation where it leans heavily to the President's side because everything from rules relating to filibuster to the ability to generate public opinion in the short term finds you further and further and deeper and deeper in.

It is a very strong argument to be made, the following one: Although it may not have made sense to go in then, there are American boys there now; ergo, we cannot leave now.

And so, I think, although no one admits it, one of the reasons for the searching for a mechanism called the War Powers Resolution was to deal with the realities of conflicts in the late 20th and the 21st century, that may so rapidly escalate that the appropriating process, although clearly available, is one that is awfully difficult to implement.

Professor Chayes, do you have a comment?

Mr. **Chayes**. I just want to say that in this whole discussion of the timeclock, we have not mentioned that Congress can extend the time if it wants.

Senator **Biden**. Yes.

Mr. **Chayes**. I mean, all that the President has to do is to get a majority of both Houses on his side during that period, to extend the time.

It really is a sort of question of on which side is the burden of proof. Does the Congress have to get up a two-thirds majority to stop something that has already started or does the President have to muster a majority on both sides in his support? That gets back to Mort's point at the beginning, which is that we have seen that it has a lot to do with the conditions of conflict in the late 20th and early 21st centuries.

Conditions of conflict are not going to be conditions, or at least our experience has been, that generate unanimous support in the body politic. They are going to be very tough and divisive conditions, and unless we can mobilize unified political branches, we are not going to do well in them.

Senator **Biden**. Professor Franck.

Mr. **Franck**. Senator, I think your Committee Print 1 in fact does put into place—though one can argue with the exact construction of it—but it does put into place a framework procedure for bringing the power of the purse to bear other than by a majority vote on a particular appropriations bill, and that is the point of order procedure. I strongly favor that.

One of my concerns, that is, my concern in this part of the discussion is that you really have set out three remedies, framework remedies. One is the one we have just alluded to, regarding the point-of-order procedure. The second one is the procedure for promoting the adjudication of the issue. The third one is the timeclock.

I guess I would just feel that the timeclock was, constitutionally, the most frail an also the most likely to draw fire that will come from much more than just the executive branch, that will come from other reasonable people who will see it as being both constitutionally the weakest of the weapons and tactically the least useful of the weapons.

Senator **Biden**. I appreciate that insight.

Let me ask you all one last question. I will start again with you, Professor Franck, if I may.

On page 16 you say, "Both the NATO and Rio Pacts can be construed as giving the President the authority to respond to an attack on a treaty partner as if it were the United States that had been invaded; that is, by acting without further authorization."

Now I must say that everything I have ever learned about both these postwar treaties, the Rio Treaty of 1947 and the North Atlantic Treaty of 1949, runs contrary to your statement.

I believe it is clear from the legislative history of those treaties, including correspondence between the Senate and the Secretary of State, Mr. Acheson, at the time, on this very point, that those treaties are not self-actuating in the case of the United States.

In each case, they represented a national pledge by the United States, but that pledge incorporates the very clear understanding that, in any given circumstance, the United States will proceed to deal with that pledge through its regular constitutional processes and that these processes have been in no way affected by the treaty.

Now, I wonder if you and the rest of the panel would comment on my understanding.

Mr. **Franck**. There have subsequently been commitment treaties, mutual security agreements and so on, which have spelled it out the way you have indicated it was understood. But I suppose the NATO and the Rio Treaties are salient in not containing, in the words of the treaty, that caveat, that we would respond in accordance with our constitutional procedures.

To the contrary, the NATO and the Rio Treaties stipulate that the United States will respond as if the United States were attacked. I would think it would not be very difficult to imagine that the other parties to the treaty and a future President of the United States, when viewing a frontal attack on West Germany, would say that he was constitutionally empowered to exercise what we have been calling his prerogative powers of self-defense because it was as if the United States were attacked and that there was a treaty to that effect.

My reason for bringing it up at all—and I did not mention it in my oral testimony—was simply in the category of tidying up. I thought that the present War Powers Act spoke both ways; that is, on the one hand it said that nothing in the War Powers Act shall affect any existing obligations, and on the other hand it said, however, no treaty obligations shall be read, either future or obligations or past obligations, as having authorized the President to act.

I think if the Congress decides that NATO and Rio should be interpreted as you have said they should be interpreted, then one ought to say that in the Resolution, rather than leaving it in this gray area, or take out both clauses, or whatever. But there ought to be a deliberate policy because, at the moment, it seems as if you are doing two incoherent things.

Senator **Biden**. Thank you.

Professor Rotunda.

Mr. **Rotunda**. Just a brief addition.

I think that the understandings, our own understandings, that say we do it in accordance with our constitutional procedures do not decide the issue. They simply bring us back to this hearing: What are the constitutional procedures to respond to an attack, a frontal attack on Great Britain or West Germany or other countries in the NATO Treaty ?

It seems like a thousand years ago, but I recall as a little boy watching TV and John Kennedy was President. We had a little black-and-white TV in which I watched his announcement on the Cuban missile crisis.

If I recall his words correctly—and I think I do, because it was really significant to me at the time—he said that "We will treat an attack by Cuba on any country as an attack on the United States by Russia and respond with our full retaliatory ability," or words to that effect.

Now, I did not know much about the Constitution at the time, though I know a little more now, and I don't think he was acting unconstitutionally.

Mr. **Chayes**. He was also acting under congressional authorization. A resolution by the Congress had been passed maybe 3 weeks before in anticipation of this very event.

John Kennedy recited it in his speech, as well as in the Quarantine Proclamation that he later made as authority for the action. He did not act on the basis of prerogative power or his power as Commander in Chief, although he recited his power as the Commander in Chief. But he also recited the authority granted by this congressional resolution.

Dr. **Halperin**. I think, Mr. Chairman, your understanding is wrong.

Mr. Acheson's letter is a classic example of a reassurance by the executive branch, which is not a reassurance at all, and which skirts the fundamental issue.

The treaty did not change and could not change our constitutional procedures for responding to various kinds of attacks. What it could do is create a fact which changes, then, the relative authority of the Congress and the President.

We all agree that if the United States is attacked—and we discussed that earlier—the President can respond without needing authority to attack. I think most of us would agree that if Ethiopia were attacked and the President wanted to go in, he would need the authority of the Congress to do so.

What the fact in the NATO Treaty said was that an attack on NATO is an attack on the United States.

That does not change the President's constitutional powers or the constitutional processes; but it changes which category that attack is in. This is because it says that an attack on NATO territory is an attack on the United States.

Once Congress says that, then I think—and I think this was intended—that the President's authority to respond to that is exactly the same as his authority to respond to an attack on American territory.

What that authority is some people may dispute. But I think the treaty did change the situation by changing that fact. I think it was intended to, and I think if you read Mr. Acheson's assurance carefully, you will see that he has written it so as to appear to give an assurance, but, in fact, he clearly preserves that distinction, and I think he understood it at the time and intended it to be understood at the time.

Now I also have to say that one of the reasons it is important to keep American troops on the line is that it adds a second, clear emergency situation. This would not be true of the Rio Pact, but certainly no attack in the NATO area could occur without shooting an American soldier.

So, as far as NATO concerned, I think the issue is somewhat moot because the President would have the authority to respond to defend the soldiers being attacked.

Mr. **Chayes**. I guess I do think that there is an ambiguity in the NATO issue. But I am not as clear-cut about it as Mort is.

That is to say, I do not think that a treaty can make West Germany a part of the United States.

Dr. **Halperin**. But I think if Congress ratifies it; it can.

Mr. **Chayes**. No, I don't think so. I think it leaves the ambiguity there.

I think you are right that Mr. Acheson was very anxious to preserve the ambiguity. But I agree with Mr. Rotunda that it sort of returns us to our own internal constitutional argument. It does not resolve it.

Senator **Biden**. I have several questions that I may submit to you in writing.

I appreciate your taking the time and the public service that you provide by doing this. We appreciate it very much.

Thank you all.

This hearing is adjourned.

[Whereupon, at 12:51 p.m., the subcommittee adjourned, to reconvene at 10:05 a.m., September 23, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

FRIDAY, SEPTEMBER 23, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 10:05 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Joseph Biden (chairman of the subcommittee) presiding.

Present: Senators Biden, Sarbanes, Adams, Helms, Kassebaum, and McConnell.

Senator BIDEN. The hearing will come to order.

Welcome, Mr. Secretary, Admiral. It is a pleasure to have you both here this morning.

I have had the opportunity, thanks to your generosity in submitting your statements yesterday, to read both your statements.

The Special Subcommittee on War Powers today resumes hearings directed at answering a critical question: Can the War Powers Resolution of 1973 be amended, repealed, or replaced so as to improve the effective cooperation of the President and the Congress in national decisions concerning the deployment of American forces in situations of actual or likely hostilities?

In previous hearings, the subcommittee heard from legislators involved in the origins of the War Powers Resolution, from distinguished American historians, from former military leaders, from the State Department Legal Adviser, from former Cabinet officials of both parties, from former President Ford, and from highly regarded experts on the U.S. Constitution.

Today, the subcommittee will receive further significant testimony, beginning with the views of this administration's top officials in the Department of Defense—Secretary Carlucci and the Chairman of the Joint Chiefs of Staff, Admiral Crowe. The subcommittee will then hear from a panel of legal experts, comprising Prof. Louis Henkin, chief reporter of the latest restatement of foreign relations law; Prof. William Goldsmith of Brandeis University; and Prof. James Bond, dean of the Puget Sound University School of Law.

I have said at the outset of each of these hearings that while the war powers issue is both intellectually complex and emotion-laden, its fundamental importance to the U.S. national interest requires that we bring to bear upon it the most thorough and dispassionate consideration. It is my hope that the subcommittee will provide a forum for that kind of deliberation, leading us toward an improvement in the law that ends the current constitutional stalemate.

At the same time, I recognize that we face a paradox. Because there is no current war powers dispute of great interest to the public, we find ourselves able to conduct our proceedings with the necessary dispassion of which I spoke, but also in a political context that might fairly be described as lethargic in that it contains little sense of urgency compelling us toward any substantive action.

Nonetheless, the subcommittee's goal of improving the law in this area is a critically important one. With that goal in mind, I welcome our first witnesses and turn to my colleagues for any opening statements they may have.

By the way, Secretary Carlucci, I note that your opening statement is focused on the proposal embodied in Senate Joint Resolution 323. Our hearings are actually more broadly focused—on any and all proposals—including a tentative draft that we have produced in the subcommittee for purposes of discussion and debate. But I am sure your comments on Senate Joint Resolution 323 will provide a good basis for our discussion.

Mr. Secretary, if we could begin with you, please proceed in any way you wish. Your entire statement will be placed in the record. You are at liberty to read it all or you may summarize it, if you like.

STATEMENT OF HON. FRANK A. CARLUCCI III, SECRETARY OF DEFENSE

Secretary Carlucci. Thank you very much, Mr. Chairman.

I know that I speak for Admiral Crowe as well as myself when I say that it is a pleasure to be before you, in these hearings on this very important subject. I commend you and other members for taking a hard look at this issue.

I have been, as you are aware, very forthright in my statement because I believe that only by being forthright can we promote a healthy debate on this subject.

Senator Biden. I have never known you to be anything other than forthright, Mr. Secretary.

Secretary Carlucci. Thank you.

My view is that the War Powers Resolution is a failure and should be repealed. Whatever worthy goals it may have had originally, in practice it has undermined other important national objectives. It has failed a reasonable test of time, as four Presidents have judged it to exceed the mandate given them by the Constitution.

One myth that was prevalent at the time the War Powers Act was passed in 1973 was that the Presidency had become too powerful, exceeding the intentions of the Founding Fathers.

Looking back on that time—and I was in Government at that time—it is now more readily apparent that Presidential ability to exercise discretion over the affairs of the Nation has, if anything, declined in recent decades.

A related myth from 1973 is that the Congress, because of the so-called imperial Presidency, had been powerless to stop the White

House from pursuing the Vietnam conflict. This argument was premised on the fact that no declaration of war against North Vietnam or its allies was ever passed by Congress.

The fact is that the Congress did have the power to stop America's military involvement in Vietnam, using its power of the purse, but it did not choose to do so. One need only list the appropriations bills that were passed by the Congress in support of Vietnam operations to grasp the reality that the Congress, no less than the Executive, lent its constitutional powers in support of the Vietnam effort.

It is also useful to recall the American public's disaffection and disillusionment with the use of military force by 1973. In voting for the War Powers Resolution, the Congress promoted the view that an excessive concentration of power in the Presidency was to blame for the controversial embroilment in Vietnam. I regard that as an error.

As the years have passed, our attitudes have evolved with time, and I think Americans have come to appreciate anew that the considered and discreet use of military force can be a successful tool of our national policy. But the unhappy legacy of the War Powers Resolution, as an attempt by the Congress in a transitory moment of Presidential vulnerability to increase its power while decreasing its political responsibility, has stayed with us.

Now, thanks to the farsightedness of many in Congress who are willing to face up to the failure of the War Powers Resolution, there is a hope that the Congress will correct this misstep.

Congressional enthusiasts of the War Powers Resolution, of course, do not describe it as I just have. They cite the desirability of having the President draw upon congressional wisdom as he decides whether to commit U.S. military forces abroad. They also point to the benefit to our Nation's foreign policy of having the American people, through their representatives in Congress, endorse a military operation initiated by the President.

I don't differ with these objectives. I support them.

The problem with the War Powers Resolution is that it supports neither. Instead of encouraging the President to seek out the views of the Congress, it fosters an atmosphere of confrontation by purporting to deny him his constitutional authority, as Commander in Chief of the Armed Forces, after 60 to 90 days of military operations. Instead of showing the world the will of the American people, the War Powers Resolution could, according to its terms, implement itself without a single vote being cast in the Congress.

This latter flaw, as much as the unconstitutionality of the War Powers Resolution, is offensive to our military establishment and seems particularly out of step with the times.

Public preoccupations have changed since 1973. Today, the accent in Government is on accountability, competence, and efficiency, and the immense war powers responsibility places a premium on all three of these.

Accountability is a basic concomitant of war powers. No President can evade full responsibility for the risks and consequences of employing U.S. military force, nor has any president, from Roosevelt through Truman, through Kennedy, Johnson, Nixon, and Carter, abdicated that responsibility.

A President would be no less accountable for the risks and consequences of failing to employ force when the defense of the national interest required it. This responsibility is a burden which we put on every President, without exception.

The war powers formula, by which the Congress could seek to invalidate the action of the Commander in Chief after 60 to 90 days through the simple expedient of doing nothing, is the very antithesis of the accountability which lies at the heart of participatory democracy. I believe such a formula shortchanges the American people, who deserve and expect to have their collective will expressed in a time of international duress; and I find it unconscionable that any elected officeholder would seek to participate in the exercise of war powers without full public accountability, when our forces in the field have pledged their very lives and sacred honor to the national interest.

This is why the no-fault formula in the War Powers Resolution, wherein no Member of Congress is required to stand up and be counted, is unacceptable. As President Nixon said in his veto message, "One cannot become a responsible partner unless one is prepared to take responsible action," meaning "full debate on the merits of the issue and each Member taking the responsibility of casting a 'Yes' or 'No' vote after considering those merits."

Mr. Chairman, since the debate over war powers arose in the early 1970's, the focus has been almost exclusively on "powers." This time, I think we should give equal consideration to the subject of "war," for there is much more to this issue than sorting out legislative and Executive authorities.

It does not surprise me that congressional commentary on the subject of war powers invariably emphasizes the importance of congressional support for U.S. military actions. Who can deny that the imprimatur of the Congress confers greater legitimacy and force to the acts of the Executive?

But legitimacy, while necessary, is not the only factor involved in the Government's responsibility to preserve the national interest.

Efficiency and competence are also central to the mission of Government. The Framers of the Constitution recognized this when they created the Executive, which has its own unique and vital purpose.

In the Framers' language, the prime characteristic of the Presidency is "energy," or the capacity for prompt action. The Congress, by its very design, is not capable of effective executive action.

When military force must be used, the American people not only want it to be legitimately authorized, they also want it to succeed. They want the tactical military objective to be accomplished with a minimum loss of life, and they want the underlying foreign policy to be served by that action.

The successful employment of U.S. military forces may hinge on the ability to act quickly. What we must do to defend our national and international interests is governed, to a great extent, by external forces and events over which we have very little control and which seldom wait for us to act.

Yet, for 60 or 90 days, or longer, the War Powers Resolution would leave in suspense the question of whether a military deployment was authorized.

Think about the factors upon which success of a military operation may depend: High morale of our forces; high confidence in our resolve on the part of our allies; and, most of all, the perception on the part of our adversaries that the United States has the willpower, the means, and the intention to achieve our goals, despite their resistance.

I cannot overstate the importance of this last objective—convincing our adversaries that we, as a nation, intend to prevail on whatever point of contention has placed us at odds.

Military strategists, from Sun Tsu to Clausewitz, to Adm. Bill Crowe, all agree that the most successful battle is the one which never needs to be fought because one's adversary recognizes the futility of further confrontation.

Yet, look at the signals the War Powers Resolution would have America send to allies and adversaries alike at a critical moment when our resolve is being measured abroad.

The first thing a President is asked to do is to judge whether hostilities are imminent. If he says "Yes," he is breaking a cardinal rule of military strategy by forfeiting the advantage of tactical surprise. One can only imagine the casualties Israel might have sustained in June 1967, had Golda Meir been obliged to engage in extensive war powers consultations with the Knesset, signaling Israel's imminent preemptive attack upon neighboring forces which it knew were poised to assault Israel.

If the President expresses the judgment that hostilities are not imminent—assuming, as I do, that Presidents would report truthfully to the Congress, even while forfeiting another key military advantage, that of deception—our adversaries can breathe more easily. They know from the experience since 1973 that the Executive-legislative disagreement over the War Powers Resolution slows down the decisionmaking process in Washington and renders major tactical military surprises by the United States almost inconceivable.

The 60-day deadline, extendible to 90 days, is the feature of the War Powers Resolution that is most debilitating to the pursuit of strategic success in an exigent situation. The very notion of setting deadlines, however short or lengthy, plants seeds of doubt in the minds of our own forces as to whether their acts of courage are backed up by their own Nation. It plants seeds of doubt in the minds of our allies as to whether they should join in our military operational efforts or wait to see whether war powers disagreements in Washington will unravel the President's approach to a problem abroad.

Deadlines constrain our military planners from fashioning an optimal response to the threat. One wonders whether President Kennedy would have regarded a naval blockade as a viable option in the Cuban missile crisis had the war powers deadlines and reporting requirements been in existence.

Kennedy's misgiving would have had nothing to do with the Congress. Obviously, all Americans rallied around their President at that time. Rather, he would have had to concern himself with Khrushchev's perceptions about the War Powers Resolution.

In my view, we are fortunate that no such thing existed in 1962. In those tense circumstances, the White House wisely left it to the

Kremlin's imagination and intelligence capability to judge what sorts of forces the United States was deploying, where, how they were armed, their mission and rules of engagement, whether we anticipated hostilities, and how long we intended to maintain our escalated force posture.

Americans are, to put it mildly, gratified that President Kennedy prevailed in that test of wills—that the other side "blinked" first.

It is a mystery to me that anyone could expect a future President to engage successfully in a similar test of wills under the ticking clock of the War Powers Resolution deadlines, when an adversary could reasonably conclude that the United States is unilaterally preprogrammed to "blink" after a 60-day deployment of its forces.

The plain fact is that, whether the challenge to our security takes the form of nuclear brinksmanship, armed conflict, terrorism, or any other type of threat to our national interests, deadlines simply encourage adversaries to wait us out until our own political system accomplishes for them what their own forces or terrorists could never achieve.

Nor is the problem with deadlines a matter of their length. It took, after all, several decades for the Ayatollah Khomeini and his clerical comrades to seize power in Iran. Khomeini himself waited in exile for 14 years before settling his score with the Shah.

When the United States initiated the reflagging operation in the Persian Gulf, the threat in the gulf to U.S.-flag shipping, international commercial traffic, and the security of gulf states friendly to the United States emanated from the Iranian regime. Given the Ayatollah's mindset, any sort of self-imposed deadline on the enhanced U.S. Navy presence in the gulf, whether days, months, or years, would surely have been self-defeating.

Indeed, the formula of the War Powers Resolution was entirely incompatible with the needs of the United States in its Persian Gulf deployment strategy. The purpose of increasing our forces was not to engage in hostilities, but to deter them. Had we imposed a deadline on the reflagging operation at the outset, the Kuwaitis might well have invited the Soviet Navy to take up a major role in the gulf for the first time. The British, French, Dutch, Italians, and Belgians might well have refrained from following our leadership in providing naval protection to shipping in the gulf.

Most of all, the regime in Tehran might have held off from its historic decision to end the war with Iraq, believing that if it only waited for the Americans to reach their time limit, it would again be able to exert effective pressure on the gulf Arab states and weaken Iraq's leverage.

Thank goodness everything came out as it did. Our allies and adversaries believed us when we pledged that the United States would not back away from the defense of its national interests, and today there is hope for peace in that region.

Now, let us recall how the Congress responded to the President's actions. ●

In October 1987, the Senate debated a resolution concerning our policy in the gulf. The resolution, which passed after initially being defeated, did nothing more than to schedule a Senate vote several months later on a resolution not yet written. Senator Bumpers said that this Resolution had been carefully designed "to do nothing."

In the House of Representatives, 110 Members attempted to sue the President, claiming he had not fulfilled his obligations under the War Powers Resolution. Judge Revercomb of the U.S. District Court for the District of Columbia dismissed the suit, saying, "The President must have flexibility in executing military and foreign policy on a day-to-day basis."

Had the 110 Members of the House of Representatives been able to persuade a total of two-thirds of the House and Senate of their position on the President's Persian Gulf policy, there would have been no reason to solicit support from the courts. As Judge Revercomb stated when he dismissed their suit, their action was a "by-product of political disputes within Congress"; and for him to rule on the issue would have been to "impose a consensus on Congress" that it had not achieved on its own. Congress, he said, is "free to adopt a variety of positions on the War Powers Resolution, depending on its ability to achieve a political consensus."

Mr. Chairman, I believe that 15 years of experience with the War Powers Resolution is enough to see that it is incompatible with the constitutional scheme set out by our Founding Fathers. The executive branch, by design, is a hierarchy, ultimately responsive to a single Commander in Chief, elected by all the people. It alone is capable of immediate, clear, coherent, and consistent action. The legislative branch, by design, brings 535 independent actors into a deliberative process which hears the voices of Americans everywhere on every issue.

There is nothing deficient in Congress' constitutional power of the purse, as every executive agency head knows from painful experience.

Schemes to inhibit the constitutional powers of the President, or to substitute self-enforcing legislative mechanisms for the exercise of responsible leadership, only serve to obscure the real source of many Members' frustration—namely, their inability to persuade their own colleagues to agree with them and to vote with them.

When the American people overwhelmingly and strongly believe that the President's policy must be reversed, the Congress will reverse it. The simple test of whether the American people generally hold to this view is to count the votes in Congress. If the votes are not there, neither is the popular mandate.

A former chairman of the Senate Committee on Foreign Relations, the late Senator Frank Church, offered some candid observations about the War Powers Resolution in a hearing much like this one, held in 1977. An original supporter of the legislation, he subsequently came to doubt its utility.

Senator Church gave the following explanation, and I quote:

> First, if the President, as Commander in Chief, uses the Armed Forces in an action that is both swift and successful, then there is no reason to expect the Congress to do anything other than applaud.
>
> If the President employs forces in an action which is swift, but unsuccessful, then the Congress is faced with a fait accompli, and, although it may rebuke the President, it can do little else.
>
> If the President undertakes to introduce American forces in a foreign war that is large and sustained, then it seems to me that the argument that the War Powers Resolution forces the Congress to confront that decision is an argument that overlooks the fact that Congress, in any case, must confront the decision because it is the Congress that must appropriate the money to make it possible for the sustained action to be sustained.

Senator Church concluded by saying:

> So, I wonder, really, whether we have done very much in furthering our purpose through the War Powers Resolution. * * * As a practical matter, I think it is going to come down to the arena of politics and the tug of war between the two branches in the self-assertion of their two powers. There is no neat formula that can accommodate the needs of the future in this respect.

That is why I believe that the most prudent step the Congress can take to clarify the issue of war powers and to maximize the effective and legitimate exercise of authority by all three branches of Government is to repeal the War Powers Resolution and return to the only formula I know of which will withstand the test of time; namely, the Constitution.

Mr. Chairman, I recognize that the committee is interested in exploring the merits of specific proposals embodied in Senate Joint Resolution 323. Although I see no necessity for war powers legislation, I am prepared to comment on the proposed legislation. With the chairman's indulgence, I would ask that my prepared statement be entered into the record, since it includes some specifics on that.

Senator BIDEN. Without objection.

[The prepared statement of Secretary Carlucci appears in the appendix.]

Senator BIDEN. Admiral, you had quite an introduction, putting you into the same category as Clausewitz.

Usually, Secretaries of Defense are not quite that complimentary.

Admiral CROWE. It came as a surprise to me, too, Mr. Chairman. [Laughter.]

Senator BIDEN. Admiral, please proceed.

STATEMENT OF ADMIRAL WILLIAM J. CROWE, JR., USN, CHAIRMAN, JOINT CHIEFS OF STAFF

Admiral CROWE. Mr. Chairman, I have submitted a statement for the record.

Senator BIDEN. It will be placed in the record in its entirety, and I have read it.

Admiral CROWE. It is from the standpoint of the military, as opposed to either legal or constitutional authority. It reflects generally the views that have been expressed by the Secretary. I would propose that I not read the statement, Mr. Chairman, so that you can get right to your questioning period.

Senator BIDEN. Thank you.

[The prepared statement of Admiral Crowe appears in the appendix.]

Senator BIDEN. Since we have such good participation, why don't we stick to a 10-minute rule. We may have trouble getting through, but, notwithstanding the suggestion of my able colleague from Maryland, who suggested 5 minutes, 5 minutes is only enough time to say your name and ask one question. It is like a Presidential press conference.

I would like to avoid that, if I can. So we will have 10 minutes.

As a matter of fact, I avoided it, though not by design. [Laughter.]

Your statement is based upon the premise that the War Powers Resolution is unconstitutional, but you also discuss the practical limitations of the law.

In 1980, the Legal Counsel for the Justice Department, in its most formal pronouncement on the War Powers Resolution, said, and I quote:

> We believe the Congress may, as a general constitutional matter, place a 60-day limit on the use of armed forces, as required by section 5(b) of the Resolution. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of armed forces abroad.

Continuing with the quote: "We cannot say that placing that burden"—the "burden" meaning the 60-day limitation—"on the President unconstitutionally intrudes upon his Executive powers. Congress can regulate the President's exercise of his inherent power by imposing limits by statute."

Now, obviously you and Mr. Sofaer, speaking for the administration, disagree.

Admiral Crowe also disagrees.

But what I find significant is that, by and large, your arguments are not so much arguments against the War Powers Resolution, but arguments against any—any— limitation, constitutional or statutory, on the President's warmaking power.

Mr. Sofaer said, and I quote. "Explicit legislative approval for particular use of force has never been necessary." This seems to be an argument that is tantamount to saying that the President could have used armed force in all American wars, without any declaration of war or any direct congressional approval.

I find the same theme in your statement today.

Accordingly, I would like to ask you the simplest of questions. Can you give me an example, Mr. Secretary, of some use of the Armed Forces that the President would not have been authorized to undertake without direct congressional authority, or, in your view, is the President authorized to undertake any use of force if he believes it serves U.S. interests?

Can you name any initial undertaking of use of force in the last 50 or 60 years where the President required congressional authorization to go forward with?

Secretary CARLUCCI. Mr. Chairman, I am not a constitutional lawyer, but I would assume most authorities would agree that President Roosevelt needed a declaration of war at the time of the Pearl Harbor attack.

Senator BIDEN. Why?

Secretary CARLUCCI. I would say that I am not prepared to make the legal arguments. But let me elaborate a bit because I think you altered a bit the argument I was trying to make.

I was not arguing against any congressional involvement. It seems to me close and continuing consultation is an essential feature of any national policy, and I think my record speaks quite clearly on this. I have always consulted with the Congress.

Furthermore, the Congress does have a very strong power of the purse, and I pointed that out in my testimony. So, we are a long way from saying there should be no role for Congress in the use, the judicious use, of military action.

I think there should be consultation. I think Congress does have an oversight rule and I think they have a very substantial power in the power of the purse. Whether there has to be a formal declaration of war or not, I would defer to the legal scholars on that.

Senator BIDEN. Well, today your statement and the Admiral's statement seem to say that the President really cannot be limited on the initial question of whether or not he or she commits American forces; that the commitment of those forces is solely a judgment made by the President.

Secretary CARLUCCI. That, in my judgment, is a fair characterization. If we were to have a nuclear attack, the President has to have the liberty to act.

Senator BIDEN. I understand that. I am trying to establish some parameters here. That is why I asked you the question, not as a legal scholar but as a very informed man. Of all the people with whom I have worked over the years, you are one of the most capable people.

I am not asking you for a legal opinion. But I am asking if you can think of any undertaking where there was an initial commitment of U.S. forces that would have required congressional authorization?

Is there any circumstance where the President, once he consulted with the Secretary of Defense, the Secretary of State, the Joint Chiefs of Staff, and determines that U.S. interests were at stake—and that is a pretty broad statement, as we all know; bases in Portugal are of United States interest; the invasion of West Germany is of United States interest; the invasion of Florida is of United States interest; a nuclear attack is a United States interest—would be required to seek congressional authority before committing U.S. forces?

Secretary CARLUCCI. Once again, I am getting into legal areas, where I am not very steep. But my understanding of what the legal experts are saying, at least in the administration, is that there are no such constraints.

Whether it is desirable is another issue.

Senator BIDEN. OK. I just want to make sure that we understand where we are starting from. The administration says there are no constraints on the commitment of U.S. forces, and, further, you argue in here, as the administration has, that the Congress has no ability to set a time limitation on that commitment.

So, we have two pieces. One, when the President makes a judgment to send 2, 2,000, or 200,000 troops to a place where he concludes U.S. interests are at stake, there is no limitation on that. That is the administration's position.

Second, once he or she does that, Congress cannot limit the amount of time they can be there. The only thing that the Congress can do is cut off the money for those troops.

Secretary CARLUCCI. Well, we had the case of the Lebanon resolution, where the President accepted a timeframe.

Senator BIDEN. Yes, if he accepts.

Secretary CARLUCCI. Yes, if he accepts a timeframe. But my understanding of the legal arguments—and, once again, I am over my head on legal arguments—is that the President cannot be obliged to accept a time limit.

Senator **Biden**. I understand.

I have a number of questions and I am going to come back to them because I think this is critically important testimony here this morning.

Admiral **Crowe**. Mr. Chairman, may I add a word to that?

Senator **Biden**. Sure, Admiral, please do.

Admiral **Crowe**. If I understand you correctly, you are trying to bound the problem.

Senator **Biden**. Yes.

Admiral **Crowe**. I did not realize that I said that it was unconstitutional, because I do not consider myself competent to make a statement like that. But, from a practical standpoint, it seems to me that in general hostilities, such as we engaged in in World War II, it is imperative, if not for legal reasons, it certainly is for practical reasons, that the President have a declaration of war because, obviously, at some time in the course of those proceedings, he is going to have to commit force and do things that are not directly related to the incident that started the whole thing. And look at what we did in World War II. We fought all over the world. Many of those things—when we went into India in order to get to China—were not a direct causal connection, and so forth. Take North Africa: We did not get to Europe except in going through North Africa.

Now that is not like Lebanon or Grenada or the Persian Gulf. That is a completely different order of battle. I can't imagine a President that would contemplate doing that without going to the Congress.

Senator **Biden**. What about sustained hostilities, whether or not they are general?

Admiral **Crowe**. Well, they have some similarity. But I think even then, if it is limited to an area, it is different.

Senator **Biden**. But, at any rate, I will yield now to my colleague, Senator Helms.

Senator **Helms**. Thank you, Mr. Chairman.

First of all, Frank, this is an excellent statement. Of course, you and the distinguished Chairman of the Joint Chiefs have been up here twice this week. One time we did not totally agree, and this time we did totally agree. I like it better this way.

Secretary **Carlucci**. So do we.

Senator **Helms**. Mr. Chairman, I think that the Secretary's statement answers the question that you asked.

Now, I'll be a little more blunt than he was. The War Powers Resolution, which we call the War Powers Act, was conceived in political upheaval. It was, more than anything else, an expression against the Vietnam war, where we sent hundreds of thousands of men to the other side of the world to fight a war that they were not allowed to win.

You and I were in our first year in the Senate when this was passed, and I have remarked on a number of occasions—and I know I will be boring my colleagues when I say this again—that I remember taking that proposed legislation home one night to study it. The next morning I called Sam Ervin, who was a pretty good country lawyer and constitutional authority, in my judgment.

I went around to see him and I asked him if this were not unconstitutional. He said absolutely.

I was one of a minority who voted against this.

You are exactly right, Frank, in what you said. First of all, Congress has a constitutional involvement and always had a constitutional involvement. The difference is there is more politics infused into the situation with respect to this Resolution than there ever has existed to my knowledge in previous history.

I thoroughly applauded Harry Truman's decision about Korea. I have often wondered how Franklin Roosevelt would have been able to prosecute World War II if he had had the same sort of thing hanging over him that Ronald Reagan and others have had with respect to this.

But I think your statement is fine.

Now, one of the media critics of Congress has written, and I quote him, that "the fact that a policy may cost lives or may fail shouldn't be a reason to scuttle it."

Now, interestingly enough, this critic is a self-described liberal, philosophically. Then he went on to say that "Congress is obsessed with such dangers and is weary of all foreign involvements."

I guess that raises the question which I will put to both of you: In your view, can the War Powers Resolution, the War Powers Act, or something like it, if a substitute were to be enacted, impinge upon and even dislocate American national security?

Secretary CARLUCCI. Oh, I think it could, Senator Helms.

As I said in my prepared testimony, at the very outset, you forfeit the advantage of tactical surprise by determining whether hostilities are imminent.

Second, your planning is very different if you realize that you are going to have to pull out in 60 days, unless the Congress votes to keep you in. You are turning the Joint Chiefs into political experts that have to go up and take soundings on the Hill and say, "Well, how do we develop our military plan?"

Key to any military plan is the adversary's perception. The adversary may say, "I've got one of two courses: I either ought to wait out the 60 days and then the problem will handle itself, or I ought to impact that process by some lightning strikes and killing a few American boys, American military people," knowing that Congress reacts adversely to that.

So, you have to plan in a different way if you are to exist under the war powers regime.

Let me ask Admiral Crowe for his view.

Admiral CROWE. I would agree with that, Senator.

The War Powers Act has had quite an impact on my business. There is no tactician, no commander now who doesn't get his lawyer alongside of him before he does anything or talks about doing anything.

I don't know that Sun Tsu or Clausewitz would have appreciated that very much.

The instance that I have had the most experience with is the Persian Gulf. I know that every time we contemplated anything that we felt was prudent from a military perspective, part of our calculations, part of our calculus, was the War Powers Resolution.

I would think, as I have said in my statement, that it would apply to our adversary as well. He knows that we are not going to conduct armed reconnaissance inside of his territorial waters because it would require a notification of the U.S. Congress. He knows that we are not going after his minelayers because it would require a notification of the U.S. Congress.

That is not a comfortable situation, from my standpoint, and that is what has made me change my mind on the War Powers Resolution.

Senator HELMS. Incidentally, Mr. Chairman, Admiral Crowe did not deliver his statement, but it, too, is an excellent statement. I might point out for him that he did not pose as a constitutional expert and he did not even address the constitutional aspects in his statement. He did it purely as a distinguished military leader, to whom all of us should be grateful.

So, I guess the obvious question—and I have no idea what the answer will be—is has the War Powers Resolution ever prevented you from doing something that you thought needed doing or which you wanted to do?

I ask that because, given your perspectives, I need to know for the record what kind of concerns are created by the War Powers Resolution from the vantage point of the Department of Defense. And you have just almost answered the second part of that question.

Implicitly or explicitly, has the existence of the War Powers Resolution ever caused you to stop and think and say "Well, gee whiz, we'd better not try to do this," and that sort of thing?

Secretary CARLUCCI. Let me try to answer that question in this way, Senator Helms.

The War Powers Act has, in all probability—and I can't speak for all Presidents—never inhibited a President from pursuing national goals; nor, in all likelihood, has it ever inhibited him from using military force when he thought that was the only way to pursue that goal.

But it has surely had an impact on how that military force is used, how the military think, what kind of operations they can conduct, how far they can go in those operations, and what kind of tactical advantages they have to forfeit.

I think that, in part, has led to a very strong feeling on the part of the military that, whenever we get involved in any military operation, we have to make sure that the public is always behind it.

I happen to differ with that concept. I think that there is an exercise of leadership here, and that you bring the public along when it is in the national interest. But the experience the military went through in Vietnam and the War Powers Act have created that kind of thinking, in my judgment.

Admiral Crowe may not agree with me, but that is my assessment.

Admiral CROWE. I would very definitely concur with that, Senator. If I could hark back again to the Persian Gulf, I treated this in my statement by saying that I knew of no example where the war powers had inhibited or prevented the Executive from the decision to commit in a very important instance.

On the other hand, I think there were a number of times in the last year where, from my standpoint, we considered doing things that we thought would be wise to protect our people, to facilitate the mission we were carrying out in the gulf and so forth. In every instance we had to ask ourselves the question: Is it worth provoking what it would have provoked by a notification and stimulation of debate, et cetera? In some instances, we did not take action which I would have advised militarily to do.

Now, I am at a little bit of a handicap this morning to discuss that in detail. I would have to go into a closed session. But the question as to whether to carry small arms versus crew-served weapons, which has some significance in the war powers business, whether to go inside territorial waters or not, which has some significance in the war powers business, whether to go on another man's soil, et cetera, et cetera, are involved.

There were specific instances where yes, in my view, the War Powers Resolution either made us temper what we thought was the wisest course or inhibited us.

Senator HELMS. I would just add one postscript and then I will finish, Mr. Chairman.

The same media critic whom I was quoting earlier made a significant statement, I think. He said, "A superpower cannot conduct foreign policy by public opinion polls." That is what it boils down to because there are no secrets in this city, as recent events of the past few days have indicated.

Anyway, thank you, Mr. Chairman.

Senator BIDEN. Thank you.

I am going to turn the Chair over to Senator Sarbanes and go over to the floor in anticipation of the cloture vote. There is a vote at 11 o'clock, and then I will return.

Senator SARBANES [presiding]. Mr. Secretary, I want to pursue a line of questioning that was put to you by Chairman Biden.

I want to put to one side the War Powers Resolution because I need, first of all, to get a clearer picture of what you think the reach of the Executive's power is in committing American forces.

As I understand your testimony here today, you see no limit on that, and I would say to you that that is not my understanding of the position that Judge Sofaer advanced to the committee.

But as I read your statement and heard you give it, and also respond to the chairman, it is your view that the President has an unlimited authority to commit forces without coming to the Congress first. Is that correct?

Secretary CARLUCCI. Once again, I really have to defer to the lawyers. You are getting me into legal arguments.

Senator SARBANES. But you are the Secretary of Defense. Suppose the President wants to take a course of action to commit American forces. Do you see any instance in which you would say we need to go to the Congress first. There is the power of declaring war that the Congress has and we can't undertake this commitment of forces without a prior congressional authorization. Do you see any such situation?

Secretary CARLUCCI. Even as Secretary of Defense, Senator Sarbanes, that would not be my role. I would advise the President whether we had the military capability to do it, what the risks might be, and I would certainly, as I have in the past, advise him to consult the Congress. I would not endeavor to render a legal judgment. I would defer to the Office of the Counsel to the President in the White House, which deals with War Powers Act issues and defer to my own general counsel for a ruling on that.

I certainly, as a nonlawyer, would not attempt to advise the President on constitutional law.

Senator SARBANES. Is it your view that he has an unlimited power to commit forces?

Secretary CARLUCCI. As a practical matter, I think his power is limited. My understanding of the constitutional arguments is that in circumstances where he judges the national interest to be at stake, he has the authority to commit U.S. troops.

Now, that is all subject to congressional oversight.

Senator SARBANES. No, no. I am not talking about oversight. I am talking about a commitment of forces solely on the basis of his own decision, without an authorization from the Congress.

In other words, would you turn to page 5 of your statement, please. This question is prompted in large part by your inclusion in your examples of Franklin Roosevelt committing the United States to war in Europe, with President Ford doing what he had to do in *Mayaguez*, President Carter in the aborted Iran rescue, President Reagan in Grenada and Libya and the Persian Gulf.

Now, it seems to me that we have to try to sort some of this out, and I understood Admiral Crowe to be trying to do that in a response he gave. In other words, there is a difference, at least it seems so to me, between a situation in which either we have been attacked or you have an instance of requiring quick response, and the kind of commitment that is involved in a major undertaking that amounts to a war, that clearly is a major war.

How can the President place us into that latter situation solely on the basis of his own authority?

Secretary CARLUCCI. I am prepared to concede that there is clearly a difference. But I am not prepared and I am not qualified to draw for you the line that distinguishes between an emergency action to, say, defend American citizens or to deal with a terrorist action or to assist in some kind of counterinsurgency operation and the point at which you enter what might be widespread warfare or, indeed, even global warfare. I don't think you can draw a hard-cut line there.

Senator SARBANES. Granting that it may be difficult to define that line, do you take the view that there is such a line?

Secretary CARLUCCI. I take the view—and this is a personal view; I do not speak for the administration on this, and, once again, I would defer to the lawyers—but I take the view that that has to be a matter of judgment, good sense, consultation between the Congress and the executive branch.

I view our Presidents as highly responsible individuals, with a broad public base, and any President is going to want to consult with the congressional leadership on matters of this nature.

Senator SARBANES. Admiral, what is your view on this question? Do you see that there is such a line?

Admiral CROWE. Well, you're getting above my pay grade very rapidly, Senator.

From my standpoint—and, again, I would qualify it the way the Secretary did, as a personal view and as a practical matter, and I think Presidents would agree with this—I do not subscribe to the proposition that the days of declaring war are gone. I do not agree with that.

I can very well hypothesize some situations where a President would seek a declaration of war, and I would advise him to, and it would be in a general war situation, where we might have to fight all over the world. Where that line is, how you determine that line, that is very, very difficult for me. I could not do it legally, and I would subscribe to what Secretary Carlucci just said, that it is a matter of good judgment and dialog between the Congress and the administration.

But I think there are instances, yes, where you need a declaration of war.

Senator SARBANES. It seems to me important to, one, recognize such a line, and, second, to try to define it. Otherwise, Presidents can commit the forces and then say that the recourse is for the Congress to deny the appropriations, which, I take it, is essentially or at least seems to be a position advanced by the Secretary.

On page 14, you talk about the power of the purse. So, in effect, you would say that the President can commit forces, the President could launch an attack on Canada without coming to the Congress, and if Congress did not think it was a good idea, then the Congress could deny him money.

But it seems to me, absent some compelling reasons requiring Executive action first, the Executive, given the declaration of war requirements of the Constitution, needs to come to the Congress to get a prior authorization.

Secretary CARLUCCI. That's the reverse argument, of course.

Senator SARBANES. No, it's not totally the reverse. In other words, I am not asserting the position that the President must in each and every instance of the use of American force to address some situation come to Congress ahead of time to obtain a prior authorization from the Congress. I do not assert that the requirement to declare war has that sweep.

So, I am not asserting a counterproposition that is the reverse of what I understand or at least am concerned may be the sweep of your assertion.

What I am trying to get at, and maybe we are making some progress because, as I understand it, you are prepared to say that there is a line there. It is difficult to define it, but you would see a line beyond which you would say well, the President really cannot commit forces in that type of hypothetical situation without first getting congressional approval in order to do so.

Secretary CARLUCCI. I would agree that there is a line. But I would argue very strongly that that line cannot be defined in advance; that it is an exercise of judgment and that is essentially what we elect our Presidents for, to use their judgment.

I think it would be a mistake to try to circumscribe Presidents by drawing up a list of all possible eventualities. I just do not think that is possible and I think it runs grave risks.

Senator SARBANES. Do you think it is helpful for Presidents to understand that there is such a line?

Secretary **Carlucci**. I cannot imagine a President who does not understand that.

Senator **Sarbanes**. Well, if you get these assertions here that the power is total, it seems to me that you begin a process of erosion with respect to the limits in the use of that power.

Secretary **Carlucci**. What I am saying is that, as a practical matter, and as a matter of fundamental perspective and the health of the Nation and the body politic, Presidents are going to consult the Congress. They are going to try to get the Congress behind them.

I cannot imagine anyone being elected to the office who does not have that kind of perspective.

Senator **Sarbanes**. Let me ask you and Admiral Crowe this question.

Why wouldn't it be preferable for the President to put the question to the Congress?

There is a fairly good point made here and that is that there is a decision by default, so to speak. We are trying to search through now to find a workable arrangement.

I am obviously very deeply concerned about any assertion that says the Executive can simply commit forces without limit or restraint. But let me put this question to you. Why isn't it desirable for an Executive, in effect, to say to the Congress either ahead of time that this is what I want to do in a situation that allows that kind of judgment or, after the fact, where you have moved but then need support, to put the question to the Congress, and say now we have done this and now we are putting the question to you, and we want a decision from you, yes or no? If you say no, we won't do it, or we'll cease to do it? And if you say yes, then we are all aligned behind what the policy ought to be?

Secretary **Carlucci**. It is desirable and it has been done, the most recent instance being the March 1988 events in the Persian Gulf, where, on a Sunday night, President Reagan convened the congressional leadership before he had made his decision and got their input and made his decision, bearing in mind their input, and the congressional leadership themselves praised that consultation process.

I think most Presidents are going to want to do that. In fact, I think all Presidents are going to want to do that.

The question is: Do you try to force them to do that through some kind of statutory circumscription of their authority, which, in effect, creates a confrontation-type situation?

Senator **Sarbanes**. No, that is not my point.

The point I am trying to get at is what is it in the Executive that causes this reluctance, as I sense it, to come to the Congress and say "We want you to say 'Yea' or 'Nay' on this policy."

Secretary **Carlucci**. Senator Sarbanes, one thing that causes this reluctance is the War Powers Act itself. If you remove that kind of confrontation mechanism, I think it will facilitate the consultation process greatly.

Senator **Sarbanes**. But I am trying to move you, Mr. Secretary, beyond the consultation process. I am trying to move you to the decision process.

Secretary CARLUCCI. Yes. But if you want an input into the President's decision, in my judgment it can best be done, and constitutionally should be done, through the consultation process. But I have heard debates in administrations of both political persuasions to the effect that, well, if we consult right now, we are going to get caught in a war powers kind of argument.

Senator SARBANES. No. I premised this whole line of questioning at the outset that I wanted to set the War Powers Resolution to one side, and I was trying to get to the sort of more fundamental, underlying perceptions.

Now, we have developed one line, which I think is very important, and that is whether there is a view that the Executive can commit forces without any limit or restraint. As I said, that was really prompted by the listing of the commitment in World War II by Roosevelt, along with these other items that you have listed, some of which I have regarded as very specific and localized and in response to an immediate threat; others are in between somewhere.

But I do think there is a line.

The next question—and I am putting the war powers to one side now—is what is the reluctance in the Executive to, in effect, put the question to the Congress, either ahead of time or after the fact, depending on a situation involving a commitment of forces and saying that we want the Congress now to either say "Yea" or "Nay" to this. You are a coequal branch in the Government and there is a provision in the Constitution about a declaration of war. In any event, over time, we are going to look to you for appropriations. We are taking this action and we want congressional support for it—not consultation, but support, decisionmaking. And put the question to the Congress.

What is the reluctance with doing that? Is it the apprehension that the Congress will not support you?

Secretary CARLUCCI. First of all, let me say, inherently, that I don't think there is a reluctance.

Senator SARBANES. There isn't what—I'm sorry?

Secretary CARLUCCI. A reluctance. I don't think there is a reluctance. I think every President with whom I have been associated appreciates the value of getting congressional support for his policies and he appreciates the risks of alienating the Congress if he does not consult them.

I have been in a number of debates where the issue has been one of timing: Should we consult now or later, wait until we get close to the operation?

There are security concerns here because many operations are on a very close hold basis. For example, the planning in the March 1988, Iranian operation was done on a very close-hold basis, over a weekend. Just a small number of us knew about this. Having the consultation quietly at the White House on a Sunday night, where people were brought in by circuitous routes, helped to preserve the security of the operation.

But it is axiomatic—and I am not casting aspersions on the Congress here—but it is axiomatic that the more people who know about any operation and the further in advance they know about that operation, the more likely it is to leak.

So, there is a security concern.

Senator **Sarbanes**. Well, we are not arguing that point.

Do you think there is any operation in which no congressional leadership should be consulted, in terms of the commitment of force, even a very limited congressional leadership?

Secretary **Carlucci**. In advance?

Senator **Sarbanes**. Yes.

Secretary **Carlucci**. Yes. Yes, sir, I do: I think where you have a highly sensitive operation where, say, foreign governments might be involved and foreign governments might have their people at risk; and I can conceive of a foreign government putting in a condition that Congress not be notified.

Senator **Sarbanes**. Now I'm not saying "Congress." I'm saying a very restricted representation of the Congress, half a dozen Members, the leadership.

Secretary **Carlucci**. The chances are almost minimal that that would ever happen. But I would not want to exclude the possibility.

Once again, I can conceive of circumstances where another country, as the price of its involvement, would say I don't want your Congress to be informed. That has, in fact, happened, not in a military operation, but in a covert action, with which you are all familiar.

Senator **Sarbanes**. Mr. Secretary, I have to go and vote.

We maintain our security to protect our Constitution, and if what is proposed is contrary to the constitutional arrangements of the allocation of powers, I think we have some very serious problems on our hands.

Secretary **Carlucci**. I am not proposing anything that, by our lights, is unconstitutional. My testimony was cleared by the appropriate lawyers. So, we think we are within the framework of the Constitution.

Senator **Sarbanes**. I will yield to Senator Adams, who I think has voted, and I will come back.

Senator **Adams** [presiding]. Yes, I have.

Thank you, Senator Sarbanes.

Senator Biden will be back. We both have voted. We are sorry that we have had to move in and out, but we want to continue the testimony.

I first want to state, Secretary Carlucci and Admiral Crowe, particularly Secretary Carlucci, I have known you for a long time and, as the chairman stated, I have great respect for you. I must say that I was a great deal more comfortable when you were in charge of the operations in the gulf.

Admiral Crowe, I have great respect for the restraint that was shown.

I have been one of those most involved with the War Powers Act. The Constitution was drawn very carefully, and there isn't any question about it by any scholar, that it divides the power to make war between Congress and the President, but that the Congress was given the ultimate power to "declare war." These were the words used in those days. This is so that we would not have a king.

Now, as I understood your testimony this morning, I don't see, Mr. Secretary, any difference between a king and a President if we follow your doctrine that a President can commit troops, can maintain and continue a military presence for an indefinite period of time without the Congress ever approving it. That, to me, is the power of a king.

What do you do with the words in the Constitution that say that Congress shall declare war. These are powers, incidentally that, at least in my opinion, don't have to be in the form of a bill. They are separately enumerated powers, just like the foreign policy power—to take prizes, to determine regulations for the Army and Navy. These may be words that we have not used a lot, but they are constitutional.

Do you think those words have no meaning? When would we ever use the divided power?

The War Powers Resolution is an attempt to try to define a way of utilizing this divided power. It acknowledges that you have a Commander in Chief who can repel attacks, who runs a war when it has once started, and who conducts foreign policy with certain limitations. But it's the Congress that declares war, which, is to marshal troops, to raise money, and to place the Nation in a sustained military operation which was called "war" as opposed to repelling an attack or responding to a military incident. Acts of war have been defined.

That is what this thing is all about.

Secretary CARLUCCI. I do not disagree that, when you have a large-scale, sustained military operation, the intent would be to have a declaration of war.

Senator ADAMS. Well, what about just a specific authorization? That is all that the War Powers Resolution says.

What I don't understand is this. We have all talked about 60 days. But there is nothing in this Resolution that says that a President has to wait 60 days, or 60 days have to pass. If a President is committed enough to a large-scale military action to sustain casualties, put the Treasury at risk, put at risk the expansion of a war, why not come up with a 4(a)(1) report and say I want to be authorized to go into the Persian Gulf and carry out the following policy? The policy can be broadly stated.

That is what I never understood about the President's action toward the Persian Gulf. I would have voted for it. None of us were saying "cut and run." What we objected to was that there was a constantly changing military and foreign policy, first with reflagging, then we are going to protect lanes, then we are going to protect every vessel attacked, then we are going to take offensive actions in retaliation. These are major acts that would be defined by those of us in World War II as acts of war.

Nobody was trying to run the tactics, which we have been talking about. It was coming to the American people—which, incidentally, has not been done yet, as far as I know, on money—and saying we want to do these things and this is our position.

You mentioned in your comments that Congress never voted. All I ever wanted, Mr. Secretary, was a vote. I just wanted a vote that said I was right or I was wrong, and, as quickly as possible, so that the Nation would be united. Vietnam almost destroyed the political fabric of the Nation by not having a declaration on the use of military force that was voted on.

So, why didn't you come up with a 4(a)(1) and just say we intend to be there? I like the policy you've got now. That was the one I was suggesting. It has zones, and everybody protects a zone. Don't protect everybody else's. A major argument we had was whether U.S. bottoms should be used, as opposed to this reflagging operation.

I just don't understand, if everybody in the administration had this in mind, why a man as experienced and as good as you and Admiral Crowe are—I know he is worried about his troops—why didn't the administration just come up and say this is what we want, put it on the floor and let us vote on it.

Secretary CARLUCCI. First of all, as long as you have the 60-day clock ticking, I fail to see why any opponent of our gulf policy would want to vote on it.

Senator ADAMS. But the clock ticking was to get you to send the letter.

Secretary CARLUCCI. I don't think our lawyers have ever asserted a constitutional problem with the reporting requirements of the War Powers Act. It is the automatic pullout, the no-fault aspect.

Senator ADAMS. But the 4(a)(1) avoids the automatic pullout. It just says we want to do this and this is what we intend to do, and we want to vote on it.

Incidentally, I am willing, Mr. Chairman, to agree on a shorter time limit. The thing I would like to see up here are absolute requirements for a vote.

Where we got into a problem on war powers, Mr. Secretary, institutionally, is that we kept having filibusters, so that we could not get the vote on the issue.

Now, that is part of our problem. But it is not the fault of the constitutional inhibition of war powers. It was the fault that nobody ever sent up a triggering letter.

Secretary CARLUCCI. We sent up letters which were consistent with the War Powers Act.

Senator ADAMS. But you said that it did not trigger.

Isn't that the administration's position——

Secretary CARLUCCI. That is correct.

Senator ADAMS [continuing]. That it never triggered it?

Secretary CARLUCCI. Yes.

Senator ADAMS. Now, if you trigger it, we've got expedited proceedings that get us to a vote for you. And, incidentally, none of us was trying to say to vote in 60 days. We wanted it right away.

I just don't understand why everybody criticizes this act. But nobody tries to use it once to see whether it works.

Secretary CARLUCCI. I think the answer is self-evident, Senator Adams. If we had acceded to the War Powers Act, we would have been acceding to it in all of its aspects, and our lawyers regard the 60-day timeframe as of doubtful constitutionality. Every President's lawyers since the Act has been signed have had this concern.

Senator ADAMS. Suppose we had put in there, instead of 60 days, that unless an authorization has been passed for an action beyond 48 hours except for repelling attack, that no funds shall be expended for any operation beyond 60 days without congressional authorization. This would be something like the Boland amendment as it applied to Central America.

Secretary **Carlucci**. I think that presents very much the same problem.

Senator **Adams**. All right.

What kind of system would you envision for the Congress exercising its power, along with the President's power, to put the Nation's resources and young servicepeople into a sustained military operation?

Secretary **Carlucci**. There is nothing——

Senator **Adams**. You said just the President alone.

Secretary **Carlucci**. My understanding is that there is nothing that would prevent the Congress from moving at any time it chose to pass a resolution cutting off funds for the gulf, if you will, or for any other part of the world. I don't think the Congress can get into the business of how you run the war or whatever action you are involved in by manipulating the power of the purse. On the other hand, they can control policy through the power of the purse.

The Congress has plenty of authority, in my judgment, should it choose to vote affirmatively to stop an action. You don't need any request from the President to do that.

Senator **Adams**. Hasn't this gone on in the Persian Gulf without any specific authorization or allocation of funds for nearly a year?

Secretary **Carlucci**. We are using funds that have been appropriated and authorized by the Congress.

Senator **Adams**. For general military operations.

Secretary **Carlucci**. Yes.

But the number of constraints on our use of funds in a defense bill is mindboggling.

Senator **Adams**. Oh, I understand that. But in the Persian Gulf, you have just been operating basically on O&M and some day you are going to have to come here and ask for a pretty big pot of money for all the time, effort, ships, and so on that you spent over there.

Secretary **Carlucci**. Oh, I'll tell you what it's been. It's been a net cost of about $15 million a month.

Senator **Adams**. So, at some point you are going to come up here and say, what is it, $600 million or $1 billion—something like that, because we're in there about a year and a half.

Secretary **Carlucci**. We are using O&M funds for these costs. But if the Congress wanted to put a prohibition on our O&M account, they are at liberty to do so, and they have done it in any number of instances.

Senator **Adams**. Suppose we tied that to any use after 48 hours automatically, and then all you have to do is come up here and ask for the money, and we have a majority vote to give you the money?

Incidentally, I think you are going to win all of these unless you commit a real turkey.

Senator **Biden** [presiding]. Senator, I'm going to have to tell you that your time is up.

Senator **Adams**. I will stop now. Thank you, Mr. Chairman, very much.

Senator **Biden**. Senator Kassebaum.

Senator **Kassebaum**. I would just like to say, Secretary Carlucci and Admiral Crowe, that I, too, share in finding your testimony exceptionally well reasoned and thoughtful, I suppose because I do agree with it. But I think that both of your statements really do give well-reasoned arguments why, basically, I think we should repeal the War Powers Resolution.

I don't even think we can fix it to make it better.

I would just say that on the other hand, I agree with Senator Adams. As long as it is on the books as law, I believe the Persian Gulf situation really is a good example of where Congress would have lent support, we were engaged in hostilities, and to try to debate it back and forth becomes a fruitless exercise.

I think your comment about the no-fault formula, Mr. Secretary, is a good one.

Congress, to a certain extent, really wants to get in a position of saying we have been involved in consultations and we agree or disagree, as the case may be. But I don't think you can legislate consultations.

So, it seems to me that, not only do we have the power of the purse, as you say, but Congress, by the Constitution, is given the power to declare war.

It is interesting to me that, in many ways, I believe we could declare war on our own.

Is that not correct? I don't think there is anything that has ever spelled out that the President has to send that request to Congress.

So, if we care a great deal about these situations, we can declare war ourselves, or the President possibly would even have veto power over such a declaration. I don't know if, constitutionally, whether it ever has been tested.

Senator **BIDEN**. I don't think it has.

Senator **KASSEBAUM**. It has been tested?

Senator **BIDEN**. I do not think it has.

Senator **KASSEBAUM**. Oh, I am correct.

So, you know, we have a great deal of authority. I think that we somehow have gotten ourselves, because of Vietnam I think initially, caught up into what our roles should be, and partly because I think Congress felt guilty after Vietnam that we had not engaged ourselves perhaps more closely during that time.

Another reason—and this is what I would like to ask you, Mr. Secretary—is what role does the draft play? Perhaps one of the frustrations today is with hostilities and there are different types of hostilities, different types of actions in which we are engaged, at what point should parameters be placed where we should say this is an effort in which we are engaged as a nation, and then call for a draft, which does help to focus the mind?

Secretary **CARLUCCI**. Senator Kassebaum, I guess you were out when I was having a discussion with Senator Sarbanes on where you draw the line between a small action and a larger action, the latter of which most people would assume would call for a declaration of war.

I am prepared to concede the point that, obviously, if you get into worldwide conflict, you should have a declaration of war, and you would probably move to a draft.

I don't know how you draw that line of where you would move to a draft. If you like, we can have the military come up with a study of at what point their reserve forces would be exhausted.

Senator **Kassebaum**. Oh, I don't think it can ever be done ahead of time.

Secretary **Carlucci**. But, obviously, if we become highly extended in a major region, in a conflict that looks like it is going to go on for a while, then you would be thinking in terms of a draft, and there would be ongoing consultations with the Congress. As you pointed out, the Congress could declare war. The Congress on its own, as Senator Adams said, if there were support for our Persian Gulf policy, could have voiced that support in a resolution, which would have, perhaps, brought Iran to the conclusion it finally came to a bit earlier.

I think the draft might be one thing that you would take into consideration. But I think you would probably judge the external factors first in weighing the way the Congress can most appropriately express its support or, indeed, disapproval for the executive branch's actions.

However, I don't think there is any hard and fast formula. I don't know if Admiral Crowe agrees with that.

Admiral **Crowe**. I would agree with that entirely, Senator.

If I could just say a word, it seems to me that the root of the problem is we are trying to adapt traditional standards and understandings to a completely new problem.

There is no question that at some point in general hostilities, we would need a declaration of war, and everybody would agree with that.

There is no question—and I have gotten this from reading the testimony that you have taken, Mr. Chairman—there is no question that if we are invaded from Mexico, the President has the right to do something about that.

What has come upon the world scene are two or three things here which I don't think the Founding Fathers envisioned. No. 1, it was historically the problem that we didn't have the capability to fight a war in peacetime. It was necessary to raise armies; it was necessary to bring people into the service before you could exert force.

We discovered as we assumed a global role after World War II that that was not very practical. So, we had to keep a large military, and we have done that since 1945.

But that is new. The Founding Fathers didn't have that in mind. In fact, they would have been sort of repelled by that.

I think, second, our opponents or potential adversaries also understand this problem, that there is at either end of the spectrum no question about what the United States is going to do. They don't want to toy with that. They are not going to challenge that.

They have discovered that there is an in-between ground, that there is a very gray zone, and that came about through Korea and Vietnam and so forth. They have discovered that there is where we are perhaps most vulnerable and where we are the most uncertain as to what we are going to do, and that they can take advantage of that.

I think we are seeing it. We are seeing that today.

The War Powers Resolution, at least as I interpreted it originally, was an attempt to deal with that gray zone. It is my conclusion which I made in my statement, that it is an unsuccessful attempt to deal with that gray zone and you are going to have to look for other ways. It is not that people don't want to consult with the Congress or people don't recognize the congressional rule. The decision to do so is made on the judgment: By consulting and starting a debate and invoking all the baggage that goes with the War Powers Resolution on balance counterproductive or productive?

It is my conclusion, from my experience, which has not been too long with this, that you very well, by starting this process, may do things that your opponents can take more advantage of than you can. And that is dangerous.

Senator **KASSEBAUM**. Don't you think today, because of television, essentially, where we have seen the effect and power of television, certainly on Vietnam and since——

Admiral **CROWE**. Absolutely.

Senator **KASSEBAUM** [continuing]. That nothing can be sustained over a period of time without public support, and that comes from both the legislative and the executive branches working together to form a policy that can be sustained? That is a significant responsibility that we both have.

I think a good illustration, not only of the power of the purse, but of that need to form a consensus of support, is our policy in Central America. By the power of the purse, we have significantly affected our policy in regard to Nicaragua.

Secretary **CARLUCCI**. Indeed we have.

Let me add that I think, yes, sustained public support is essential for any military operation. But, equally important, as I said in my testimony, is success, and somehow we have to balance those two considerations, so that we come out with a formula where we can have both.

Senator **KASSEBAUM**. Thank you, Mr. Chairman.

Senator **BIDEN**. Thank you.

We keep talking about the power of the Congress to declare war. Really, what is at issue here is the Congress limiting the ability of the President to declare war.

Now, I would like to focus on one specific thing.

Mr. Secretary, in your testimony on page 5, and then again on page 6, you refer to the no-fault formula.

I want to point out that the only time that the Congress doesn't have to vote on support or nonsupport for the decision the President has made to deploy troops, is if the President avoids sending up a 4(a)(1) report.

No President has sent that up because no President has wanted to acknowledge the law's constitutionality. But if they did, it would trigger section 5(b), which says within 60 calendar days after a report is submitted or is required to be submitted, the President must withdraw the forces, unless Congress has authorized their continued deployment.

But you are not going to get to a no-vote, no-fault situation because of section 6, which provides for expedited congressional action. If Presidents would send up a 4(a)(1) acknowledging hostilities or imminent hostilities, we would not be in this no-fault situation you refer to. There is an expedited procedure for the Congress to vote.

So, the point I want to make is the only reason you are able to make this no-fault claim and Congress can avoid its responsibility is because every President has been disingenuous and avoided saying: "I am about to introduce forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated."

So, I think it is important that we be honest with one another. If administrations had submitted 4(a)(1) reports, the Congress would have had to vote: Either we are with you, Mr. President, or we are not with you, Mr. President, up and down, under expedited procedures, within that 60-day period. And if a President said, I am submitting a 4(a)(1) report and I want you to have that vote within the next 10 days, or 2 days, there is not a Congress that could resist that, and you would have an up or down vote on whether the Congress was with the President.

Every Member of Congress would have to stand up—unless they hid and did not show up that day—and be counted.

Secretary CARLUCCI. But it is an option that the Congress has.

Senator BIDEN. It is an option only if the President refuses to submit a 4(a)(1) report. If he does, then you know we up here are then in the soup; we all have to vote. Indeed we in the Foreign Relations Committee would have to vote twice.

The next point that I would like to raise before we let you go is on page 14 Mr. Secretary, you again seem to be praising the idea of the Congress voting when you say, "The simple test of whether the American people genuinely hold to this view," support a particular policy, "is to count the votes in Congress. If the votes are not there," you say, "neither is the popular mandate."

So, in principle, you seem to accept the idea of Congress voting.

Now, doesn't this really come down to how you want the vote decided? The War Powers Resolution envisaged that the President would simply have to obtain a majority vote in each House in order to continue whatever action he or she initiated.

But you are not willing to accept that, it seems. It seems that implicit in what you are saying is that you want a framework where the premise is accepted that the President should be able to do anything that he or she wishes militarily unless the Congress can summon a two-thirds vote in both Houses to stop him.

In other words, the War Powers Resolution says to the President, "Go to the Congress get a majority for or against." Your answer is that the President can do what he wants, as long as he can keep the support of one-third plus 1 in either House.

So, doesn't this come down to a fundamental disagreement on whether or not you want to be in the position to needing only one-third plus 1 to continue the process, as opposed to 50 percent plus 1 to continue the process?

I have several other questions that I would like your comment on, including one on the Cuban missile crisis. I don't know how the War Powers Act would have stopped that.

Can you imagine any single Member of Congress standing up when the President says "They're putting missiles in Cuba and I'm going to stop them," and somebody standing up in that furor and saying I object? You know, that would have been the person they wrote about in the next edition of "Profiles in Courage." I just don't see it.

Secretary CARLUCCI. You are obviously correct if there is an immediate vote.

But the point we are trying to make is that it automatically introduces an element of doubt, the way it is currently structured, with a clocklike mechanism, in the adversary's mind.

There is nothing to prevent the Congress, on its own initiative, from taking an affirmative vote, and I would hope that it would do that from time to time, on its own initiative, in implementing the War Powers Act.

Senator BIDEN. What would happen if, immediately upon the deployment of troops, the Congress voted and 51 percent of the Congress said you can't do that, Mr. President, bring the troops home?

Would you feel bound to bring them home?

Secretary CARLUCCI. I think any President would have to give very heavy weight to that.

Senator BIDEN. But not constitutionally? Not legally?

Secretary CARLUCCI. You are a lawyer, Mr. Chairman, and I am not. Therefore, I am not prepared to make the legal argument.

Senator BIDEN. You're the best negotiator I've ever seen, though.

Secretary CARLUCCI. But I cannot conceive of a President not giving that heavy weight, particularly since he knows the funding bills are to follow.

Senator BIDEN. OK.

We promised you that we would get you out of here somewhere around 11:15. We obviously have broken that promise.

It is now a quarter to 12, and I just hope this does not mean, Admiral, that Dover Air Force Base will be going to New Jersey. [Laughter.]

I want to thank you both. Your testimony is extremely valuable.

Secretary CARLUCCI. Thank you, Mr. Chairman.

Senator BIDEN. It was a pleasure to have you both.

Secretary CARLUCCI. It was a pleasure being here.

Admiral CROWE. Thank you, Mr. Chairman.

Senator ADAMS. Thank you both.

Senator BIDEN. Our next and distinguished panel is a panel of legal scholars: James Bond, Esquire, Dean of the University of Puget Sound School of Law, Tacoma, WA; Dr. William Goldsmith, former Emeritus Associate Professor of American Studies, Brandeis University; and Louis Henkin, Esquire, University Professor Emeritus, Columbia University School of Law, New York, NY.

Would you all please come forward.

While you are coming forward, I understand that Professor Henkin has a particular time constraint. If his colleagues would be willing, I ask that Professor Henkin be allowed to testify first, even though his name was called last, unless one of the two of you has a more urgent time commitment or plane to catch.

Senator ADAMS. Mr. Chairman, if I might, I would welcome Dean Bond here today. He is from the State of Washington.

I am particularly pleased that you are here, Dean Bond.

If I have to leave, gentlemen, during your testimony, it is because I have to preside today at 12 o'clock. I wanted to say that, Mr. Chairman, because I am extraordinarily interested in their testimony, and I will read it carefully.

I thank you, Mr. Chairman, for the opportunity to welcome Dean Bond and the other members of the panel.

Senator **Biden**. I want the record to show that Dean Bond has been invited here not because there are two Senators from Washington on this committee, but because of his legal expertise.

Let us now proceed with Professor Henkin's testimony.

Professor, welcome back. The last time we had your testimony was on another subject crucial constitutional subject: The treaty power.

Welcome back.

STATEMENT OF LOUIS HENKIN, ESQUIRE, UNIVERSITY PROFESSOR EMERITUS, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

Mr. **Henkin**. Thank you very much, Mr. Chairman.

I am glad to be here. I am glad to see you well and here with us.

My name is Louis Henkin, and I am a professor at Columbia University. I have held chairs in both constitutional law and international law and have written extensively on foreign affairs and the Constitution.

I was pleased to be invited to join in your deliberations.

As we have already heard, the subject you are considering is large and controversial. I shall make some brief general comments on the constitutionality of war powers legislation, which is the one field in which I can claim some expertise. I will address some of the difficulties with the present text of the War Powers Resolution and make some suggestions for its improvement.

Of course, I will answer any specific questions, if I can.

I begin with the Constitution.

Mr. Nixon vetoed the War Powers Resolution principally on the ground that it was unconstitutional; but his veto message did not detail which provisions of the Constitution the Resolution violated. He said only that it would "take away * * * authorities which the President has properly exercised under the Constitution for almost 200 years."

Now there may be elements in the present Resolution that raise serious constitutional questions: Surely, the *Chadha* case, which invalidated the legislative veto in sweeping terms, casts a heavy shadow on section 5(c). I will say another word about that in a moment.

But, in general, and in principle, in my view, Congress had the constitutional authority to enact the War Powers Resolution and, therefore, has the power to amend or rewrite it in the same spirit.

My view can be stated simply: The power of Congress to declare war means the power of Congress to decide when, where, and whether the United States shall go to war. Congress can direct the President to fight a war; Congress can direct the President not to fight a war. It can tell the President in what circumstances to fight a war.

Congress can also, I believe, direct the President to end a war.

In my view, then, Congress can also act what I would like to call "prophylactically," and direct the President to refrain from activities that, though themselves "short of war," are "close to war," or create a reasonable likelihood that they may lead to war.

Congress, in fact, exercises this kind of prophylactic war power in much of its defense legislation, which is within the power of Congress because it is necessary and proper to carry out the war powers of Congress.

So, war powers legislation, I am satisfied, fall clearly within the war powers of Congress. The question is whether it is prohibited or limited by other constitutional provisions.

In this case, the argument which Presidents in effect raise is that congressional power may not usurp or infringe on powers granted to the President by the Constitution. That, I assume, is the unarticulated argument of the Nixon veto message.

Nothing in the Constitution limits the power of Congress to forbid warmaking by the President. That should be obvious. The Constitution does not give the President power to make war, and no President has ever claimed such power. Therefore, Congress can deny him such power without infringing any Presidential authority.

But for over 200 years, Presidents, without authorization from Congress, have engaged in activities involving uses of force which one might call force "short of war." And it is presumably those activities to which the Nixon veto message referred when it said that the Resolution would "take away * * * authorities which the President has properly exercised under the Constitution."

It is unnecessary to reopen now and here debates as to whether the President had constitutional authority to engage in some or all of those hundreds of instances of the use of force short of war. History has confirmed the general practice, and neither Congress nor the courts have challenged any particular use of force.

If historic practice contributes to the development of constitutional authority, Presidents can surely claim to have acquired some authority to use some force in some circumstances. But history has confirmed the President's power to act when Congress is silent and acquiesces. There is no history to support a view that the President can act when Congress denies him the power.

In the terms that we have come to use, then, the most the President can claim, I believe, is a concurrent power, one he can invoke when Congress is silent.

When Congress acts to regulate Presidential activity, when the President presumes to flout the will of Congress, his power is, as Justice Jackson put it, "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."

I add a sentence from Justice Jackson's opinion, cited in the note at the bottom of my prepared statement, which echoes something I heard this morning from the subcommittee. Justice Jackson continued: "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

In other words, the question is are there limits on what the Congress can do in these respects; we are not discussing the limits on what the President can do.

I will sum up: Congress can prohibit or regulate any activities that amount to war, and there is a strong case that Congress can regulate Presidential resort to hostilities "short of war" when involvement in such hostilities is likely to lead to war.

On this view, I think one can reduce, and perhaps even render irrelevant, the controversy about the President's constitutional authority that has swirled around section 2(c) of the War Powers Resolution. There, Congress declared that, in its view: "The constitutional powers of the President, as Commander in Chief, to introduce United States armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

As a statement of Presidential authority, section 2(c) is too narrow for some and too broad for others.

Presidents see it as denying them constitutional authority to do what they have done in hundreds of cases. On the other hand, others have argued that the Framers contemplated only one situation in which the President can go to war on his own authority, and I quote: "to repel sudden attacks" on the United States.

That quotation is from the motion made at the Constitutional Convention to change the words Congress shall have the power "to make war" to Congress shall have the power "to declare war," because they wanted to leave to the Executive the "power to repel sudden attacks."

I submit that in the Constitution, in the Framers' minds, in later history, that was the only power given the President to do what we would call "going to war."

Some argue that section 2(c) seems to recognize Presidential authority not merely to repel an attack but to wage war. Moreover, it is argued, to permit Presidential war in case of attack "on its armed forces" opens a wide loophole: It might be construed to permit Presidential war not only when an enemy begins a war by attacking U.S. Armed Forces, but even in response to a terrorist incident in which a few U.S. soldiers were killed, as in the well-known incident in Berlin, in 1986.

On the other hand, even some who see little room for Presidential warmaking think that the President ought to be able to use reasonable and proportional force to extricate U.S. nationals who are held hostage or who are otherwise in danger, even if such use of force puts U.S. forces, in the terms of the War Powers Resolution, "into hostilities or into situations where imminent involvement in hostilities is indicated."

I suggest that, instead of engaging in difficult debate as to what the President may do under the Constitution on his own authority, Congress should consider laying down guidelines as to the circumstances in which force may be used, in addition to improving the procedures for monitoring such uses, which I will address below.

Then the President could clearly use force lawfully in the circumstances indicated by Congress, and he would do it by authority of Congress, if not of the Constitution. But he could not lawfully engage the United States in warlike hostilities in circumstances other than those specifically authorized by Congress, unless Congress should provide special authorization.

In other words, I am suggesting that Congress assume responsibility for the exercise of war powers by authorizing their exercise in some very special, very narrowly defined circumstances.

Congress should also attempt to redefine the kinds of "use" of the Armed Forces it seeks to regulate. That is not easy to do. The War Powers Resolution attempted to do that by regulating the introduction of U.S. forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."

That formula has proven unsatisfactory. "Hostilities" may include uses of force that do not plausibly court war and whose links to the war power of Congress are not intimate. Even if Congress could constitutionally reach every "involvement" in "hostilities," the formula used may reach some deployments of forces that Congress does not wish to regulate. A less-sweeping definition, moreover, may reduce constitutional objection and Presidential reluctance to comply.

I suggest that:

Congress redefine the kinds of activities that trigger regulation. One way of doing that would be by adding a section defining "hostilities," perhaps by linking them to acts of war under international war or "activities that will probably involve U.S. forces in war or warlike activities." It will be difficult to write a good definition, but it is worth trying and the result will be better than what we have now.

Then, Congress should authorize the President to introduce forces into hostilities, as defined, in specified circumstances or for specified purposes; for example, to repel attacks—properly defined—on the United States or on its Armed Forces, or to extricate U.S. hostages or other nationals who are in danger.

Third, improved definitions are necessary, but they will not be sufficient to achieve effective congressional control of and participation in war-related decisions.

In my view, it is necessary also for Congress and the President to establish a continuing, regular body, including Executive and congressional representation at the highest levels, to review world affairs, anticipate situations that might lead to U.S. involvement in hostilities, as defined, consider any uses of force that the President may be contemplating, and monitor the process of any such involvement if it is initiated.

Deliberations in such a body could lead to wider congressional consultation or to formal congressional action, where necessary.

I offer now some brief comments on the present War Powers Resolution.

In the War Powers Resolution, Congress declared that the President's powers to use force were strictly limited, then proceeded to regulate Presidential uses of force. It has never been clear to me whether the regulations apply to the few circumstances in which

Presidential uses of force would be within his constitutional powers as indicated in section 2(c), or whether the regulations apply even where Congress thinks the President is not acting within his powers. That ambiguity, I urge, should be eliminated.

Declarations of constitutional limitation on the President are undermined if Congress proceeds to assume that he will violate them and then prescribes procedures for handling those violations. The ambiguity, I suggest, would largely disappear if Congress were to redefine the President's authority, as I have suggested, so that he would always be acting only with congressional authorization.

The present War Powers Resolution also has a provision for consultation. Section 3 requires that the President "in every possible instance shall consult with Congress before introducing armed forces. * * *" The provision is ambiguous, as well as impossible to implement.

"In every possible instance" might be interpreted as meaning whenever the President thinks it would not be undesirable. "Before introducing" might mean a half hour before, when consultation could not influence the decision. Consultation "with Congress," strictly, means with both Houses of Congress formally. If there is to be meaningful consultation, it must be with a small, select, congressional body. It must be sufficiently in advance of the contemplated military action. In many circumstances, consultation should be such as to give Congress a voice in the decision.

There is also the provision about reporting, about which we heard this morning.

The reporting requirement of section 4 raises few constitutional questions. It has suffered from the fact that Presidents have not reported as required, perhaps because of uncertainties as to whether particular instances "triggered" the reporting requirement. If there is congressional participation in advance, as I have suggested, the reporting requirement might be less important; but it is desirable to keep it, while redefining the circumstances that trigger it.

We have heard much about section 5. Section 5 is probably the most controversial section of the Resolution. There have been challenges to the constitutionality of its various sections.

Section 5(c) is certainly the most questionable. It seems to contemplate a legislative veto and would seem to fall within the sweep of *Chadha*, unless the war powers were constitutionally different for this purpose from other legislative powers of Congress.

The argument for the validity of section 5(c) in the face of *Chadha* is that *Chadha* invalidates efforts to circumvent the Presidential veto, but, it is argued, congressional declarations of war and decisions by Congress as to war and peace are not legislative in character, and are not subject to veto.

That argument has been made. I think I heard it from the subcommittee this morning.

I do not know how to resolve that issue. In any event, the provision seems to address an unreal problem and a hypothetical situation not likely to arise.

Section 5(b) requires the President to terminate U.S. involvement in hostilities within 60, or 90, days unless Congress acts to authorize continuation or is physically unable to meet because of an armed attack on the United States.

The 60-day period begins to run from the date of a Presidential report under section 4 or from the time the President should have reported under that section. Therefore, the weaknesses in the reporting section infect the termination section as well.

If the President does not report because he believes the circumstances do not require it, he will deny that the termination requirement applies. The definition of "hostilities" that I have proposed might reduce this difficulty as well.

Some have claimed that this provision violates the President's authority as Commander in Chief. I do not think so.

Congress, which has the power to decide for war, can decide for peace. It can direct termination of a war by resolution; it can do so in advance by setting a time limit.

However, the desirability and effectiveness of such a provision are another matter.

Section 5 reflects the unhappiness of Members of Congress at the end of the Vietnam war, who had not had the votes, and some would say the political courage, to terminate the war. This section seeks to shift the burden of taking action to end the war. Without section 5, hostilities begun by the President continue as long as the President wishes, unless Congress affirmatively directs that they be terminated. Under section 5, hostilities end after a prescribed time, unless the President persuades Congress to act to authorize their continuation.

Questions of "legislative veto" apart, termination clauses are constitutional, but, prima facie, undesirable, and of questionable utility. We have to improve the processes of Government so that vital decisions are not made by one branch alone.

For constitutional purposes, the executive branch is the President; but decisions to engage in hostilities and to continue them are sometimes made, in effect, by unelected, unaccountable, often unidentified officials. There must be effective participation in those decisions by Congress, through institutions and procedures that will have the effect of bringing to bear the judgment of congressional leadership before, during, and after commitment of U.S. forces into war and near-war.

If that were done, constitutional as well as political difficulties would be sharply reduced.

I would like to add to my prepared statement, Senator, that I did not have before me and I acquired only at the last minute a copy of something which I think has the status of a bill, proposed legislation.

Senator BIDEN. If you are referring to the draft that I put together, Professor, it is literally that. I am seeking comments on it. It is not a bill at this point.

Mr. HENKIN. I will make only one brief comment, unless you want to ask me some questions.

My principal comment, as you may guess, is that I seem to have anticipated in my testimony some of the things you have done in that draft.

I am in favor of greater congressional involvement and I think, and your draft would provide, that Congress should assume responsibility for deciding in which circumstances the President may use force.

On the other hand, there are a number of things about that draft with which I have some substantial difficulty; and, therefore, if you go forward with that draft, Senator, and if you wish I will give you my opinions about some of the details.

If you have any other questions, I will be glad to answer them.

[The prepared statement of Mr. Henkin appears in the appendix.]

Senator **BIDEN**. Let me ask you, Professor, what is your time constraint?

Mr. **HENKIN**. I need to be on the 1 o'clock plane.

Senator **BIDEN**. Would you comment more specifically on the draft that my staff gave you a copy of, as to the parts with which you have the most difficulty, or how you would most improve it, if you think it is capable of being improved?

Mr. **HENKIN**. I am willing to do that, Senator, but I must tell you that I had not looked at it until I was on the plane coming down.

First of all, there are terms which I think need to be clarified. For example, in section 3, subparagraph 2, "violent or dangerous act": Perhaps we all know what "violent" is, but "dangerous" is a word that you may want to reconsider.

You refer to "violate the criminal laws." You might do well to indicate which criminal laws because there are all kinds of criminal laws that don't have anything to do with terrorism.

Frankly, I did not understand the last phrase in section 2(c), "including the locale in which their perpetrators may seek asylum." The clause says "transcend national boundaries by the means through which they are accomplished, including the locale in which their perpetrators may seek asylum." I think it means an act of terrorism as to which somebody is going to try to get asylum in a country other than the one in which he acted. That is a fuzzy statement which you may want to clarify.

Section 4(3), on protecting the lives of citizens abroad, provided they are being evacuated as rapidly as possible, is a desirable provision. But it is important to distinguish here, and it may be a distinction relevant for purposes of international law, between going into another country with whatever force is necessary to extricate people, which is, I think what you have in mind, as distinguished from going in to overthrow a government or do something else of that kind, although there may be some American nationals involved.

I think what the authors of this draft had in mind is that the President can move to extricate them.

Senator **BIDEN**. That was my intent.

Mr. **HENKIN**. Then some redrafting would take care of that.

I have a little trouble with "to retaliate against perpetrators." I am not questioning Congress' power to do that. But, first of all, I thought that your purpose in section 4 was to address situations in which there was no time to go back to Congress. If you are talking about retaliation one can wait 24 hours or one can wait for years for that matter. Also, I am not sure that retaliation, without limits, is what you wish to authorize. I would consider both the timeframe and the kinds of retaliation, and whether you want retaliation without some congressional participation into the decision.

As to sections 5 and 6 also, one of the questions one ought to ask is whether those are cases in which you are satisfied to have the President act without congressional participation, because you would be now authorizing him to do just that. These do not seem to me to be circumstances of real emergency.

I was not sure that I understood section (b)(3), which says force may be used only "(3) if negative diplomatic military, economic, or humanitarian consequences are not likely to be inordinate in relation to the benefits of such objective."

Senator **Biden**. This is very helpful to me. Let me ask you two questions.

First, would you be willing to continue this analysis for me over the weeks ahead, perhaps in writing? Is that possible?

I know I am asking a lot of you.

Mr. **Henkin**. I will do what I can.

Senator **Biden**. Well, maybe we can do it over the telephone, because I would like your criticisms of this.

Second, let me ask you this: Without a timeclock, how can you enforce the idea of Congress' participation in these decisions?

Mr. **Henkin**. Well, as your draft proposes, Senator, you will have congressional participation along the way. That congressional participation would itself trigger, as I suggested, wider participation by more of Congress or by the Congress as a whole.

To be specific, if the President consults the leadership and the leadership says look, Mr. President, we can't agree to this, I think we ought to take this to Congress, you would not have to worry about a timeclock. After all, the timeclock was written for circumstances where you did not have congressional participation.

Second, as Secretary Carlucci, in his colloquy with you gentlemen on the panel, made clear, Congress always has the power to act to terminate hostilities. The question is, Do you want to have the termination automatic?

As I said, Senator, I don't have any constitutional problem with your power to do this. I do think the Secretary has a point about the desirability of doing this. And, frankly, I don't think that it is all that important.

If you are in a situation where a majority of the Congress—but not two-thirds—wants to end the war, we are in a hell of a situation. I would not wish to rely on timeclocks in those circumstances. In those circumstances you would get a vote, and we may have to decide whether the President can veto it; if he dares veto it and Congress cannot override it, we are in a serious constitutional situation.

But I don't think the timeclock will help you very much.

Senator **Biden**. Thank you.

I have more questions, but we should move on to the other two witnesses. I am anxious to hear them.

Why don't we now move to Professor Bond?

I thank you, Professor Henkin. Any time you have to leave, we understand.

Dean Bond, thank you for being so gracious. Would you proceed?

STATEMENT OF JAMES BOND, ESQUIRE, DEAN, UNIVERSITY OF PUGET SOUND SCHOOL OF LAW, TACOMA, WA

Mr. BOND. I have a very brief statement, which, as it turns out, I think is responsive to many of the questions you and your colleagues have been asking this morning, though perhaps not responsive in the way you would like.

Senator BIDEN. I'm not sure what response I'm looking for, to tell you the truth.

Mr. BOND. My premise is a simple one, and I would like to state it and then elaborate upon it. There is no constitutionally derived, judicially enforceable formula for determining, as between the President and the Congress, the proper allocation of authority to initiate uses of force.

The Framers did express a clear preference on two points. First, the Framers, in most cases, wanted the Congress, rather than the President, to make the initial decision to use force, at least where those uses of force amounted to the conduct of war.

The two exceptions, of course, are the emergency exception—that is why the preference does not control in all cases—and, of course, the "diplomatic ploy" which deals with those diplomatic circumstances in which Presidents may feel, incident to the conduct of foreign policy, that they must use force short of war.

In all cases, the Framers wanted the President to assume responsibility for managing uses of force.

One cannot derive a constitutionally based formula from these preferences, however, because they do not resolve the ambiguity inherent in the necessity exception to the general preference that Congress, rather than the President, initiate uses of force. Nor do they delineate the criteria that can be used to distinguish that use of force incident to the conduct of foreign policy from uses of force that amount to the conduct of the war.

Necessity is always a factual question and must, therefore, always be judged by the criterion of reasonableness.

Moreover, the conduct of foreign policy may require uses of force short of the conduct of war.

Simply put, the Framers could not foresee a future in which both necessity and diplomacy would require a more frequent initiation of force by the President. On this point, I am reminded of Holmes' observation that a page of history is worth more than a volume of logic.

I agree with Professor Henkin that history demonstrates that Presidents have consistently used force short of war in the conduct of foreign policy. I would disagree with him that history establishes only that the President can exercise that power at the suffrance of Congress.

In any case, separation of powers questions generally, and particularly this question of the proper allocation of authority as between the President and the Congress to use force, are political questions. Consequently, they cannot be resolved in the courts because they are not properly resolved by legal rules of the kind employed by courts.

Resolution of this question involves policy choices on which courts have no special expertise. Disputes about the proper allocation of authority usually arise in an ongoing situation, in which there is public debate over the wisdom of the particular use of force. In those circumstances, what we have is a quintessential political question, which has to be resolved in the political process.

We ought not to expect the courts to do what the Congress and the President have been unable to do, and that is to agree on the proper distribution of authority as between the Congress and the President in this area.

Certainly, the Congress has ample means by which it can protect its powers if it believes that the President has impermissibly invaded them or arrogated to himself or herself powers properly belonging to the Congress.

Let me make clear my view. I am prepared to concede that the War Powers Resolution might plausibly be asserted by the Congress as a fair statement of its constitutional authority in the area. At the same time, I think the President can, with equal or perhaps greater plausibility, claim that, as he reads the Constitution, he has a different and broader role to perform.

Like those of you in the Congress, the President takes an oath of office to uphold the Constitution of the United States. Like you, he is equally obliged to fulfill that oath of office.

If, in a regrettable circumstance, the President reaches a conclusion different from that of the Congress as to the appropriate allocation of authority as between the two of them in this area, then what we have is a difference of opinion between two coordinate branches of the national Government as to the proper allocation of authority between the two of them. That is not a question that can be resolved in the courts. And, while legal arguments based on constitutional texts and constitutional history are surely relevant to the Resolution of that question, those arguments should be addressed to the American people because, ultimately, the American people in this democracy are sovereign and, ultimately, they must decide if there is a conflict between the President and the Congress as to how that power should be exercised.

Senator **Biden**. Thank you very much for a clear and concise statement, Dean.

Dr. Goldsmith.

STATEMENT OF WILLIAM GOLDSMITH, FORMER EMERITUS ASSOCIATE PROFESSOR OF AMERICAN STUDIES, BRANDEIS UNIVERSITY, PROVIDENCE, RI

Dr. **Goldsmith**. Mr. Chairman, I have been with you here since early this morning, and I am certainly not going to impose on this body another paper or lengthy statement of any kind.

Senator **Biden**. We are anxious to hear what you have to say. Please don't curtail what you have to say.

Dr. **Goldsmith**. Thank you, and I realize that. But I have submitted for the record a quite lengthy statement of 15 pages, which I hope will be read.

Senator **Biden**. The entire statement will be placed in the record.

[The prepared statement of Dr. Goldsmith appears in the appendix.]

Dr. **Goldsmith.** I believe my point of view comes across very clearly in this paper.

I would like in the time remaining to pick up on the colloquy that has been going on in this committee for several days. I have had the pleasure of reading some of the testimony, seeing other hearings of the committee, and, of course, being present this morning.

It would seem to me that I could serve my purpose here best by singling out several points that seem to be at the crux of the problem that several members of the committee have pointed out, and perhaps we can discuss them for a few minutes.

Several days ago, a distinguished former Secretary of State, a man who has served many Presidents in various responsible offices, Cyrus Vance, testified before the committee. Mr. Vance's testimony was so eloquent, for me, at least, and so true, that I beg your permission to read several sections from that testimony, which I think will raise, perhaps in even more precise language, some of the issues that I am concerned with and that, from my observation, the committee is most concerned with.

He said at the conclusion of his testimony:

> Finally, I recommend an amendment designed to withhold funds that have already been appropriated from any Presidential use of force that lacks congressional authorization under the War Powers Resolution. Funds could be used, however, to remove forces already deployed in such a situation.

I kept feeling this morning, during the testimony of Admiral Crowe and Mr. Carlucci, that when arguments are made against the War Powers Resolution, they never seem to focus on the consultation aspect of that Resolution, but go to other sections of the statute, which could be obviated if consultation were conducted in good faith by both branches of the Government.

Secretary Vance is a man who served in many important capacities in the course of a number of years in the Government, and he has this final assessment to make of the consultation process:

> There is one important aim, however, that the War Powers Resolution has singularly failed to achieve. That aim is to require the President to consult with Congress in every possible instance before introducing forces into hostilities or into situations where hostilities are imminent. History demonstrates that Presidents have repeatedly failed to consult meaningfully with Congress or the congressional leadership about actions that could lead to involvement in hostilities abroad. In short, the goal that the President and Congress should form a collective judgment about the wisdom of such actions has not been realized. That goal, it seems to me, is a contemporary reaffirmation of the Framers' conviction that, while sometimes awkward and inconvenient, a system of political principles, including especially effective checks and balances, is a necessary precaution against the abuse of unfettered power in the hands of any one individual.
>
> I believe, that the consultation required by the War Powers Resolution means, first, that congressional leadership should be given all information.

I think that is a critically important point because information is power in these situations, and Congress, as I read the history of the last 200 years of our Nation, has been crippled constantly from acting in some of these situations by the lack of such information.

Secretary Vance is suggesting here,

> That the consultation required by the War Powers Resolution means, first, that congressional leadership should be given all information about a planned action that is material to a judgment about its advisability; second, that the congressional leadership should receive that information sufficiently in advance of the planned

action to permit a reasonable opportunity to absorb the information, consider its implications, and form a judgment before irrevocable decisions are made by the President; and, third, that the congressional leadership should have a real opportunity to communicate its views to the President, or at least to his closest advisers.

Now, if one takes those paragraphs, together with the proposal made by a professor of law at Yale Law School, Professor Koh, which appears in my written statement, I think you have at least a modus operandi for getting to the bottom of this problem, because what was really happening for the past 15 years, which I think all of us have admitted, through a number of Presidents, is that we have been dancing around this problem. The administrations have been manipulating the Congress and the Congress has been nursing its wounds, but not effectively getting to the root of the problem.

We have heard a great deal about the power of the purse from the counselor of the State Department, and we have heard it from Mr. Carlucci this morning. Anybody who has looked at the history of wars or hostilities for any period of time would realize that the power of the purse is impotent once the flag is at stake, once the troops are on the ground.

So, to keep reminding us that Congress has the power to act after the military action is underway, I think would be a way, really, of avoiding the problem.

The problem, as I see it, is of getting the President and the elected representatives of Congress together for this consultation process, and, once together, making a decision, at least on the part of Congress, through its funding authority, whether the President is going to be given the approval and the authorization to act or not to act.

Now, there are a whole range of decisions that could be excluded from such a procedure. But, until we get such a procedure established, until it is recognized by the executive and the legislative branches that they must come together and come into some agreement on these questions before force is employed in any large-scale manner, I don't think we are going to get anywhere with War Powers Resolutions or any actions whatsoever.

Senator BIDEN. Thank you very much.

I agree with you, Dr. Goldsmith. But, then again, most laws would be totally unnecessary if people acted reasonably.

The whole idea—and I think Senator Helms is incorrect when he has pointed out some of the reasons why this act came about in the first place—I would argue that it is not just because of Vietnam or even primarily because of Vietnam, but because the doubt and mistrust that was planted at the time were intensified by a pattern of increasingly expensive presidential assertions of autonomous power.

I don't know how you legislate your way out of that.

Dr. GOLDSMITH. If I could just interject this one comment, I lived through that period, and it seemed to me at that time—you were there and I was observing from a distance—that the action that triggered the final consideration of that legislation—and it was not really a hasty piece of legislation was President Nixon's actions in Cambodia, and not the Vietnam war. Congress considered this for 3 long years, with many, many committee hearings. I have read every one of them, so I know. They add up to quite a number of pages.

Very serious thought was given to this legislation.

Senator **Biden**. I agree.

Dr. **Goldsmith**. An American President, without congressional authorization, ordered a bombing attack on a neutral country without informing Congress and, certainly, without receiving its authorization. The bombing continued for 14 months and Congress did not find out until an officer who was in charge of burning the reports of those bombing missions wrote to a Member of Congress and informed him of that action.

Congress was shocked by that, as they were shocked by the invasion of Cambodia, again without the President informing Congress or obtaining authorization. It was these events, rather than some guilt attitude about Vietnam, I think, that brought on a vote.

I think it is important to note, since we have referred to that vote many times, that, when the final vote was taken, it was a pretty overwhelming vote, and it bridged a range of opinions of both conservatives and liberals in both parties--Senator Javits and Senator Dole in the Republican Party; Senator Stennis and Senator McGovern in the Democratic Party—there were 75 votes to override the President's veto. Many of the votes against the bill were by proponents of the bill who felt it was not strong enough and felt that it had been watered down to the point where it would not be effective.

I am afraid to say that history has proven that perhaps they were right.

But, at any rate, it was not a hysterical reaction of Congress or an action of guilt; but it was a recognition that a President had taken such extreme actions without any consultation, without any information being provided to Congress, and even attempted to cover up this action for 14 months. The Congress was outraged, it seemed to me, at this information, and this was one of the efforts that propelled this act.

Senator **Biden**. I personally do not disagree with that, and I am not sure that, when I characterized the Senator from North Carolina, the place where he and I disagreed, I guess it would have been more appropriate to say the war in Southeast Asia, which would have included Cambodia.

Let me ask you, Dean Bond, this question. Are there limits on what the President can do in terms of using force?

For example, if the President were, in the interest of stopping terrorism, to bomb Libya for 14 months, is that war, or is that a use of force that he is able to undertake constitutionally?

Mr. **Bond**. I think both the question and the example illustrate the difficulty of trying to transform a political dispute into a legal question.

To ask if there are limitations on the power of the President is to invite what I believe to be the obvious answer, and that is of course there are limitations on the power of the President. There are enormous practical limitations stemming from the political environment in which the President must work that limit his authority to use force without congressional support.

To postulate an ongoing use of force that escalates into what would, I think, probably fairly be characterized as the conduct of war is to posit a circumstance in which it is inconceivable to me that the President could proceed without substantial congressional support, whether in the form of a declaration of war or whether in some other form.

I think it is simply unrealistic to hypothesize a circumstance in which a wild President irrationally uses force amounting to the conduct of war over a sustained period of time while an outraged Congress and an unsupporting public stand helplessly by. It will not happen.

Senator BIDEN. I think experience indicates that any time an American President commits U.S. forces, the overwhelming instinct of the American people, as well as of the Congress, notwithstanding their view as to whether it was a wise thing to do in the first place, is to support that action because there are American personnel who are now vulnerable.

What I was searching for is whether there are constitutional limitations on a President that proscribe him or her from taking certain actions.

Let me put it another way.

Could we legislate a definition of "war"?

Mr. BOND. You could.

Senator BIDEN. We could constitutionally legislate a definition of "war," and I assume your point would be that, notwithstanding that, we still have a political dilemma if the President——

Mr. BOND. Does not acquiesce in that definition?

Senator BIDEN [continuing]. Does not acquiesce in that definition.

Mr. BOND. I would not presume to tell this committee or the Congress how it ought to spend its time and energy. But, as an outside observer, it seems to me to be a somewhat futile exercise to try to draft legal standards, rules, and criteria——

Senator HELMS. Amen.

Mr. BOND [continuing]. That cannot possibly address the multifarious circumstances in which this country may feel, for right reasons or wrong reasons, wisely or unwisely, the need to use force in the protection of its national interests.

What I would think this body ought to do and what I would think the President of the United States ought to do is to begin to rebuild a bipartisan commitment to a foreign policy that is sensitive to the need to protect American security and that recognizes, within that broader context, that there may be circumstances in which resort to force is necessary and that in at least some of those circumstances prior consultation with the Congress is counterproductive.

Senator BIDEN. How could you have a bipartisan foreign policy that would result in consultation being counterproductive?

Mr. BOND. Consultation in the process of generating a consensus about the aims of our foreign policy and, in general, the means by which those aims might be achieved clearly does require not just prior, but extensive prior consultation.

But in some cases, I think the Congress ought to realize that the execution of that agreed-upon policy through agreed upon strategies may well require action that does not involve prior consultation.

I think that the statements of the Secretary of Defense and Admiral Crowe illustrated that this morning. I think it is simply a practical matter, and I don't regard it in any way as an insult to the Congress of the United States, that some kinds of policies cannot be efficiently or successfully executed if prior consultation is required.

I recall former Secretary of State Dean Rusk once saying, and I think he was quoting a former Director of the Central Intelligence Agency, that the ship of state is the only state that leaks at the top.

Senator BIDEN. Thank you.

Senator Helms.

Senator HELMS. You know, nothing seemed to me to be clearer than what was going on at the time this Resolution was passed, which was trying to fix something that was not broken.

Now, down through the years, until fairly recent history, there has been consultation, there has been coordination and cooperation between the President and the Congress, which is the way it is supposed to be. I think that is the point that you are making.

But if you go back, you cannot avoid the obvious conclusion that this whole thing was political.

I remember, Joe, prior to the time I lost my mind and ran for the Senate, wondering about the involvement in Vietnam the way we were. We had all sorts of advice about don't get involved in a ground war over there, and from some pretty respectable military leaders.

But you can Monday morning quarterback every one of the decisions. The fact is that the decisions were made, beginning with Eisenhower, and then with Kennedy, then with Nixon, then with Johnson, and all of this involvement was portrayed on the television networks night after night. It is the first war that I guess has ever been fought on the evening news in the United States.

So, you get all of these things. But the paramount political situation developed when the American people began to wonder why we were involved in a war that those boys were not allowed to win. That is it.

Now, Nixon, as a personality, we all know about. I think he was one of the brightest Presidents we ever had. He may not have been the best President in PR that we have ever had. But, even when you get to the veto of the War Powers Act, that veto was overridden by a margin of four votes.

Then you talk about the Cambodian situation. Well, you have to go back and look at what was going on and what went on after the political pressures forced us out of that situation.

Something like one-third of the population was slaughtered by the Communists. So, I guess I agree that the courts ought probably not to be forced to make a judgment on something that ought to be decided by the Congress and by the President, the Executive.

But here you are in the business of unscrambling an egg. You know, the War Powers Resolution is—period. It is.

I think we would be better off to scrap it and go back to precisely what you said, a voluntary consultation. We got along with that fine with Roosevelt during World War II. I don't recall anybody running out to the radio announcers and the newspapers and condemning Franklin Roosevelt the way that Reagan has been condemned for a very appropriate, compassionate act with respect to Grenada, for example.

So, I wonder if I may ask both of you the question I have asked of every other panel of legal experts: Aren't we really talking about political considerations? Doesn't it boil down to that?

Dr. GOLDSMITH. You have made some very telling remarks in the course of the hearings with regard to history and history playing a role in the powers of the President. But I think we have to give attention to how we look at that history and how it is read.

If I can just for a minute take us into the 1950's, which we seem to forget, there was a military operation in Korea which, if put to a vote by the Congress, to my knowledge would have received every vote but that of Vito Marcantonio, who said he was going to vote against it.

Senator HELMS. That's correct.

Dr. GOLDSMITH. Under the advice of Dean Acheson, President Truman did not request the authorization of Congress to support that operation, and he was attacked on the floor of Congress by Senator Robert Taft, the distinguished constitutional lawyer and the son of a Chief Justice of the Supreme Court. Senator Taft argued that the law required consultation and authorization, and I think that President Truman lived to regret the fact that he did not seek such authorization, because he suffered politically later on—the *Youngstown* case is one evidence of that—because he did not have the authorization.

Senator HELMS. Excuse me, Dr. Goldsmith, but you are making my very point for me. It was political. Truman did regret it. But it was a political regret, rather than a constitutional one.

Dr. GOLDSMITH. When Eisenhower came along, President Eisenhower, he studied the Truman experience, I would imagine, very carefully, and he did go to the Congress and received authorization on two different occasions, a very substantial delegation of power.

When I was listening to Mr. Carlucci this morning, I was thinking why doesn't the President go to the Congress if there are some questions that are—and Roosevelt was mentioned—of an "iffy" character or a very secret character, why doesn't the President go to the Congress, explain his situation, and perhaps ask for the authority of a more general nature to operate in some of these areas? Congress is certainly capable of considering such a request and granting it. Then you have the unified kind of bipartisan policy that we are talking about here.

The consultation is the nub of the problem. We don't seem to be getting consultation without mandating it.

Senator HELMS. Well, of course what you just said is a given. I am not derogating it at all. But what I am saying is that the other side of the coin is this. Supposing, as Frank Carlucci and Admiral Crowe—I believe Admiral Crowe said the same thing—suppose there had been that limitation over there in the Persian Gulf. The Soviets and all the rest of them would just have waited out that period, and they would have won.

But I still say that, with rare exceptions, any Chief Executive who does not understand the necessity of doing what every President prior to recent times has done—and I think Ronald Reagan has done it, or tried to, consult with the Congress—but he has to consider sometimes the people who rush out to the television cameras or get on the telephone and whisper "leaking" information, and that sort of thing. That involves the security to our personnel and the success of the mission.

Now, I don't apologize one syllable for the President's action with respect to Libya or with respect to Grenada. I think he was right.

Others may say that he was not, and that is for them to say. The facts are contrary to that.

I would like to hear your answer to the question.

Mr. BOND. The question is are we really talking about questions of politics. I indicated earlier that I thought that these kinds of questions were quintessentially questions of politics.

Let me just add this.

I am a lawyer. I am devoting my life to the education of young men and women to become lawyers. I teach constitutional law. I write in that area. I believe, with Gladstone, that it is the greatest single document ever struck off by human hands. But I would add this. We cannot find answers to all of the problems that bedevil us in the Constitution or in legal procedures.

One of the reasons that the Constitution is such an extraordinary document is that it remits to the political processes a broad range of questions that cannot be fairly or efficiently resolved by resort to law.

Now, arguments based on constitutional allocations of power are wholly appropriate in the political context. They are not excluded from the political context. But they are only one basis upon which responsible Congresspersons and Presidents made decisions.

Senator HELMS. Mr. Chairman, thank you very much.

I might add that Dean Bond served on the faculty of a distinguished university in North Carolina, named Wake Forest, where I happened to go to school some years ago, more than I would like to specify.

I thank you and I thank you, Dr. Goldsmith. If Professor Henkin were still here, I would thank you.

I do thank you all.

Senator BIDEN. There are a number of questions that could continue this process. I don't want to keep you any longer. And Senator Helms and I could continue to argue over why the American public came to the conclusion it did on the war in Vietnam.

But neither would be fruitful at this moment.

So, I thank you gentlemen very much for your time and your testimony.

Unless you gentlemen have any comment that you would like to make, we will adjourn the hearing.

Senator HELMS. Thank you very much.

[Whereupon, at 12:54 p.m., the subcommittee adjourned, to reconvene at 10:18, September 29, 1988.]

THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

THURSDAY, SEPTEMBER 29, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 10:18 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Joseph Biden (chairman of the subcommittee) presiding.

Present: Senators Biden, Adams, Helms, Pressler, and McConnell.

Senator BIDEN. The hearing will come to order.

Good morning.

We have two distinguished panels, a total of eight distinguished persons, testifying today as the Special Subcommittee on War Powers holds the last in an extensive series of hearings directed at answering a critical question: Can the War Powers Resolution of 1973 be amended, repealed, or replaced, in order to improve the effective and efficient cooperation of the President and the Congress in national decisions concerning the deployment of American forces in situations of actual or likely combat or hostilities?

In previous hearings, the subcommittee heard from legislators involved in the origins of the War Powers Resolution, from distinguished American historians, from former military leaders, from the State Department Legal Adviser, from former Cabinet officials of both parties, and from former President Ford; from the current Secretary of Defense and the Chairman of the Joint Chiefs of Staff; and from highly regarded experts on the United States Constitution.

Today, the subcommittee will receive further testimony from two panels of distinguished legal experts. I think one or two members of these panels have had the opportunity to look over the highly tentative piece of draft legislation entitled "The Use of Force," that I, with the help of John Ritch and others, prepared as a focal point for analysis.

Not today, perhaps, but later, I will welcome the comments of all of our panelists on that draft. It is by no means clear that we will move ahead with such legislation; but I am anxious to hear your comments at a later time, if you would be willing.

In the weeks and months ahead, while the Congress is in adjournment, the subcommittee will continue its efforts to discern whether new legislation could resolve the constitutional impasse in which we find ourselves and give us a practical, working piece of legislation under which Presidents would be willing to participate in the process with Congress and the Congress would be willing to step up to its responsibility to participate, as I believe it should.

In that period, which will require a lot of hard thinking about constitutional legalities and practical realities, we will welcome the intellectual contributions of the experts who have agreed to appear before us today.

We have a lot to do and I suggest we begin.

Our first panel consists of Prof. Edwin B. Firmage, University of Utah, College of Law, in Salt Lake City, UT; Prof. Michael J. Glennon, University of California, Davis, Law School, Davis, CA; William Taylor Reveley III, Esquire, practicing attorney and author from Richmond, VA; and Prof. Robert F. Turner, Associate Director, Center for Law and National Security, University of Virginia Law School, Charlottesville, VA.

Gentlemen, welcome to you all.

Why don't we begin in the order that your names were called, unless you all have decided there is a more rational way to proceed.

Professor, welcome.

STATEMENT OF EDWIN B. FIRMAGE, COLLEGE OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UT

Mr. **Firmage**. Thank you very much, Mr. Chairman.

Let me simply summarize very quickly a much longer paper in six quick points.

Senator **Biden**. By the way, before we begin, I would like your entire paper placed in the record.

Mr. **Firmage**. Of course. Thank you very much.

The war power of Congress is complete. The war power of the United States, in the sense of the decision for war or peace, is entirely in the Congress of the United States.

The sole exception to this is the power of the President to respond to sudden attack upon the United States.

The text makes this abundantly clear, the power to declare war and grant letters of marque and reprisal.

The first century of our history bore out this interpretation. There were exceptions, as Presidents exceeded the empowerment of statutes of Congress, but never until Korea and Vietnam did you have an effort to justify, under the Commander in Chief clause, a separate base of power to decide for war.

The Commander in Chief clause in the original understanding simply made the President Congress' general. These were the terms of Alexander Hamilton, a proponent of strong Presidential power. He, nevertheless, saw the paradigm shift from a European model of a monarchical power to decide for war to a congressional power to decide for war or peace.

Thomas Jefferson, though not present at the Philadelphia convention, where the Constitution was struck, rejoiced at this change, and he noted that they had gone a long way toward chaining the "dog of war."

The power over foreign relations, the matrix within which the war power sits at the heart of congressional power, was clearly meant to be collegially conducted and determined by the Congress and the President. The treaty power, I think, as Louis Henkin demonstrated a decade ago, gives us this insight.

Unlike the present time, in the 18th century, foreign relations would have been conducted dominantly through the treaty power, and there, with the Senate and the President joining together, we see the original idea.

A relevant question, nevertheless, after any analysis of original intent, is whether two centuries' experience and radical changes in technology make that original understanding insufficient.

I believe quite the contrary.

As one looks at ICBM technology and at the power of thermonuclear weapons, I see nothing so enticing in nuclear war as to encourage us to make war more easily accomplished, rather than less.

I think, quite the contrary, that every restraint of law on Government and diplomacy should be placed upon the inclination to go to war that possibly can be.

While one thinks, perhaps loosely without thinking it through, that ICBM time of 15 minutes, or 20, or 25 minutes, might make a quick decision absolutely necessary, when you stop and think about the actual situations where nuclear weapons could possibly be used, if, in fact, deterrence fails, what's the hurry?

If you think through the scenarios of the likely use, or first use, particularly, of nuclear weapons, I see no reason to drop restraints of the Congress of the United States upon a decision for war or peace, but enormous reasons to do just precisely the opposite.

Beyond the question of the use of nuclear weapons, I would like to address two more issues.

I believe that covert war has come to be the type of war of our time. I would hope that in some manner the War Powers Resolution can be strengthened to cover covert war.

Two factors, I believe, combined to make covert war the form of international violence of our time. First, the enormous power of nuclear weapons, paradoxically, limited the likelihood that they would ever be used. Second, a Manichaean world view—seeing the world in an absolutist vision of good and evil—grew understandably out of our experience in World War II. In that war, far more than in World War I, Vietnam, the Korean war, or the War of 1870, totalitarian dictatorships made war against nations at peace. But it would be disastrous to adopt this black-and-white world view as the paradigm rather than the exception. We emerged from World War II, nevertheless, with the view that we were continuing to fight against unadulterated evil, therefore excusing what ever vicious means we chose to employ.

We have been so totally assured of our own righteousness and yet deterred from all-out war in the model of World War II that we have waged covert action, and done so, I think, with great harm to others and to ourselves.

I think we have had short-term embarrassment and long-term disaster consistently in our use of covert action and covert war.

Congress is responsible for this form of war not one whit less than for overt war. The term "grant letters of marque and reprisal" in the 18th century was a way of saying Congress has the total war power, announced, declared or undeclared, public or private, fought by the official forces of this country in uniform or by mercenaries, done by whatever means. If one wanted to make Francis Drake, pirate, who was preying upon Spanish shipping and who might be hanged as a criminal if caught, into Sir Francis Drake, confidant of the Queen, empowered and authorized by the state, one granted letters of marque and reprisal.

When we see mercenaries not authorized by the Congress of the United States fighting war or committing acts of war, we see abuse of the war power of Congress by the President.

Finally, how do we go about remedying these things?

I think the reality is that the view that the courts are the least dangerous branch is most surely true here. They are the least dangerous and the least helpful. They have the least power.

I hope that there are ways, probably peripheral, that the courts can come into play, and I have proposed this in my testimony. I have slight hope, really, that the central issues will be resolved there. The only other big guy on the block with the President of the United States is the U.S. Congress, where the war power was originally reposited and where it should remain.

I support the War Powers Resolution with great reluctance. I think it is simply the least worst way we have practically available now of going about things.

It assumes continued Presidential initiative in committing American troops into hostilities or situations where hostilities are likely, and it assumes congressional subservience in this process, both in reporting and consulting roles.

In the original understanding—and in my view, nothing has happened since then to change the wisdom of that understanding—we should be speaking of congressional authorization, not consultation and of censure or impeachment, not reporting, for Presidential violation of congressional power over the decision for peace or war.

I support strongly the War Powers Resolution but only because practically I do not see at this present time how to restore congressional virtue that was lost, I think tragically, in Korea and Vietnam.

Thank you.

[The prepared statement of Mr. Firmage appears in the appendix.]

Senator Biden. Thank you very much, Professor.

Professor Glennon.

STATEMENT OF MICHAEL J. GLENNON, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, DAVIS, LAW SCHOOL, DAVIS, CA

Mr. Glennon. Thank you, Mr. Chairman.

Let me begin by thanking the subcommittee for inviting me to be here today.

I wish to note at the outset that, although I serve as counsel to the congressional plaintiffs in *Lowry* v. *Reagan*, the views that I express here today do not necessarily represent those of my clients in that case.

My remarks will be directed to the constitutionality of the War Powers Resolution and also to the Use of Force Act set forth in Committee Print No. 1.

I understand that Committee Print No. 1 is intended not as a proposal but, rather, as a focal point for analysis. I believe that each of its provisions is constitutional; but I am less convinced that certain of those provisions are wise from a policy perspective. I would thus suggest that primary consideration be devoted to policy considerations in Committee Print No. 1.

In discussing issues of constitutionality, it seems appropriate to begin with a comment upon the September 14 testimony of the State Department Legal Adviser, Abraham Sofaer. In that testimony and in his answers to the chairman's written questions, Mr. Sofaer launched a broad attack upon the congressional warmaking power, referring throughout to "independent" power conferred upon the President by the Constitution and reiterating the proposition, transposed in various forms, that independent Presidential power is not subject to statutory limitation.

The observation is, of course, true and, indeed, truistic: What his claim comes down to is that Congress cannot act unconstitutionally.

Yet, Mr. Sofaer repeatedly overlooks the fact that there is a second category of Presidential power that is subject to congressional regulation: concurrent power. This is constitutional power that may be exercised initially by the President in the face of congressional silence, but which Congress may, nonetheless, subsequently choose to restrict.

It is this class of power to which Justice Jackson referred in his famous concurring opinion in the *1952 Steel Seizure* case.

In that case, in which the Supreme Court struck down the seizure of the steel mills during the Korean war by President Harry Truman, Jackson wrote: "Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress." He continued, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."

The Supreme Court formally adopted Justice Jackson's mode of analysis in *Dames & Moore* v. *Regan,* in which Justice William Rehnquist applied Jackson's approach to uphold President Jimmy Carter's Iranian hostage settlement agreement as having been authorized by Congress. In so doing, Rehnquist wrote that Jackson's opinion "brings together as much combination of analysis and commonsense as there is in this area."

Rehnquist then quoted from Jackson a passage that, today, in this context, is as significant as it is timely. He said: "The example of such unlimited Executive power that must have most impressed the Forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

The War Powers Resolution, therefore, placed certain Presidential use of armed force in this third category of Justice Jackson's analysis, where his power is at its lowest ebb. Under this analytical approach, the time limits of the War Powers Resolution, as well as the "prior restraints" set forth in the earlier Senate version, seem clearly constitutional. The scope of the President's concurrent power is a function of the concurrence or nonconcurrence of the Congress; once Congress acts, its negative provides "the rule for the case."

Mr. Sofaer ignores the learning of the *Steel Seizure* case, however, and can barely list the parade of horribles set to march by the time limits: They interfere with the "successful completion" of the President's initiative; they "may signal a divided nation, giving adversaries a basis for hoping that the President may be forced to desist"; they provide "an undesirable occasion for interbranch or partisan rivalry."

The curious thing about these arguments, Mr. Chairman, is that every one of them is an argument not against the War Powers Resolution but against constitutional limitations on Presidential warmaking power. Every one of these arguments is an argument for untrammeled Presidential discretion to use the Armed Forces whenever, wherever, and for whatever purposes the President may choose.

Indeed, on close analysis, it becomes clear that this is precisely Mr. Sofaer's view: "Explicit legislative approval for particular uses of force has never been necessary," he candidly said.

The President thus could have used armed force in World War I, World War II, or Vietnam without any declaration of war or any other legislative approval.

This view of warmaking power is, of course, not new. But it should suffice to say at this point in our history that the divine right of kings approach was ventilated and rejected in 1789, and I see no point in reopening that debate today.

The constitutional theory underpinning the War Powers Resolution is different from that underpinning the Use of Force Act. The War Powers Resolution confers no authority upon the President; as section 8 makes clear, it merely places limits upon the use of authority that otherwise might lay unregulated.

The Use of Force Act, on the other hand, affirmatively delegates power to the President to use armed force in certain specified instances. That distinction is critical. As early cases demonstrate, where Congress delegates authority, limits imposed incident to that delegation are constitutionally valid.

This important premise undergirds the approach of the Use of Force Act.

Mr. Chairman, a number of proposed modifications of the War Powers Resolution are before the subcommittee, ranging from the Byrd-Nunn proposals and Committee Print No. 1, to the De Fazio approach to simple repeal.

I would simply say, in concluding, that none of these modifications of the Resolution will, in themselves, to quote the War Powers Resolution, "ensure that the collective judgment of both the Congress and the President will apply to the introduction of U.S. Armed Forces into hostilities."

Fifteen years after the War Powers Resolution's enactment, it has become clear that the Resolution's sponsors were naive to believe that any law could achieve that objective. The most that a statute can do, however artfully drawn, is to facilitate the efforts of individual Members of Congress to carry out their responsibilities under the Constitution.

To do that requires understanding and it also requires courage. It demands a insight into the delicacy with which our separated powers are balanced and the fortitude to stand up to those who would equate criticism with lack of patriotism.

For a Congress comprised of such Members, no War Powers Resolution would be necessary. For a Congress without them, no War Powers Resolution will be sufficient.

Thank you.

[The prepared statement of Mr. Glennon appears in the appendix.]

Senator **Biden**. Thank you.

Professor Turner.

STATEMENT OF ROBERT F. TURNER, ASSOCIATE DIRECTOR, CENTER FOR LAW AND NATIONAL SECURITY, UNIVERSITY OF VIRGINIA LAW SCHOOL, CHARLOTTESVILLE, VA

Mr. **Turner**. Thank you, Mr. Chairman.

It is a great pleasure to be back here. I spent 5 years sitting on the other side of your bench, in the back row, when I was working for a member of the committee. It is good to see the committee is still as active and as effective as it was in the old days.

Senator **Biden**. Which is easier?

Mr. **Turner**. Ask me that in 10 minutes.

Senator **Biden**. All right.

[General laughter.]

Mr. **Turner**. I have a rather lengthy statement that——

Senator **Biden**. Excuse me. Would you start the clock for this witness again.

Professor Glennon has been here so often and back here, too, that he didn't even use his 10 minutes, which means he didn't learn any of the lessons Senators taught him.

Mr. **Turner**. How long a warning is there?

Senator **Biden**. We always go over 10 minutes.

Mr. **Turnfr**. How long a warning do we have on the yellow light?

Senator **Biden**. I think it is 1 minute and then your seat is ejected.

[General laughter.]

Mr. **Turner**. I was wondering. I thought the device beneath the lights might be some sort of laser weapon.

I have a rather lengthy statement, Mr. Chairman, which I would like to submit for the record.

Senator **Biden**. The entire statement will be placed in the record.

Also, I ask unanimous consent that Professor Glennon's statement be placed in the record.

Mr. **Turner.** I would also like to emphasize that the views I express this morning are my own and not those of the University of Virginia, the Center for Law and National Security, the ABA or any other group with which I am associated.

This is a very important issue, and I am determined to be as candid and as honest as I can with the committee.

It is appropriate to note that we meet here today on the 50th anniversary of the opening of the 1938 Munich Conference; because, in my view, the War Powers Resolution stems from the same intellectual tradition which led Neville Chamberlain to think he could promote "peace for our time" by appeasing aggression, and which led Senator Nye and other isolationists during the same era to pass statute after statute, tying the President's hands, in an effort to legislate peace.

In the interest of time, I would like to focus primarily on the separation of powers issue. I want to help you "break the code" on how the Founding Fathers sought to separate powers between the President and the Congress.

Before doing that, I would like to make a few brief statements that are discussed at great length in my prepared testimony, which might provide the subject for discussion during the question-and-answer period.

First of all, as I testified last month at length in the House, the Congress was a full partner in getting the United States involved in Vietnam. The suggestion that it was not is not in my view unsupportable. I believe, in essence, the War Powers Resolution was a political fraud aimed at persuading the American people that Congress had had no role in that unpopular war.

Among the things which lead me to this conclusion are, first of all, the Senate, in 1955, consented to the ratification, with only one dissenting vote, of the SEATO Treaty. It created a legal obligation for the United States to go to the defense of certain countries in Southeast Asia that were victims of aggression, in response to their request, and, of course, acting pursuant to our constitutional process.

In carrying out those constitutional process in August 1964, by a vote of 416 to 0 in the House and 88 to 2 in the Senate, Congress enacted statutory authorization empowering the President to use armed force in Indochina.

Senator Javits said that this made Congress a full partner in the commitment. During the debate prior to passage, a colloquy took place between the chairman and ranking minority member of this committee, in which Senator John Sherman Cooper said that "Looking ahead, Mr. Chairman, if the President determined it were necessary to use such force as could lead into war, we will be giving that authority by this Resolution."

Chairman Fulbright responded, "That is the way I would interpret it."

Later, in 1970, Senator Sam Ervin, a very distinguished constitutional scholar, said that in his view, the Gulf of Tonkin Resolution represented "a declaration of war in a constitutional sense."

In 1967, when this committee issued its report on the national commitments resolution, it stressed that such resolutions as the Gulf of Tonkin Resolution were "a full alternative to a declaration of war and were an appropriate means of Congress giving authority for hostilities."

Section 2(c)(2) of the War Powers Resolution expressly recognizes the legality of the Commander in Chief using armed forces pursuant to "specific statutory authority." That's exactly the situation we had in Vietnam.

Before the public turned against the war, Congress, for several years, appropriated tens of billions of dollars for the war, often by 90 percent or greater majorities. During the month surrounding the Gulf of Tonkin Resolution, President Johnson's popularity shot up not 30 percent, but 30 points—30 percentage points—an incredible increase, all attributed to the popularity of the Vietnam war in the early days.

My second conclusion is that Congress, in reacting to the implementation of the legislation, has been guided by political expedient rather than constitutional principle.

Let me illustrate by mentioning just three examples. When President Ford rescued the crew of the *Mayaguez*, he violated article 2(c)(C) and article 3 of the Resolution—not to mention the Cooper-Church amendment, which prohibited spending funds to send combat troops into that region. And yet, this committee passed a unanimous resolution praising his action and saying it was in full compliance with the War Powers Resolution.

In contrast, when President Carter tried to rescue endangered American citizens in Iran, under very similar circumstances—but in the absence of a statutory prohibition against sending troops into the area—the chairman and ranking minority member of this committee denounced his action as being in violation of the War Powers Resolution.

To me, the only clear distinction is that the public supported the successful Ford operation; they opposed the unsuccessful Carter operation.

Grenada is even a clearer example, because people like House Speaker Tip O'Neill stood up immediately and denounced the President upon learning of the operation. The House Foreign Affairs Committee called a hearing to investigate the legal aspects.

Later that afternoon, students landed at the airport, kissed the ground, and praised Ronald Reagan. The polls that came in overnight showed better than a 90-percent support for the operation, both within the United States and among the people of Grenada. House Speaker O'Neill announced that he had "reconsidered" the operation and had decided the President was fully justified. The House Foreign Affairs Committee decided to "postpone" their hearing on the legal issues, and those hearings still have not been rescheduled.

In essence, what Members of Congress have been doing is using the War Powers Resolution as cover. If there is a crisis, if there is a risk of the use of force, they shout "Fire" and run to the hills.

If the President, with the adversary knowing the country is divided, nevertheless succeeds, they come down from the hills, pick up a flag, and walk in the victory parade—saying that of course they supported the President from the beginning. If there is a failure, as occurred in Iran and Beirut, they solemnly come down from the hills, charge that the President "broke the law," and then shoot the wounded.

These divisive congressional debates have done a great deal to increase the likelihood of war and to harm the cause of peace.

Today, the Nobel Prize Committee awarded the 1988 Nobel Peace Prize to U.N. peacekeeping forces. The United States, in 1982 and 1983, tried to participate in a very similar peacekeeping effort in Lebanon. By no strain of the imagination could it be said that sending American Marines to Beirut as part of an international peacekeeping force—at the request of all the governments in the area—constituted either an act of war or an infringement upon the power of the Congress to declare war. And yet, I think in large part because of the divisive debates in the Senate, President Assad of Syria concluded the Americans were "short of breath."

Right after the Senate debate, less than a week before the bombing of the Marines, the American press quoted intelligence accounts of intercepted Moslem militia messages that said, and I quote, "If we kill 15 Marines, the rest will leave."

A few days later, terrorists killed 241 Marines. I believe the U.S. Congress, and especially the Senate, deserves a great deal of responsibility for that tragedy.

In essence, by passing a War Powers Resolution that says any time a terrorist anywhere in the world takes a shot at an American soldier, that will start a clock and the President will have to withdraw all U.S. forces within 60 or 90 days, you have surrendered the initiative to the terrorist—and in the process you have placed a bounty on the lives of American servicemen.

Mr. Chairman, my final conclusion is suggested by the title of my paper, "Restoring the Rule of Law: Reflections on the War Powers Resolution at Fifteen."

Although some of you may not believe it, Congress can violate the law. Each of you took an oath of office to support the Constitution, and when you pass a law that seeks to take away from the President part of the Commander in Chief power vested in him by the American people through the Constitution—the essence of which is the control of the deployment of armed forces—you are violating the law.

Let me turn briefly to the question of "breaking the code" of separation of powers.

There is a theory today that perhaps the Founding Fathers didn't really think about separation of powers, or perhaps they couldn't decide how to divide them, so they decided to just leave the two parties to struggle. That is not in my view an accurate account of what happened.

To really understand what the Founding Fathers intended, first of all, you have to understand the views of John Locke, Montesquieu, and Blackstone—the primary theorists who influenced the constitutional Framers on separation of pwers matters.

They all argued that legislative bodies were not competent to handle foreign affairs because battles would quickly change, princes would die, and it was necessary to be able to act with speed, dispatch, and secrecy—and for a variety of other reasons having to do with the inherent strengths and weaknesses of the two political branches.

Locke used the term "federative power" to refer to the power of controlling "leagues and alliances, war, peace, and all transactions with all persons and communities without the commonwealth." But he said the federative power required the same attributes for its execution as the power to execute the municipal laws passed by the legislative branch and, thus, both should be placed in the same hands.

Montesquieu distinguished between "the Executive in respect of things dependent upon the laws of nations" and "the Executive in regard to matters that depend upon civil law."

One you understand the 1787 meaning of "Executive power," you understand why, when the Founding Fathers in article 2, section 1, vested "the Executive power" in the President, as Quincy Wright said in his classic 1922 study, "The Control of American Foreign Relations," and I quote, "When the Constitutional Convention gave Executive power to the President, the foreign relations power was the essential element of the grant."

I would like to close with just two other quotations to show that both Jefferson and Hamilton, two arch rivals in the initial Government, strongly agreed on this subject.

Jefferson, in 1790, said, "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. The exceptions are to be construed strictly." The same theme of exceptions to Executive power being construed strictly was picked up by Madison.

If I might conclude with an almost identical statement 3 years later by Alexander Hamilton, he wrote in his first "Pacificus" letter, "It deserves to be remarked that, as the participation of the Senate in the making of treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly and ought to be extended no further than is essential to their execution."

So, what I am suggesting is that the Founding Fathers vested in Congress a power of veto—a negative—over a decision by the President to launch a war, an offensive war, the kind of war for which a formal declaration would historically be associated. Short of that, the deployment of military forces, the entire question of what we do with our military and also how we fight wars either authorized by Congress or initiated by a foreign government, is left entirely to the discretion of the President under the Constitution.

The War Powers Resolution conflicts with this theory.

Senator BIDEN. Excuse me. I want you to keep going, but I want to make sure that I heard you correctly.

Did you say the Constitution vests in the Congress a veto power? Is that what you said?

Mr. TURNER. I used the term "veto," or "negative" which is exactly the term that Jefferson used.

Senator BIDEN. I understand. I just want to make sure that I heard what you said. It's a veto power.

Mr. TURNER. Yes, over a decision by the President to launch an offensive war.

The classic case of the proper congressional role occurred under Andrew Jackson, when the President decided he wanted to launch a war against France because the French had not made good on their promise to repay certain debts owed to the United States from Napoleon's seizure of American merchant ships. Jackson went to the Congress and said in essence "I'm going to send the Navy over there and chastise the French and they will pay their debts." But Henry Clay, the chairman of this committee, said "No you're not," for a variety of reasons, and Congress blocked the President.

That was exactly the kind of adventuristic Executive initiative that the Founding Fathers were trying to guard against by the "declaration of war" clause.

It is a very important clause. But the critical point I am making is that that clause was not violated in Vietnam. The constitutional system was not broken. What happened in Vietnam was that Congress, after initially strongly supporting the war—and, indeed, many of the people who pushed the War Powers Resolution in 1973 had in the early 1960's denounced President Kennedy and President Johnson for not doing more, for not sending combat troops to Vietnam. A classic example was Representative Paul Findley.

At any rate, my bottomline is that the War Powers Resolution was a fraud. It exceeds the constitutional powers of the Congress. I strongly believe that it should be repealed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner appears in the appendix.]

Senator BIDEN. Thank you very much. Mr. Reveley, please proceed.

STATEMENT OF W. TAYLOR REVELEY III, ESQUIRE, PRACTICING ATTORNEY AND AUTHOR, RICHMOND, VA

Mr. REVELEY. I have a long statement that I would appreciate being included in the record.

Senator BIDEN. It will be.

Mr. REVELEY. I will orally cover only the first 5 pages of it.

The theme of my remarks, Mr. Chairman, is let's be practical.

In my judgment, the country does need war powers legislation. We need it to help solve the severe, debilitating war powers problem that afflicts us.

The problem is not that the President is deliberately, wickedly, usurping ancient congressional prerogatives over war and peace. Nor is the problem that Congress is deliberately, wickedly, invading hereditary powers of the President over the use of force.

The problem is that the country lacks a constitutional consensus about the process by which the President and Congress are to share authority over American decisions to use force.

We continue to bicker over which branch gets to decide what and when. This bickering occurs at profound cost to the country. Four sorts of harm come quickly to mind.

First, the bickering poisons relations between the President and Congress. To be accused of constitutional usurpation is simply no fun. It engenders anger, fear, defensiveness, countercharges.

Constitutional theologians from both sides, the President's and Congress', insist with passion of truly religious intensity that their view of the Constitution is the "only true view," that all others are heresy.

The fate of heretics in the hands of the righteous is well-known.

Second, the bickering undermines public confidence in the rule of law and in the legitimacy of both the President and Congress.

The political branches of Government cannot go on year after year accusing one another of illegality in one of the most sensitive areas of American life, war and peace, without seriously eroding the faith of the people in both of these branches of Government.

Third, the bickering prevents focused attention to policy; that is, focused inquiry into what the United States ought to do about particular foreign and military situations, what our realistic alternatives are for dealing with them, what the costs and benefits of these alternatives are, and which alternatives we ought to pursue to maximize our national interest.

Rather than focusing on these policy issues, the debate all too often focuses on process issues, on which branch is constitutionally entitled to decide what and when. Focused attention on whether the United States ought in the national interest to commit troops abroad is sacrificed to bickering over the precise way in which the President and Congress are to make whatever decision is ultimately to be made.

Fourth and finally, the bickering denies American war and peace decisions the wisdom and the staying power that can come only from having both the President and Congress meaningfully involved in our decisions to use force. It is unavoidable that the Constitution divides the war powers between the two branches. Thus, it is inescapable that for American foreign and military policy to work, the two branches must cooperate in the exercise of their overlapping prerogatives.

But wait, some people say, these sorts of harms occur not because we lack a constitutional consensus on process but simply because the country lacks a current consensus on policy. We had a policy consensus from the end of World War II to sometime in the mid-1960's, they say, but now we've lost it and that's the problem.

Well, of course, when people can easily agree on what policy to adopt—whether these people are spouses dealing with one another, parents and children, university faculties and administrators, corporate officers and directors, litigants, voters, or Presidents and Congresses—when consensus on policy does exist, then little attention is paid to the nature of the decisionmaking process.

But how often do people agree easily about difficult and important issues? History suggests not all that often, and the more difficult it is to get agreement on policy, the more important it becomes to have agreement on process.

There are two reasons. First, when people agree on how a decision should be made—that is, when they accept that a particular person or group is entitled to make a particular sort of decision—then they are far more likely to accept the decision that is ultimately made, even if they disagree with it as a matter of policy, than they are likely to accept such a decision if they believe it was made by people not authorized to decide.

Every day, in countless contexts, people accept and support decisions whether they like them or not because the decisions have been made by a process that people thought was legitimate. In other words, agreement on process helps produce agreement on policy.

When we disagree over both process and policy—over who gets to decide as well as over what the decision ought to be—a two-front struggle results, with dismal effect for focused inquiry into what we ought to do in the national interest. Sound policy suffers.

In short, process matters. We badly need a constitutional consensus on how the President and Congress are to go about making war and peace decisions.

To reach at least minimal agreement on process, all the crucial constitutional threads must be drawn together. The President's constitutional theologians must stop ignoring the fact that the language of the Constitution and its Framers' and Ratifiers' purposes create an enduring role for Congress in American decisions to use force.

At the same time, Congress' constitutional theologians must stop ignoring 200 years of practice under the Constitution. From George Washington's administration to date, practice also has been central to this country's constitutional journey. War powers practice indicates that, when Congress has provided the necessary tools to the President—men, money, and materiel, for instance—and when Congress has not previously banned a particular use of force, then the President may begin it on his own initiative. Two hundred years of practice make that clear.

It is essential that we weave these threads together in war powers legislation.

We might just as well howl into the wind as try to put into place a process that ignores either the country's deeprooted constitutional expectation of congressional involvement on the one hand, or the country's equally deeprooted constitutional expectation of Presidential initiative on the other.

Both expectations must be met if we are to develop a war powers process that actually works.

For now, we should focus on the irreducible constitutional minimum, on the"nothing less" bedrock that must exist if Congress is to be involved consistently in decisions about the use of force and if the President is to retain the initiative that practice has given him and that he will exercise, in light of the hazard, pace, and complexity of foreign and military affairs and his greater capability than Congress, to deal quickly and quietly with these affairs.

What is the irreducible minimum? In my view, it is this:

First, means to encourage the President and Congress to consult meaningfully together before and during moments of truth;

Second, recognition that, informed by this consultation, the President may act alone if he thinks it in the national interest, for instance, because he believes speed or secrecy is crucial to U.S. success; and

Third, recognition that, when the President alone does initiate the use of force, it thereafter is for Congress to approve, disapprove, or limit the use if Congress chooses to act.

The irreducible minimum does not include time limits within which Congress must act either to approve, or be deemed to have disapproved, Presidential initiatives. It is far from clear that disapproval by inaction is constitutional; and it is quite clear that the President, all Presidents, will resist such a concept relentlessly and that Congress will rarely try to enforce it. Time limits won't work in the real world.

Is disapproval by concurrent resolution part of the irreducible constitutional minimum? In my opinion, it can go either way. After *Chadha,* Presidents will also probably resist relentlessly the concept that concurrent resolutions can constitutionally curb their initiatives.

But, as a practical matter, if the President commits troops who remain in the field a week, 2 weeks, 3 weeks, 2 months after their initial commitment, and Congress, by majority vote in both Houses, acts to limit or end the use of force, it is most unlikely that the President will simply disregard such an expression of congressional will. If he did, Congress has remedies, easy remedies—for instance, the power of the purse.

In sum, the War Powers Resolution, as passed in 1973, has not succeeded. It needs to be reduced to its most basic and workable elements. These elements, together, can lead the way to the constitutional consensus we so desperately lack. The consensus would involve less than either Presidential or congressional theologians insist is their branch's constitutional due. But the consensus would work.

One final note.

Some people say, if war powers legislation is to be so reduced, why bother to have it? Better to kill the 1973 resolution outright and thereby vindicate the Presidential view of the Constitution; or better to beef up the Resolution to require Congress' prior approval for any use of force, except for a few specified sorts, and, thereby, enshrine the congressional view of the Constitution. And, anyway, the irreducible minimum just described already exists. The President and Congress do not need a War Powers Resolution in order to consult one another. The President has been acting alone and reporting to Congress from time to time without such legislation, and Congress can already act before or during Presidential initiatives to block, limit, or end them in a variety of ways.

True, but simply because most of us could exercise daily, eat sparingly and otherwise see to our bodies does not mean that most of us do it. We are more likely to do it when pushed by an action-forcing regimen.

The War Powers Resolution is an action-forcing regimen for both the President and Congress. It hasn't worked well so far because it carries too much baggage, such as sections 2(c) and 5(b).

Stripped to its irreducible minimum, however, the Resolution just might bring the President and Congress to engage one another constructively on questions of war and peace—to consult, let the President act first if he feels so compelled, but then force the President to report and let Congress act second to approve or disapprove his initiative, if it feels so compelled.

To repeal the War Powers Resolution, leave it as it is, or amend it to impose more restraints on the President would do nothing for constitutional consensus. Repealed, the Resolution would greatly disappoint expectations that Congress must play a sustained, meaningful role in use of force decisions. Left as it is, the Resolution would continue to work so fecklessly as to suggest that consistent collaboration between the two branches on the use of force is hopeless. Amended to try to restrain further the President, the Resolution would surely be ignored by just about everyone.

Cut to its irreducible minimum, however, the Resolution could lead us to constitutional consensus.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Reveley appears in the appendix.]

Senator **BIDEN**. Thank you very much.

We thank all of you for very concise and well-reasoned statements, close to within the time limit.

I have a number of questions. But let me begin in a slightly unorthodox way.

Would any of you like to raise questions about anything any of your colleagues have said?

Mr. **FIRMAGE**. I have two points in regard to comments that have been made regarding Vietnam and foreign policy generally.

The point of Vietnam that was so disastrous is not that Congress didn't have an input into the decision, much to its regret, I believe. I think the Tonkin Gulf Resolution was, in effect, an unconstitutional attempt to delegate the warmaking power of Congress to the President.

I think that the Congress may well have been deliberately misled by the President in the Tonkin Gulf Resolution, too.

Nevertheless, I agree with my colleagues that Congress had an input in that decision to go to war. The problem that is even more disastrous than the disaster of the Tonkin Gulf Resolution itself is that Presidents made an argument that they didn't need it anyway, that, through the Commander in Chief clause, the President had the power to go to war and Congress could "go fish."

That argument, following the same argument from Korea, is, what I think, represents a vast difference from the past.

Of course we have had a checkered history. Of course Presidents have exceeded power given them. They have done things that perhaps they should not have done, and exigencies will arise when a President perhaps should cross a constitutional line, to be later, retrospectively, saved by Congress.

But what is very dangerous is an argument that the President has the power, under the Commander in Chief clause, to ignore any need of authorization from Congress and decide for war or peace. That does not have precedent in the past and it has no text to support it, either.

In regard to power over foreign relations, no doubt the transaction of foreign business is to be done by the President, as John Marshall noted before Congress. John Marshall speaking before the House of Representatives in defense of a controversial action taken by President John Adams, first described the President as "The sole organ of the Nation in its external relations, and its sole representative with foreign nations." What Mr. Marshall meant, of course, was that the President is our singular voice in the conduct of foreign relations—see Francis Wormuth and Edwin Firmage, "To Chain the Dog of War: The War Power of Congress in History and Law" 181, 1986. But the determination of that foreign policy and the authorization of that policy, as well as the funding of that policy, is in the congressional bailiwick. There, I think, along with the general intent that we see from the treaty power, that foreign policy be conducted collegially, places Congress squarely in the role of determining the nature of, and then authorizing our foreign policy. This power collegially to help determine the content of our foreign policy is a separate empowerment of Congress, expressed in a multitude of constitutional texts, apart from the congressional power exclusively to decide for war or peace, absent a sudden attack upon this country.

Senator BIDEN. Would anyone else like to make a comment?

Mr. TURNER. I could easily go on for 20 minutes, Mr. Chairman, but I will not. I will make just one point.

Professor Glennon, an old colleague from our years with the committee, made reference to the *Steel Seizure* case. It is very common for people analyzing the separation of powers issue to do that. I think it is an error, however, with respect to foreign affairs.

I would note that Prof. Louis Henkin, who testified here recently, I understand—though I have not seen his testimony—notes in his book, "Foreign Affairs and the Constitution," that the *Steel Seizure* case is not generally viewed as a foreign relations case. In the case of *Goldwater* v. *Carter* in 1979, four members of the Supreme Court, including the current and immediate past Chief Justices, distinguished that case from *Steel Seizure*, arguing that—unlike *Goldwater* and *Curtiss-Wright— Steel Seizure* was not a foreign affairs case. And, if you read both Justice Black's majority opinion and the famous Jackson concurring opinion in *Youngstown*—which, at the time, of course, was joined by not one other member—they both stressed that at issue in *Steel Seizure* was a President who, although he made reference to his Commander in Chief power, was trying to seize privately owned steel mills. Under the fifth amendment, the President is not empowered to seize privately owned property of U.S. citizens for any purpose without due process of law, and certainly the Commander in Chief power has to be exercised pursuant to all of the other constraints in the Constitution.

So, I would argue that relying upon the language in the *Steel Seizure* case is a serious error in trying to understand foreign affairs powers; because, in that case, the President was not exercising his Executive power of general control over foreign relations; but, rather, he was infringing upon the constitutional rights of U.S. citizens.

Senator BIDEN. I assume, Professor Glennon, that you would like to say something.

Mr. GLENNON. Mr. Chairman, I think that Mr. Turner's theory concerning the irrelevance of the *Steel Seizure* case is belied by the facts of the *Steel Seizure* case, the analysis of the Court in the *Steel Seizure* case, and the subsequent analysis of the Supreme Court in *Dames & Moore* v. *Regan*.

In the *Steel Seizure* case, President Truman argued that seizure of the steel mills was permitted under his independent power as Commander in Chief because of the indispensibility of steel as an element in the war effort to prosecute the war in Korea.

The Supreme Court held that that was not so; that his independent power as Commander in Chief did not support the seizure of the steel mills.

In 1981, the issue of the validity of the Iranian hostage settlement agreement confronted the Supreme Court, and the Court had to decide what analytical framework was to be applied to resolve that dispute. Justice Rehnquist wrote, in speaking for a majority of the Court, that the analysis of Jackson in the *Steel Seizure* case "brings together as much combination of analysis and commonsense as there is in this area." He proceeded to apply the analysis of the *Steel Seizure* case to resolve the validity of this international agreement.

Mr. Turner might be right, but I would be inclined to agree with Chief Justice Rehnquist.

Mr. TURNER. This is very important, so let me try to be precise.

I think in both the *Iran Claims* case and in the *Steel Seizure* case the facts involved the property rights of individual American citizens. They were in that respect essentially domestic disputes. All powers of the Constitution have to be exercised consistent with all of the constraints of the Constitution.

If the President decided that he was angry at Canada, and wanted to send the Army up to launch an invasion of Canada over some economic or political grievance, before he could do that—and in this case, I might disagree with my dear friend, Taylor Reveley; what Taylor said was ambiguous—but if he meant to say that the President could essentially launch a war if he felt it were an emergency and then to go Congress, I would disagree.

I think the President can only launch a war, the kind of war with which declarations of war have historically been associated—which excludes a defensive war—after he has to come to Congress and obtained approval from both Houses.

But short of that, in Justice Jackson's opinion——

Senator BIDEN. Let me stop you there.

How about if the President of the United States concluded that he wished to send troops into Mexico because he believed that, absent doing so, the Communist Sandinistas would take control of Mexico City? Would he be able to do that without the consent of Congress?

Mr. TURNER. I would argue that if the Government of Mexico asked him to come in, he might well be able to do it, but——

Senator BIDEN. Without Congress' approval?

Mr. TURNER. Well, it depends upon the specific circumstances.

If he is going in for the purpose of engaging in war or in sustained hostilities, I would argue that he should, ideally, come to Congress first. But there are some cases where, for example, under a treaty, I can make an argument that the President—let's say if the Soviets invaded Germany tomorrow—I could make you a constitutional case that the President could respond to that immediately, even ignoring the fact that we've got tripwire troops there that he would also be permitted to protect.

But, my own judgment is, which is in part based on constitutional and in part political consideration, that he ought to get the approval of Congress as quickly as possible, if not in advance.

Senator **Biden**. Professor Turner, I think there is no one who would disagree that it would be better if the President and the Congress agreed. But the key question is, If the President concludes that he needs to project U.S. forces into an area where any reasonable person would expect that there would be a resistance to those forces being placed there, does he need congressional approval to do that.

Mr. **Turner**. I would argue in general "No," but in some specific cases, he might.

The reality is that many decisions of how the military forces of the country are deployed during peacetime run the risk of another country getting angry and attacking or declaring war against us.

The question of whether the President may use the Navy to convoy merchant ships first came up in 1798, when Congress was passing a law in the House that had a provision "authorizing" the President to use the Navy to convoy ships. Speaker of the House John Dayton, the youngest man to sign the Constitution, said "We can't have this clause in here because the President already has the authority to use the Navy to convoy ships, and to put this language in the bill might someday be viewed as a precedent to argue that he did not get that power from the Constitution."

Now, what you are suggesting—deploying the Army into a foreign country against that Government's will—the only justification for that would be if the President could argue it were necessary for a real defensive purpose; for example, if that country had seized American civilians.

Senator **Biden**. Take Nicaragua.

Mr. **Turner**. First let's take Iran and *Mayaguez*.

I think the President had the right to send United States forces into Iran and into Cambodian territory to rescue endangered Americans without congressional authorization.

Nicaragua is a more difficult case. The Congress itself has found, by law, that Nicaragua is engaged in a flagrant violation of the rules of international law contained in article 2(4) of the U.N. Charter, article 18 of the OAS Charter, and other legal instruments. They have clearly been engaged in armed aggression against their neighbors, and the United States does have some treaty commitments to assist victims of armed aggression in the region.

My preference would be for the President to come to the Congress if he felt we should use armed force against Nicaragua.

Senator **Biden**. I understand your preference. But I am trying to establish clearly what the issue here is. I was here when we passed the War Powers Resolution, and we all have varying opinions on why we passed it. But rather than go back and argue why we did, our task now is to determine whether to keep it, throw it out, put in a new vehicle, or amend the existing vehicle.

So, let's not argue about Vietnam and what got us where we are today. We are revisiting this now in a different atmosphere.

The real issue up here is that many of us in Congress are concerned that any President, Democrat or Republican, will, under a stated authority, the Commander in Chief clause, decide to commit U.S. forces into a situation that establishes a substantially new foreign policy without any participation by the Congress. The concern is that the President, essentially by the projection of forces, can make new policy. And, in the nuclear age and given the complexity of the world, those hostilities could quickly widen with potentially dire consequences.

We are not worried about 1898 or in 1798.

The stakes were not as high then.

But if a President sends forces into a half dozen regions of the world, it has the potential to produce a showdown between the Soviet Union and the United States of America. Any showdown between the Soviet Union and the United States of America has the potential for nuclear annihilation.

So, that is one important and practical reason why everybody is either arguing the President should have the authority to act unilaterally or should not. But the issue also applies to situations where the scope of hostilities would in all probablity remain limited but where there are fundamental issues of policy involved. For example absent the existence of an emergency which involves clearly visible U.S. interests relating to American military personnel or American citizenry abroad, does the President without consulting Congress have the constitutional authority to say tomorrow "Because I believe that the Sandinistas are a destabilizing threat to the Western Hemisphere, 75,000 American troops have invaded Nicaragua for the purpose of restoring democracy and stabilizing the hemisphere." Does the President have the authority to do that?

Mr. TURNER. The answer depends upon the specific factual circumstances, Senator, but the Nicaraguan case is obviously the one you have in mind. But let's look at it more broadly.

Senator BIDEN. No, no. Let's look at that one. If you don't have an answer to that one, let's pass.

Mr. TURNER. Let me have just a moment.

As Commander in Chief, the President has the power to deploy the military forces of the country anywhere he deems necessary short of engaging in war, and if that includes sending them where another country may be tempted to launch a war against us, that power has been conveyed to him.

Senator BIDEN. If, in fact, that country would resist, is that launching against us?

Mr. TURNER. I'm not talking about invading countries.

If he goes into a country at the request of the government, as in Beirut—many of you all complained, if you remember, that he was infringing the prerogatives——

Senator BIDEN. I understand all that. I'm trying to deal with your expertise here.

Mr. TURNER. The strongest legal case in which a President could order U.S. forces to invade another country would be if he could justify the action as defensive—for example, in response to armed aggression against this country, its citizens, or arguably an ally. For example, if Nicaragua continued its aggression against El Salvador—again, it is the kind of situation he ought to come to Congress on, but I am not prepared to say that under no circumstances could the President legally use force against Nicaragua.

On the other side, if I were talking to Abe Sofaer, I would strongly urge him before advising the President that it was legal to commit American forces to invade Nicaragua, to advise that he go to Congress and get affirmative authorization.

I agree with Hamilton. In a case, the consequences of which could involve war, the President ought to exercise no doubtful authority. But, in particular, if you have a regional treaty, if you have a clear case of armed aggression by one party against others, certainly the President ought to be able to "rattle the saber" if you will, as a means of trying to deter agression and restore peace. Whether or not he can go further than that, I think the best answer to that question is a political one, and that is he ought to come to Congress and get your approval—as occurred in Vietnam. I don't want to say as a matter of law that he can't do it.

Senator **Biden**. I have one last question for you and then I will let all of the panelists comment on both of these and I will let my colleague interject.

If we don't satisfactorily negotiate a base agreement with the Philippines, can the President say—without the authority of Congress—"Mrs. Aquino, tough luck, we're staying, we're moving in, we're going back to the old days"?

I'm serious. Can the President do that, because those are clearly the most important bases in the entire Pacific Basin and critical for American security interests. If the Filipinos say "Get out," can the President say "No way, we're staying, I don't care what the Congress says, and, by the way, we're moving into Manila"?

Mr. **Turner**. I would say "No."

Senator **Biden**. OK.

Now, would you like to comment?

Senator **Adams**. I wanted to ask a question on this.

Senator **Biden**. As long as you don't take them off this area.

Senator **Adams**. No. I want to stay on this question.

You mentioned that if we have a treaty or a series of treaty commitments and one of the parties to that feels threatened—the example used by the chairman. Are you stating that the President can invade another country that threatens one of the signatory countries to those treaties, and commit our Armed Forces to war without a declaration of war?

Can we do it? This is a practical question. Could we invade Nicaragua based on the fact that we felt that Nicaragua was invading El Salvador?

Mr. **Turner**. This is extremely important and I don't want to mislead you. Let me give you a couple of examples.

Senator **Adams**. No. Could we first, Mr. Turner. Then give me examples.

Mr. **Turner**. But it is such a complex area——

Senator **Adams**. No, it's not complex. It could happen tomorrow. I mean, we have the situation and we want to know what the power is of the President.

We have had people up here say that the President can do anything in committing troops. We have had some testify that no, if there is an offensive war and you go into somebody else's territory, you're sending troops, and that probably requires a declaration of war.

Mr. **Turner**. I agree it requires prior congressional authorization.

Senator **Adams**. I think I have heard you say that if there is some kind of treaty and we are indirectly threatened, the President can move troops in and can attack. The chairman used the example of 75,000 troops into Nicaragua if there were a Nicaraguan incursion or attack on El Salvador.

Can he do that without a declaration of war?

Mr. **Turner**. I would want to look very carefully again at the Rio Treaty before making such an argument—but it is theoretically possible.

The basic argument would be that if the treaty makes an attack on a treaty partner an attack on the United States as a matter of law, since treaties are part of the supreme law of the land and the President is required by the Constitution to faithfully execute the law of the land, and the President, as Commander in Chief, is authorized to act defensively to an attack on the United States, he could in such circumstances act without further authority.

Senator **Adams**. Wait a minute. You also have a law of the land, which is ignored, in the War Powers Resolution. It says that the President should be doing certain things, and certainly most scholars have said that these cover offensive land actions. And those offensive land actions can be categorized that we will go ahead.

You forget, I think, one portion of the Gulf of Tonkin Resolution. I came to Congress just after it. I was here during the time of enactment of the War Powers Resolution. The War Powers Resolution was in part a result of the invasion of Cambodia by President Nixon which meant that it fit the definition that some of the scholars have given. Some scholars have said that the only time you declare war is when you are going to create a world war. I believe that is correct, is it not, Mr. Chairman?

Senator **Biden**. If the Senator would yield, he is forgetting that I still have the floor. I think this is a worthwhile area to go off on.

Senator **Adams**. I don't want to go off on anything. I want to stay on the point.

Senator **Biden**. My point was, absent a war powers act, under the Constitution, does the President have the authority to deploy troops in the examples I have raised?

I pursue this because the Secretary of Defense, accompanied by the Chairman of the Joint Chiefs of Staff, and a number of other people have come up here and said there is no restriction on the President being able to do these things. In fairness, I don't think I mentioned the Philippines then—but there was no restriction, they said, on the ability of the President to do the kind of thing I have suggested.

So, it is not just idle discussion that is interesting at a cocktail party.

But I would like to let the others make comments here on the questions that I have just asked.

Mr. **Reveley**. On the Philippines, Senator, I think probably there, by any reasonable definition, you would be into aggressive war. In my judgment, the President cannot, unilaterally, by himself, engage in an aggressive use of force. It is not even clear to me that the President and Congress together can.

Senator **Biden**. So, the key is not U.S. interests, but aggressive.

Mr. **Reveley**. Yes, but I don't think that is very helpful. As a practical matter, if the President does commit troops, he and his lawyers and his political aiders and abettors will argue that the use of force is defensive.

Senator **Biden**. Let's look at this as a practical matter, and I am a practical politician—with all due respect, I think the people sitting up here, including my friends on the Republican side of the committee, are probably more aware of what practically motivates politicians than you all who are sitting down there.

Mr. **Reveley**. You are right about that.

Senator **Biden**. One of the practical facts of life is that Presidents or Members of Congress or anyone else—and one of you mentioned this before—are reluctant to do things that have already been defined as out of bounds.

The issue that I am trying to narrow down is under what circumstances the President is able, under his own authority, to project American forces into a situation—whether it be the Philippines or Nicaragua—where any reasonable person would expect armed resistance.

Mr. **Reveley**. The Philippine example, Senator, is seems to me is clearly an aggressive use of force. Just because we want a base in somebody else's country and it's in our national interest to have a base there does not give us a right under international law to invade that country and take a base. We would like to have lots of Japanese yen, too. But we can't go and seize Japan to get the yen.

If most reasonable people agree that a particular use of force is "aggressive" under international law, then I don't think you are going to find many constitutional scholars saying that the President alone may commit troops.

But that is a rare situation. That is at an extreme end of the continuum.

The far more difficult questions are Cuban missile crises and Nicaraguas, and there you inescapably confront disagreement on the constitutional score. The language of the Constitution and its Framers' and Ratifiers' debates, strongly suggest that in the Cuban missile crises and Nicaraguas you need prior congressional approval for American use of force. Two hundred years of practice suggest the opposite.

Senator **Biden**. I would argue that we have taken care of the Nicaraguan situation, short of the use of American forces, through the Intelligence Committees and the Intelligence Act. We disagree. We fight about it. It does not always work. But we have reached a ground upon which we mediate, negotiate, and constrain, or promote Presidential action with regard to use of non-American forces; that is, forces other than American troops.

Professor Glennon, would you like to comment, and then Professor Firmage, and then I will yield the floor.

Mr. **Glennon**. Senator, I think the answer that the Senate gave to your question in 1973 is probably the best answer that has been formulated, and that is the definition of the President's exclusive powers set forth in the Senate version of the War Powers Resolution which, in addition to those situations set forth in section 2 of the current version of the War Powers Resolution, recognizes Presidential power to introduce the Armed Forces into hostilities to forestall an imminent threat of attack on the United States, and also to rescue endangered U.S. citizens and nationals located abroad.

The whole theory of this approach is one of emergency power, which derives from the intent of the Framers, from constitutional custom since the earliest days of the Republic, and from the functional attributes of the two branches. The theory is that, where Congress has time to act and an underlying policy judgment has to be made about whether we should invade Japan to get more yen or the Philippines to get bases, that is a judgment for the elected representatives of the people.

It seems to me that to argue that in those circumstances that the President can use armed force without congressional consent would be to rob the congressional war power of any meaning.

Now, Senator Adams raised a separate question and that is whether under such circumstances the President might infer authority to use the Armed Forces in hostilities from any treaty. There are 7 mutual security treaties now in existence with 26 different countries. If one of those countries is attacked, can the President, relying on a treaty, respond to a real or purported request from one of those countries to introduce the Armed Forces into hostilities?

The answer is "Absolutely not."

None of those treaties in existence gives the President an iota of war power that he would not have had in the absence of those treaties. Every one of those treaties makes clear—and the legislative history is abundantly clear, established by this committee—that the allocation of constitutional power to make war between the President and the Senate that existed prior to the ratification of those treaties was not affected by the Act of ratification.

If the President needed to come back to Congress for authority prior to ratification, he still needs to after the Act of ratification.

I might point out to the committee that I have written an article for the Columbia Journal of International Law on precisely this subject, which I will make available to the committee, if it wishes.

Senator **Biden**. Yes, thank you.

[The information referred to appears in the appendix.]

Senator **Biden**. Professor Firmage.

Mr. **Firmage**. I agree fully with what Professor Glennon has just said and would underline his last point particularly.

I think there is no base to hoist yourself up by treaty to have a war power that the President simply lacks. That is the power of the U.S. Congress. No treaty grants that. No treaty can constitutionally bind a Congress and an administration not then in existence to go to war at some time in the future. *Reid* v. *Covert* laid to rest the notion, inferentially suggested by Justice Holmes in *Missouri* v. *Holland*, that the treaty power was somehow beyond the bounds of the Constitution. Only the Congress of the United States possesses the war power. Only a sitting Congress can finally, absolutely commit us to war.

I would quickly tick off my response to your central questions.

The President, in my opinion, must have congressional authorization to place troops in any situation that would likely involve hostilities.

Second, no request of a host state changes that in the least. That has some relevance to the question of whether or not we are violating international law. It has no relevance that I can see to the question of the constitutional allocation of power between the Congress and the President.

Third, I do not think—I will go beyond your hypothetical situation—I do not think that the protection of U.S. citizens abroad gives any such right of intervention. I think that is highly suspect in international law and without any base in constitutional law. The protection of U.S. warships, U.S. forces, and other public forces provides a far different and stronger basis for claiming a Presidential responsive act of defense, analogous to a surprise attack upon our country.

U.S. citizens abroad place themselves there under the sovereignty of another state. They can never legitimately be used as the basis of Presidential war.

Your other point regarding base agreements: absent base agreements in the Philippines, the President of the United States possesses no right to maintain troops there. No amount of supposed U.S. interest creates that constitutional power, absent action by the Congress of the United States authorizing such a base agreement with subsequent acceptance by the Government of the Philippines.

Finally, regarding the hypothetical invasion of Nicaragua, no notion of preemptive action can be allowed to justify such an invasion or the idea of self-defense, which is rightly in the Constitution, simply eats up the rule of who has the war power, and that is the United States Congress, not the President of the United States.

Senator BIDEN. I thank you and I yield to my colleague from North Carolina, Senator Helms.

Senator HELMS. I will yield to Senator Pressler because he has another meeting.

Senator PRESSLER. Thank you.

I shall just ask one question and put the rest of my questions into the record.

I thank my colleague for yielding.

I might say that I have just been informed that the Discovery has been successfully launched and is going very, very well. I think that is good news.

I want to compliment this panel. I especially want to compliment Professor Turner for his "Restoring the Rule of Law." I am one who believes the War Powers Resolution should be repealed and I think this is an excellent study.

I also apologize for not hearing all of the testimony this morning. We have had a caucus, plus I have another committee meeting.

We cannot anticipate all of the circumstances that might arise. Also, it seems to me that we already have the appropriations process to help Congress in its relationship with the President.

I certainly agree we should have consensus and consultation. I think in some ways the war powers legislation actually causes more of a strained relationship between the two branches of Government.

In a speech at Oklahoma University recently, Supreme Court Justice Sandra Day O'Connor, in referring to the problems relating to the separation of powers said that each of the three branches of

Government has its hands in each other's pockets. I think our Framers did a pretty good job with that Constitution, and I see the War Powers Resolution as an infringement on that.

My suggestion is that we repeal the War Powers Resolution. Very frankly, that probably will not happen. But I hope that in amending it or whatever we do, we take very careful consideration of Justice O'Connor's speech.

I am intrigued with all of the other legislation in the mid-1970's that also struck at the President's powers. Why do you think—and I will address this to any panelist—why do you think it took until 1973 before Congress legislated on the war power?

Before that time and since that time, the Executive had used force abroad in one way or another approximately 200 times in the 200 years of the Republic. Surely practice has made precedent.

Why did it take until 1973 before Congress legislated on the war power, do you think? I might just ask each of you for your assessment.

Mr. FIRMAGE. I would contest your conclusion regarding 200 incidents. I think when you begin to analyze those 200 incidents, which I have done in each case, you find that they collect into different groups, in the main, with maybe a dozen exceptions, into very understandable, justifiable interventions where the Commander in Chief clause is not really at issue.

In 1967 the State Department compiled an official list of 137 instances where it asserted that the President, as the Commander in Chief of the Armed Forces, committed acts of war on his own authority beyond the borders of the United States. Careful scrutiny of the examples provided by the Government belies this assertion; 8 of the Acts involved enforcement of the law against piracy, for which no congresional authorization is required; 69 were landings to protect American citizens, many of which were statutorily authorized; 20 concerned invasions of foreign or disputed territories, which, although illegal, were not acts of war if the United States claimed the territory; 6 were minatory demonstrations without combat; another 6 involved protracted occupations of various Caribbean states, which occupations were authorized by treaty; and at least 1 was an act of naval self-defense, which is justified by both international and municipal law. Even in the one or two dozen instances when the President has acted without congressional authorization, he has done so by relying falsely on either a statute, a treaty, or international law, never on his power as the Commander in Chief or the Chief Executive. Clearly, neither the Constitution nor historical precedent empower the President to initiate a state of war or engage in an act of war on his own authority beyond the borders of the United States. The Presidential warmaking power is strictly limited to defending against sudden attack—see F. Wormuth and E. Firmage, "To Chain the Dog of War: The War Power of Congress in History and Law, pages 133 to 149, 1986.

Presidential action aimed directly against the sovereignty of another state, whether or not done under the subterfuge of acting to protect U.S. citizens abroad, is a very different and far more dangerous and utterly aggressive action, with no conceivable justification or authorization in the U.S. Constitution.

Mr. **Glennon**. I think that Professor Firmage's analysis is absolutely correct. In fact, his excellent book, "To Chain the Dog of War," contains an analysis of those incidents. I believe the current number cited by the State Department is 132.

The point that he and Professor Wormuth make is that, if you analyze them closely, it turns out that most of them are relatively minor uses of force, involving chasing bandits across the border, clashing with pirates, et cetera—not sustained, large-scale involvement of U.S. Armed Forces in hostilities abroad, not instances in which the state of the Nation was changed from peace to war.

It really is a fairly recent phenomenon that Presidents have claimed authority to do that without congressional consent—beginning, really, as Professor Henkin has pointed out, with the Korean war. It was, as Professor Firmage said, the tragedy of Vietnam that crystallized congressional thinking on this subject.

So, I think that is the answer to Senator Pressler's question.

Mr. **Turner**. I would argue that the real distinction here is whether it is an operation that would historically require a declaration of war, or is it something like going after pirates or some similar use of force. In the old days, before the U.N. Charter outlawed aggressive war, Presidents often authorized force against such small states that there was really no likelihood of any kind of serious response. In most of those cases, Congress did not question such uses of force.

I agree that Korea was the first major exception. I personally think Truman was wrong in Korea. I think he should have gone to Congress.

I would note that Arthur Schlesinger, Jr., Henry Steele Commager, and others strongly defended Truman's use of force in Korea in those days. But I disagree with that view.

Your real question is why did they do it in 1973. I argued in my House testimony last month that Congress was a full partner in getting us into Vietnam and overwhelmingly supported the war until about 1967 or 1968, when the public turned against it.

Why they passed the Resolution in 1973 is, first of all, because public opinion did shift against the donflict, and they were trying to cover their tails, if you will. Second, it was because of Watergate. The veto override came right after the "Saturday Night Massacre," and I think there is a general consensus among people who have studied this that the Resolution's supporters would not have had the votes to override had it not been for the anger at President Nixon over Watergate.

Mr. **Reveley**. Three quick points, Senator.

First, I think you are absolutely correct that practice over 200 years—as well as the language of the Constitution and Framers' and Ratifiers' debates—has to be taken into account if we are to reach a constitutional consensus on the war powers. You can't ignore practice any more than you can ignore the Framers and Ratifiers or the text of the document.

Second, I think the War Powers Resolution was passed in 1973 for two reasons. The first was a reaction against a period of unusually vigorous Presidential assertion of war powers, assertion that had gone beyond the sorts of claims to use force that the President had made successfully in the 19th century and the early 20th.

Second, and far more important, the Resolution came up for a final vote in the context of Watergate. But for Watergate at white heat, I don't think the Resolution ever would have passed.

Senator **Pressler**. I have some additional questions.

I ask unanimous consent to insert an article by John Silber, president of Boston University, which appeared in the New Republic on the War Powers Act.

I also ask unanimous consent to ask several questions for the record, and I apologize for my departure.

Senator **Biden**. Without objection.

[The information referred to appears in the appendix.]

Senator **Biden**. I have been told that Schlesinger, when he testified, and Commager, have since recanted their philosophy as "high-flying prerogative men."

I guess we learn, or, hopefully, I will learn from them.

Senator Adams.

Senator **Adams**. Thank you, Mr. Chairman.

I want to thank the panel for their discussion. I want to go back to the particular point on consensus and whether or not something can be done when there is or is not a consensus. I am going to give you three examples, and these are not far-fetched. They are in the world that we have all lived in.

As the chairman stated earlier, we are not interested in just examining history but in trying to live in a world where we are now a superpower. We are confronting a superpower and maybe other growing superpowers in areas of smaller countries that can rapidly escalate. After all, World War I started in very small countries; World War II started in small countries.

I would say particularly let's take, as a first example, Korea, which has been talked about.

What if we had not had a president that pulled back the general that brought us to a point where the Chinese entered into that conflict? Would that not have required a declaration of war at some point, if we were engaged with the Republic of China in Korea, as opposed to what we are doing.

Professor Glennon.

Mr. **Glennon**. Senator Adams, I think you have raised a point that answers the objections to the time limits in the War Powers Resolution, because it highlights the fact that what the critics of the time limits really object to is constitutional constraints on Presidential use of the Armed Forces. Forget about the War Powers Resolution: When the President puts the Armed Forces into hostilities abroad, at some point, as the magnitude of hostilities increases, the President constitutionally has to get congressional consent.

Senator **Adams**. Let me follow through with that. The other members of the panel can comment afterward.

That is the problem, and I am prepared to work with the chairman and others to make this act more workable. But in each of these cases, we have the beginning of a hostility, generally in a small country, and then an escalation that goes to what would ordinary be acts of war.

I mentioned Vietnam. We were moving then on Cambodia, another nation, which, as it turns out, we probably ended up causing the destruction of that nation. That was beyond what was contemplated certainly in any Gulf of Tonkin Resolution.

Even though our debates up here were unsuccessful in triggering the Act in the Persian Gulf, we did prevent what many of us were concerned about, which was a land invasion of the Iranian area because of the Silkworm missiles and our ships being there, with no congressional policy, but just a Presidential policy.

It started first with some Kuwaiti tankers; then went to freedom of navigation; then all vessels; then an offensive action against the Iranian Navy, which was believed to be attacking. I am just thankful that we did not arrive at the point of the Silkworm missiles ashore.

So, the problem we are talking about up here is not theoretical. It is continual movement up, and at some point you cross the line.

Now, my question is if you don't have consensus in a democracy, you've got to have process. Process is the only means by which you divide a majority from a minority; then establish a majority position, so that the U.S. people, through their representatives, have said we are a majority committed to this military action.

That's the declaration of war power, and it is clear, through all the constitutional debates and down through the areas of these incidents, that it is a marshalling of major forces.

What did not happen in the Vietnam war was the Reserves were not called up, we did not go into a taxation program, and we never called it a "war." It was always an "incident."

But it marshalled U.S. powers. And those who could not be involved in that—the 18-year-olds and their families and the others—went to the streets because the consensus had not formed.

Now I don't know whether we want to call it a "declaration of war" or a "special authorization," but I would like to have any one of you tell me the process on the executive branch side and the congressional side that authorizes actions. Appropriations won't do it unless we put in a special provision in this law that says you can't have any money for any operation after so many days. You can operate on O&M a long time. I want the process that says we're in this, we're prepared to go to the next step, the minority has had its say, the majority has voted it, and the country is moving forward.

That is what we want.

You had your hand up first, Professor Turner, and then anybody else who wishes to respond, and I will ask no other questions.

Mr. **Turner**. I think the process was established very well by the Founding Fathers, and that is the President, as Commander in Chief, can deploy whatever military force Congress gives him anywhere up to the point that he cannot launch a war. By that I mean that if you have a situation where a declaration of war would historically be necessary, the President must come to Congress.

Now, LBJ did that in Indochina after Congress pushed him into deeper involvement.

If you go back and look at the record of the 1950's, you find Senators like Hubert Humphrey, John Kennedy, and J. William Fulbright saying that the United States had to defend South Vietnam. First the Senate approves a treaty that covered both Cambodia and South Vietnam. Second, Congress passed a joint resolution—by a vote of more than 500 to 2—saying the United States was prepared to resist aggression in this area, using such measures as the President determined, including the use of armed force; and it included in its parameters all of the SEATO countries and protocol states, which included Cambodia.

The Government of Cambodia, the Lon Nol Government, made a public plea in 1970 at the United Nations for help in defending itself against North Vietnamese aggression. We responded to that by sending in troops. The conflict was fully authorized by the SEATO Treaty, as implemented by the Southeast Asian joint resolution.

But, returning to the process itself, the key consideration for the Founding Fathers was the knowledge that you can't fight a war or even defend the country by antecedent laws—you can't have a law that says put the First Platoon on Hill 401 but keep Congress informed so it can pass another law in 30 days if the troops need to move, if the other side sends a larger force to the hill.

The command of military forces is a very important power. But by our Constitution we confine it in our Commander in Chief, who is elected by the people.

Now what you are saying is that times have changed. Today, there is a risk that if you even send a small unit out, the Soviets may decide to get involved—and it could get us into World War III.

What you are saying is that time has created a need for greater constraints, but even if you are right, you still can't amend the Constitution by law. You have to have a constitutional amendment to change that power.

Senator ADAMS. No, no, no. I am not saying that the time has changed to add greater constraints. I am stating that we already have the constraints and that there needs to be a process for using them so we don't declare war each time.

Mr. TURNER. Of what sort?

Senator ADAMS. Like in the War Powers Resolution, where you have the President say "I'm going to the Persian Gulf, I want the Kuwaiti tankers, here is what I want voted. Vote it or not."

Then, if there is a decision that we're going to invade Iran, that is a different kind of operation. It could be included in the first one if the President wanted to do it, or not.

But there must be a way of communicating with the Congress when you are in a major, sustained operation.

Professor, I'll state to you that we have been in the Persian Gulf for over a year and a half. The Joint Chiefs of Staff said to me that it was costing us $50 million a month, and this may well be supported by the Congress. But the Congress has never been involved in what is a sustained operation, which included offensive operations at certain points.

I think the Congress would have authorized those. I don't know whether they would have authorized an invasion of Iran.

That kind of use of the power to declare war and the powers which are connected in it—to take prizes and all of the other constitutional powers, which are carefully separated, so that we didn't have a king—from the Presidential power of Commander in Chief—why nobody in this Congress ever has tried to say to the President how many ships you fire and which fires where and where they are located. But the policy of how big is this going to be, how many countries are we going to invade, how much money is it going to cost, that is what we are trying to get a system for establishing.

Professor Glennon.

Senator HELMS. Excuse me, Senator Adams, but how long are we going to go beyond the red light?

Senator ADAMS [presiding]. I just got on with my questions, Senator Helms. The chairman has authorized us to finish our questioning. I thought you had passed on, but I would be happy to yield to you in just a moment.

Senator HELMS. I had just passed on for one question from Mr. Pressler.

Senator ADAMS. I had been here and he had not given me an opportunity to question yet for about 2 hours. I was just trying to get the answer. Then I would be happy to yield to you.

Senator HELMS. Very well.

Mr. GLENNON. Senator Adams, the question that you raise is, what is the process by which we determine where the bright line is to be drawn? Of course, the War Powers Resolution was intended to be the authoritative, legislative answer to that question. Section 4(a)(1) purported to draw the line at the point when the Armed Forces are introduced into hostilities or situations in which imminent involvement in hostilities is clearly indicated by the circumstances.

The intent of the framers of the War Powers Resolution was that a report would be automatic and that the 60-day time period would be triggered when events specified in section 4(a)(1) occurred.

As you well know, it has not turned out that way for a variety of reasons. The War Powers Resolution in practice has not been self-executing.

Senator ADAMS. There has been no trigger, has there, Professor?

Mr. GLENNON. That's quite right. The trigger has been blurred by the fact that there is not one but three reporting requirements in section 4(a), and in the absence of a specification of the paragraph of subsection (a) under which a report is submitted, it is anybody's guess as to whether the report is a 4(a)(1) report or a 4(a)(2) report or a 4(a)(3) report. And the 4(a)(2) and 4(a)(3) reports do not trigger the 60-day time period.

Now, as you well know, in the case of the Persian Gulf, Congress has received a number of communications from the President. None of them has been specified as a 4(a)(1) report. It seems to me that the clear intent of the framers of the War Powers Resolution was that this was the quintessential situation in which a triggering report would occur and that, after a 60-day period had expired, the President would be required to withdraw the Armed Forces from that situation unless Congress had authorized their use there or extended the time period.

Well, that has not happened.

It seems to me that the solution is, one, to make the bright line even brighter by defining what's meant by "hostilities" and requiring that the subsection of the report be specified; or a variation of that, which is the approach set forth in Committee Print No. 1; and, second, and this is most important, statutorily facilitating an effort by an individual Member of Congress, such as Mike Lowry, to go to court and get a declaratory judgment or injunctive relief from a court in the event a President declines to comply with the Act, as he has in the case of the Persian Gulf.

Senator **Biden** [presiding]. Thank you very much.

Senator Helms.

Senator **Helms**. Mr. Chairman, I thank you very much.

As I listen to various comments by various panels and various witnesses, on this question, I am reminded of the three blind men of Hindustan, who paraded loud and long, "Aween," about an elephant not one of them had seen.

Now, Professor Turner, I happen to agree with you and I sympathize that you are outnumbered three to one this morning. But one thing is inescapable in all of the discussion: The War Powers Resolution was passed in a highly charged political atmosphere. And it was highly charged because of the emotionalism that had been whipped up by politicians and by the liberal media of this country.

The Vietnam war was probably the first war ever fought on the television screens of America.

I have often said to the boredom of my colleagues that if Franklin Roosevelt had to fight, had to prosecute World War II under the same restrictions and conditions that prevailed, that war would have been lost. And probably the French people would be making their vichyssoise out of sauerkraut today.

But there is no question about this thing being the bastard child of politics. There is no question about that.

It's just the same as we hear today about the "Reagan deficits," and all of the spending. Well, it was the Congress of the United States that passed the Impoundment Act, prohibiting the President from saving any money. It also completely ignored the news media, saying that no President can spend a dime, that has not been authorized and appropriated by the Congress of the United States.

So, just like the War Powers Act, the Federal debt and the Federal deficits are the handiwork of Congress. The dead cat is lying on the doorstep of Congress.

Now, as for the Vietnam war, it was protracted through several administrations, through several Presidents, and the reason it became such a bitter, open sore is that we sent hundreds of thousands of men around the world to fight a war we would not let them win.

The American people got sick of it. The news media portrayed it in their own way. And we lost that war.

Here, again, it was the Congress of the United States.

Now, Mr. Turner, since you are outnumbered three to one, I am going to confine my one question to you because I looked over your text, and I noted that you urged there be consultation between the President and the Congress. That's the way it has always worked heretofore.

This hostility between the executive branch and the legislative branch never existed before.

At the same time, you appear to oppose quite vigorously—and I agree with you—that there should not be any formal requirements for consultation because that is a can of worms that will be opened up politically again.

Now, I would like for you to elaborate for just a minute or two on your view that such formal requirements would be an unconstitutional infringement on the Executive's prerogatives.

Mr. TURNER. Senator, I would be quite pleased to do that.

Essentially, what I am arguing is that the Founding Fathers created the two political branches as coequal representatives of the people.

Senator HELMS. Absolutely.

Mr. TURNER. As coequal representatives, they each have a great deal of autonomy.

I have argued that in all of these areas, it is very important that there be genuine consultation. During my service in the State Department, when people came to me and said to consult with Congress about a decision made a day earlier, I would say to them "Look, if you'd come to me 2 weeks ago, I could have consulted; now you are telling me simply to 'inform' Congress of a decision already made"—and that's not the way the system ought to work.

I am a big believer in genuine consultation and not just notification. But what I'm saying is that when you put it into law and insist, by law, that the President must consult when you tell him and where, that is comparable to the President, as Commander in Chief, calling up General Gray and saying "Send a battalion of Marines over and bring the Speaker of the House to the White House, because I want to consult with him."

It is unseemly, it is improper, it is not the way that coequal branches of a sovereign government ought to deal with each other.

The principle behind setting up what I used to call a joint committee on national security—and the concept predates my entry into this field by many years—to engage in consultation, is a wonderful idea. But you don't put it in a law saying that whenever these key congressional leaders blow a whistle, the President must run over and salute, or sit down and consult. That is not the proper way for the two branches to deal with each other.

If I were the President's counsel and you tried it, I would advise him not to go lest it be understood from this that he was now the minion of the Congress and not the great coequal representative of the American people.

Senator HELMS. I thank you.

Mr. Chairman, I have some questions that I wish to submit to each of these gentlemen in writing, so that they can respond in writing, and particularly to Professor Glennon.

I don't want to develop a subject in public that I want to be made a part of the record. So, I am going to provide you, sir, with some questions, which I would appreciate your answering.

With that, I think we ought to move to the second panel. But before you do that, Mr. Chairman, I don't know any of the second panel personally except Charlie Rice. I have known Charlie Rice for a long time, and his advice and counsel have meant a very great deal to me. He is a professor of law at Notre Dame.

I might ask Charlie if he likes Lou Holtz as the football coach now.

Mr. RICE. Very much.

Senator HELMS. Very much. Well, Lou is also a good friend of mine.

I welcome Charlie.

I'm going to have to leave, but I think it would perhaps be good to move on to the second panel. Thank you, gentlemen.

Senator **Biden**. Gentlemen, before you get up, I would like to note for my colleague from North Carolina that I really think it has been more two and one-half to one and one-half.

Mr. Reveley was, I think, somewhere between Glennon and Turner, leaning to Turner on two points, and somewhere between Firmage and Turner, leaning to Firmage on one point.

Gentlemen, all of your testimony was extremely helpful. You all made very concise, straightforward statements, and the disagreement is helpful to this committee, not harmful.

I sincerely appreciate your time and your efforts in being here.

Senator **Helms**. Mr. Chairman, I did not imply any derogation of anybody.

Senator **Biden**. Oh, not at all.

Senator **Helms**. Everybody has to be somewhere on every issue.

Senator **Biden**. I realize that, and I think Mr. Reveley is a little more conservative than you gave him credit for. I don't know.

Mr. **Reveley**. It varies with the time and the moment.

Senator **Biden**. I want to thank you all again. Seriously, thank you all very much.

I will now call our next panel, and I understand that some of my colleagues will have to leave. I apologize that we have kept you all for so long. But, as you can see, this is an area of great interest to many of us.

We truly appreciate your testimony.

Our next panel is equally distinguished. It consists of Mr. David Friedman, Esquire, who is a practicing attorney and author from New York City; Prof. James Nathan, Professor of International Relations, the University of Delaware, my alma mater, of Newark, DE, and a man who writes not only on this issue, but the Armed Services Committee should invite him to hear his views on the deployment of naval forces, which is another question. I have now sufficiently embarrassed him.

We also have Prof. Charles E. Rice, Professor of Law, University of Notre Dame, who has already been mentioned and who has been before this committee on other matters. It is good to have you back, Professor.

Last, we will have Mr. Peter Weiss, Vice President of the Center for Constitutional Rights, also from New York City.

If we could proceed in this order: Friedman, Nathan, Rice, and Weiss, as we have you listed here, it would be the best way to go.

I ask you, if you would, to try to keep your statements within 10 minutes. Again, your entire statements will be entered into the record.

Mr. Friedman, please.

STATEMENT OF DAVID S. FRIEDMAN, ESQUIRE, PRACTICING ATTORNEY AND AUTHOR, NEW YORK, NEW YORK

Mr. **Friedman**. Good morning, Chairman Biden. I would like to thank the committee for the opportunity to testify about the proper scope of the President's war power. Due to the time limitations, I will summarize my views briefly and present the committee with the more detailed analysis contained in my article.

The Framers of the Constitution considered the power to initiate war far too important to entrust to the President alone, and, therefore, the Framers intended that the United States remain at peace until the Congress, as well as the President, agree that war should be initiated.

From 1789 through June 25, 1950, when without any congressional authorization, President Truman committed American forces into combat in the Korean war, the 32 Presidents and 80 Congresses adhered to the Framers' intent. During this 161-year period, every President sought and received congressional authorization before he subjected the Nation to the death and destruction of war.

President Truman's decision to fight a major war in Korea and his concomitant claim of an unlimited power to make war on his own initiative constituted a coup d'etat against the Constitution. Truman's usurpation of power has been followed by his successors, so that today the American President possesses substantially more power to decide the fate of the Nation and the world than any Roman emperor or absolute monarch ever exercised.

The Framers of the Constitution granted a war power to the Congress that was explicit and broad. Article 1 of the Constitution states that "The Congress shall have power * * * to declare war." Modern advocates of broad Presidential warmaking power claim that the congressional power "to declare war" consists merely of the authority to issue a formal "declaration of war." However, the records of the Constitutional Convention show that the Framers intended that the "to declare war" clause was a grant to Congress of the authority to initiate war and all other military actions.

Although article 2 of the Constitution says that "The President shall be the Commander in Chief of the Army and Navy of the United States * * *" this clause was not intended by the Framers to confer upon the President the power to make war on his own initiative. In the "Federalist Papers," Alexander Hamilton wrote that "Commander in Chief" was nothing more than a designation of military rank.

From 1789 until the Korean war—a 161-year period, which was frequently marked by significant threats to the national security—Presidents claimed only the most narrow power to unilaterally initiate war: The authority to protect American territory and citizens from attack. The pre-Korean war Presidents lacked the authority to protect any other national interest.

For example, after defense of its own territory, maintaining the balance of power is the most significant interest of any nation. Yet, prior to the Korean war, despite repeated and substantial threats to the balance of power, no President ever claimed he had any authority to use the Armed Forces to protect the balance of power without first obtaining congressional authorization. In fact, in May 1940, when the Nazis were on the verge of conquering all of Europe, Franklin Roosevelt, citing constitutional constraints, remained neutral in the most momentous battle the world had ever known. Roosevelt understood that only the commitment of American military power could save France from an imminent Nazi conquest. However, he also recognized that, under the Constitution, he was powerless to commit American forces. He specifically acknowledged his loyalty to "constitutional government" when he solemnly and sorrowfully declared: "Only the Congress can make a military commitment." Since Congress was unwilling to authorize American intervention to preserve the balance of power, the United States remained neutral as France fell.

Thus, Roosevelt was obedient to constitutional principle during the Battle of France, even at the price of losing a vitally important nation to the most aggressive, totalitarian, and genocidal nation in history. In contrast, a mere 10 years later, in the Korean peninsula—an area that the United States Government had never before considered vital or even relevant—President Truman acted without any legislative authorization and committed American forces to a massive, conventional war, which could have easily escalated into a nuclear conflict. Even though the Truman administration acknowledged that South Korea was completely irrelevant to the defense of American territory or the maintenance of the balance of power, Truman impetuously decided to commit American forces to support South Korea in its war with North Korea. Thus, for the first time in its history, the United States began fighting a major war without any congressional authorization.

Moreover, in an attempt to justify his action, Truman falsely claimed that the Commander in Chief clause granted the President the power to use force to protect any "interest of American foreign policy." The alleged power to employ force to protect any "foreign policy interest" is so broad that it is virtually limitless, because even the most unimaginative President can always find a "foreign policy interest" which needs protection.

Truman's successors in the Oval Office have continued his usurpation, and have behaved as though the Army and Navy were their own personal property. Post-Korean war Presidents have arrogated unto themselves a power to use force to advance such marginal interests as protecting democracy in undemocratic lands, aiding the anti-Communist faction in any petty Third World dispute, and protecting the oil exports of Kuwait.

Unfortunately, Congress acquiesced in this Presidential practice during the 1950's and 1960's. However, in the 1970's, Congress attempted—attempted—to regain its power.

In 1973, Congress passed the War Powers Resolution. Congress had considered, but then rejected, an alternative war powers proposal, the Javits bill. The Javits bill would have repudiated Truman's sweeping claim of war power by restoring the pre-Korean war procedure. More specifically, the Javits bill restricted the President's authority to commence war to the constitutionally permissible categories of protecting American territory and American citizens. Unfortunately, the Javits bill was defeated in conference committee. The House bill, which permitted the President to exercise unlimited war powers for a 60-day period was enacted into law.

Not only does the War Powers Resolution fail to reverse Truman's usurpation, it also confers legitimacy upon this unconstitutional practice by codifying it into the statute books. This irresponsible surrender by the Congress of its constitutional rights and constitutional duties is the greatest defect of the War Powers Resolution.

The second great defect of the War Powers Resolution is that it permits a President to radically alter the international situation before Congress even has the opportunity to exercise its power to decide upon war. The President's commitment of American forces puts overwhelming pressure on Congress to continue the commitment, even if Congress were to decide that the President's action was unwise and dangerous. This is because if Congress were to repudiate the Presidential commitment, then all other commitments will be doubted by anxious allies and challenged by aggressive enemies.

The War Powers Resolution is flawed for still a third reason. In modern warfare, 60 days is far too long to give the President an unrestrained license to make war against any nation with any weapons. Russian missiles can destroy American cities in just 30 minutes. Nuclear war can occur not only as a result of a deliberate Russian attack, but also, and more probably, as a result of unintentional escalation from a conventional war or superpower crisis. Even if nuclear weapons were not employed during the first 60 days of the war, conventional weapons can inflict millions of casualties within weeks, if not days. Thus, Congress abdicated its responsibility to protect the millions of American soldiers and civilians who could be killed during the first 60 days of a Presidentially initiated war.

In conclusion, the War Powers Resolution "legalizes" Truman's usurpation and fails to provide any effective restraint on Presidential war power in an age of weapons of mass destruction. Accordingly, the War Powers Resolution should be repealed. In its place, the Javits bill or some other legislation, which restricts Presidential war power to the constitutionally permissible categories of protecting American territory and lives, should be enacted into law.

Thank you for giving me the opportunity to present my views on this important topic. I would be happy to answer any questions.

[The prepared statements of Mr. Friedman appear in the appendix.]

Senator Biden. It has been a pleasure to have you here. I will have questions for you when the entire panel finished.

I would like to tell you in advance that I would like very much for you to look over what we are referring to as Committee Print No. 1, to comment on it at a later time, maybe in writing. We attempt there to do some of the things you suggest.

Professor Nathan, Jim, before you begin, since we are very colloquial up here when it comes to our home State universities, in particular our alma maters—although half the guys I went to school with, Professor Rice, went to Notre Dame—we, in Delaware, still refer to Notre Dame as a great place to be from, but a hell of a place to be.

[General laughter.]

Senator Biden. Then, again, I went to a Catholic, non-Jesuit high school. That explains a large part of it.

Jim, would you please proceed.

It is good to have you here.

STATEMENT OF JAMES NATHAN, PROFESSOR OF INTERNATIONAL RELATIONS, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF DELAWARE, NEWARK, DE

Mr. Nathan. Thank you.

Mr. Chairman, I am honored by your invitation.

I would like permission to have my extended remarks placed in the record.

Senator Biden. They will be placed in the record.

Mr. Nathan. I think we ought to remember why we had a war powers act in the first place.

We now have the testimony of former Secretary McNamara that in the fall of 1965, he thought the war in Vietnam was not winnable militarily. That was his private belief. Nobody who knew anything about that war, with any sophistication, believed it could be won.

Yet the war went on. And it went on; while the mandate for the war was extracted from the Congress really under false pretenses, and I believe the historical record well reads. I write books on history and I think it is indisputable that the circumstances of the Gulf of Tonkin were falsely stated to the Congress.

So, I don't see how anybody can claim that the mandate for the war was a serious congressional mandate.

The war went on. Congress tried to repeal with legislation, a barrage of legislation, succeeded by barrage of legislation; and yet, the war went on. And it went on and it went on. Congress tried to pass cutoffs; and the war expanded.

At long last, over a Presidential veto, as you know, Congress finally brought the war to an end.

I understand that times are different. I understand that things are different. But a consensus came out of that period that I believe is still valid today, and the consensus, I think, has three elements. It was assumed that armed forces should not enter into hostilities without adequate domestic support. It was assumed that interests should dictate any future commitments. And it was assumed that Congress was capable of offering a kind of reality test to the Executive.

Now, this latter element of the consensus derived from our experience in Southeast Asia is no trivial matter. The 25th amendment recognizes that Presidents can have crippled judgment, for all kinds of reasons. We have journalistic reports of Mr. Nixon's decision style, even before the "final days." We now have reports of Mr. Johnson's state of mind that are extremely disturbing, when Vietnam weighed heavily on him.

It is, therefore, important for Congress to have a role in these matters.

In the 1970's, we squeaked by with haphazard attendance to the War Powers Act. But in the 1980's, under two Presidents, we have instances of Congress being ignored and exercises undertaken which could have had extraordinarily worrisome consequences. We lucked out. There is no doubt about it.

But disaster loomed at every corner. It could have been worse. It was bad, but it could have been extremely worse.

Well, we have to have, it seems to me, a better methodology for dealing with the external world.

Luck will not always grace us. We need procedures. Indeed, I would argue that procedures become the precondition of sound policies.

I think that most serving military officers now share the sentiments of John Stennis when he said, 15 years ago, "The last decade has taught us that this country must never again go to war without the full moral sanction of the American people."

But no full moral sanction can be said to derive from extreme representations if the circumstances and purposes of U.S. policy are not carefully explicated. And no meaningful consensus can be said to have been forged between those who command and those who serve, if the circumstances are falsely stated. No full moral sanction can logically emanate from anything but a complete articulation of what is to be achieved by any armed action. How the goal is to be achieved, and within what timeframe the goal is to be achieved ought to be specified.

Officers of the Executive argue now that the military is demanding, as a result of Vietnam, a prepackaged, full-fledged, before the fact warranty of public support. But Congress is hardly likely to be blindly obstructionist. Congress has supported most Executive initiatives at arms. It is not excessive for Congress to request an explanation of the evidence that motivates the use of force in advance, or, if necessary, as force is being deployed.

A strengthened War Powers Act, therefore, it seems to me, would try to extract a checklist of explanations as to why an action is necessary, why and how it is likely to be successful, and how it might be proportionate as to ends and means.

The reporting document, it seems to me, should anticipate the length of the engagement with specificity and define the mission and mission objectives with precision.

Last, the document should provide the Congress with the criteria by which it can judge that the mission has been completed.

A more rigorous reporting requirement would be an asset in reaching the consensus our troops deserve. An exacting reporting requirement would probably give the exertion, if well conceived, the requisite domestic boost it would need for success.

Some of the details might have to be classified. The length of stay, for instance, and the rules of engagement do not have to be spelled out in more than generalities. But Congress at large and the American people should have some idea if an effort is openended or finite. Such information is vital to our collective destiny.

It should not be withheld or distorted or wrapped in bloody shirts just because "it works."

The approval mechanism should take the form of a one- or two-House veto, as it is, in a de facto way, with the Intelligence Committees now. There should be a vote up or down approving or disapproving an armed action. A joint resolution would just make matters worse.

We would do well to recall in 1973 how it was, when funding cutoffs were passed in both Houses, but the cuts and cutoffs were overridden. When Mr. Nixon said he had the authority to continue the war, in any case, in defiance of Congress, the U.S. District Judge

Judd, presented us with this argument: "It cannot be," he said, that there is a rule "that the President needs a vote of only one-third plus 1 of either House to conduct war. [T]his would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized" itself.

I think, further, that the financing of wars ought to be faceted into new legislation. Funds should be appropriated separately for each armed action. There has to be a way to stop wars in a less strange and ungainly fashion than we saw with the dreary spectacle of the steady drizzle of legislation that characterized our time of trial in the late 1960's and the early 1970's.

It follows, therefore, that backdoor financings of war has to be explicitly prohibited. I don't think we can afford the peculiarities associated with the Iran-Contra scandal any longer. I think that is undeniable.

The Framers, it seems to me, were men of a peculiarly practical bent. They knew that war was too often in the nature of things in the world. But the Founders knew that their solutions might be both messy and unique to their time. They were not about to prescribe solutions to indeterminate problems in unknowable circumstances in the indefinite future.

We have to come to grips with the permanent American exposure to great power politics. This is something which would flabbergast the Founders. But the world of the early days of the Cold War, the 1940's, is past. The policy routines which accompanied that world are of decreasing utility.

Old habits die hard. The custom of soliciting congressional consent with scary congeries drawn from distant circumstances does not serve us well.

There is peril enough in the world. Depicting dangers larger than life makes it more likely that one day, either Congress will divine an incident to be like the Gulf of Tonkin—simple hyperbole—and then Congress will refuse the requisite support when it is most needed. Or, more likely, Congress will continue to neurologically respond to overstatement, no matter what the facts might be.

It is at this point that we will need some kind of meaningful War Powers Act. Then a war powers act will be most needed. Perhaps we will be lucky. Perhaps both truth and the wisdom to deal with it will bubble forth more quickly than was the case in our time of trial in Asia. But it would be far better to have meaningful legislation at the ready, to restrain an ongoing but ill-conceived enterprise, than to try to beat out a new law when there is the accompanying din of battle.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Nathan appears in the appendix.]

Senator BIDEN. That's what I call pretty good timing. Maybe if we had gotten the timing down like that in the debate, I would not have gotten into trouble.

Professor Rice.

STATEMENT OF CHARLES E. RICE, PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME LAW SCHOOL, NOTRE DAME, IN

Mr. RICE. Thank you very much, Mr. Chairman.

My full statement I would ask to go into the record.

Senator BIDEN. Yes, it will.

Mr. RICE. I would just like to put some additional points into my oral statement.

We have the division of powers in terms of the war powers. Congress has the power to declare war, declare letters of marque and reprisal. The President has his powers. But we are dealing here with what Justice Jackson called, I think properly, the twilight zone, where there are concurrent powers of uncertain distribution. If you recall, President Nixon's veto message, he noted the wisdom of the Founding Fathers, who were convinced that you could not foresee every contingency and that these matters should be handled by close cooperation between the branches, rather than by what President Nixon called rigidly codified procedures.

Basically, I believe the War Powers Resolution is imprudent and probably unconstitutional on two grounds. One is its interference with the Presidential decisionmaking power. Second is because of its violation of the presentment and bicameralism principles of the *Chadha* case.

I won't discuss the *Chadha* case in these remarks. I have some comments on it in my testimony.

But on the first point, it interferes with the flexibility that is inherent, I think, in the President's power to repel attacks, which has to include a power to forestall attacks. The Resolution is, in a sense, micromanagement.

I think it is worth recalling the statement by Senator John Sherman Cooper in the 1972 report of this committee, where he relied on Justice Jackson's "zone of twilight" comment to say this: "I doubt that the Congress has the authority to limit the exercise of Presidential authority to an exact term," such as 30 days. "If the President's exercise of authority is constitutional, I do not believe that a statute"—he's talking about what ended up as the War Powers Resolution—"I do not believe a statute could prevail over his constitutional authority if he should determine that a period of time longer than 30 days would be necessary." And so on.

We're dealing with a blunt instrument, which makes no effort to distinguish between the magnitude of the involvement in different kinds of hostilities or imminent hostilities, and you are dealing, of course, with a problem of definition, without getting into the details of it extensively.

The Resolution does not define its terms. But you note in the report of the House Foreign Affairs Committee, which accompanied the Resolution, that they did attempt to define the terms. You can see what the problems are.

For example, hostilities were defined in that report: "Hostilities encompass a state of confrontation in which no shots have been fired, but where there is a clear and present danger of armed conflict."

All right. Then what are "imminent hostilities"? They continue: "Imminent hostilities denotes a situation in which there is a clear potential, either for such a state of confrontation or for actual armed conflict."

So, we are dealing here with hostilities, where there is a clear and present danger, and imminent hostilities, where there is a potential for a clear and present danger.

I think you are illustrating in this process not that that committee ought to be criticized for its efforts but, rather, that there are some terms so incapable of satisfactory definition that they and the controversies in which their meaning would arise would be better left to political, rather than to specified, statutory resolution.

In my comments, in my written statement, I set forth a couple of paragraphs from President Nixon's veto message, which I think is worth reading, and which I think looks pretty good in retrospect, in terms of what this thing is about.

He said that the Resolution would undercut the ability of the United States to act as an effective influence for peace. The cutoff, the 60-day cutoff, he said could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of U.S. withdrawal and an adversary would be tempted to postpone serious negotiations until the 60 days were up.

Only after the Congress acted would there be a strong incentive for an adversary to negotiate.

In addition, he said, "The very existence of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expired."

He is talking there about an escalation by our side.

The difficulty is this micromangement technique of specifying in advance time limits. I think one of the problems is that the War Powers Resolution has focused attention on sterile questions of procedure and unresolvable questions of constitutionality. It accomplishes no purpose that would not be accomplished without it because the ultimate remedy under the War Powers Resolution is still, if you are dealing with an intractable, defiant President, the cutoff of appropriations, the override of a veto, or, ultimately, impeachment.

In either one of those situations, you need to have supermajorities in the Congress. And I suggest that that is the way it ought to be.

We are wondering here what is the structure, what is the process. Well, the process is in the Constitution. It is that the President has an emergency power. And yet, the Congress prevails.

I am taking a position against the War Powers Resolution. But I believe Senator Taft, Senator Robert Taft, was right in the positions that he took in 1940, for example, when he criticized President Roosevelt for sending troops to Iceland—80,000 American troops. Taft said that he should have asked for Congress' permission beforehand, because there was no emergency and they were going right into a war zone.

He criticized President Truman for sending troops into Korea and not asking Congress afterward. Now, Senator Taft did not demand that the President had to go to Congress before authorizing the troops because it was a very fast-moving situation. But I believe he was correct in his position that President Truman very quickly should have gone to Congress and said "OK, fish or cut bait, either by a resolution, or a law authorizing this, or by a declaration of war."

In the great debate in 1951, you saw the same breakdown, where the ultimate authority, of course, is with Congress because Congress can ultimately impeach the President.

But we are dealing here with a resolution which accomplishes nothing, except to particularize procedures and to confuse the issue. And, when you get right down to it, the ultimate remedies remain the same—a supermajority in Congress, either with respect to a cutoff of appropriations or, ultimately, impeachment.

I would suggest that in terms of the consultation process, I don't think you can really mandate that in a structured way. But I do think that there would be no problem with a statute which would set up a process in the sense of defining particular Members of Congress with whom the President ought to consult prior to and after the introduction of armed forces, provided that this is left for implementation to cases where it is possible to do that in the President's judgment.

I think you have realistically to say that that sort of provision would be mainly precatory. You are mainly saying "Look, we are setting this out and we hope you will follow it. And if we think that you are really defying us, then we are going to use our ultimate remedies, which would be cutoff of appropriations, and which would be joint resolutions, demanding withdrawal and so forth, and, ultimately, impeachment, as well as the override of vetoes."

Those are the comments I have informally here. I believe the constitutional structures were provided by the Framers and we ought not to try to absolutize everything.

One final point on the question that I think it was Mr. Reveley who suggested, which is that aggressive action by the President ought to be completely ruled out. I don't think you can do that. I don't think you can absolutize that, either, because the Presidential power has to include not only power to repel attacks but, in some cases, a power to forestall attacks.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rice appears in the appendix.]

Senator **Biden**. Thank you very much, Professor Rice.

Mr. Weiss.

STATEMENT OF PETER WEISS, ESQUIRE, VICE PRESIDENT, CENTER FOR CONSTITUTIONAL RIGHTS, NEW YORK, NY

Mr. **Weiss**. Thank you, Senator.

It is good to have you back.

Senator **Biden**. Thank you.

Mr. **Weiss**. Senator Biden, Senator Adams, I would like to start with a small correction, if I may. I see that I am listed as "Mr." and the other lawyers here are listed as "Esquire." I am a also lawyer.

Senator **Biden**. We were just trying to save your reputation. [General laughter.]

Mr. **Weiss**. I appreciate that thought, Senator Biden.

Senator **Biden**. I do apologize for the oversight.

Mr. **Weiss**. I have been engaged in litigation around the war powers clause and later the War Powers Resolution for some time. One of the first was a case called *Drinan* v. *Nixon,* which ended up as *Drinan* v. *Ford* and which involved the illegal bombing of Cambodia.

I remember we went up to the First Circuit in Maine on an expedited appeal, and about 3 days later, the bombing of Cambodia stopped and we were mooted out of that case. So, you can see how effective litigation can be in certain circumstances.

Anticipating your desire to have us dwell on the present and the future, rather than the past, I have, even in my prepared statement, taken certain basic propositions for granted for purposes of my presentation.

One is that the Framers intended the war powers clause to vest the power to commit the country to war solely in the Congress. The next is that neither the President's duty to conduct the foreign affairs of the United States, nor his responsibilities as Commander in Chief, nor the relatively new, pernicious doctrine of "national security" give him the power to make war without the consent of Congress.

The next point is that the War Powers Resolution is not a constitutional amendment; it seeks to implement the war powers clause by providing a mechanism for reminding the President and the Congress of their duties.

Finally, the War Powers Resolution has not worked.

There are a number of reasons why it has not worked. They include the misguided notion, held by a succession of Presidents, that there are certain all-transcending powers inherent in the Presidency. Sometimes this is put as "the Constitution is not a suicide pact."

They also include the reluctance of Congress to stay the hand of the President when American lives are or are perceived to be at risk. This is sometimes known as the "rally round the flag" syndrome.

Then there are the varieties of abdication to which courts have resorted when called upon to perform their powerbalancing function. I would like to concentrate in the remainder of my statement, as I have in my prepared statement, on the role of the courts.

The most recent example of the varieties of judicial abdication is the decision of the District of Columbia District Court in the *Lowry* case.

This case, as you know, arose out of the Persian Gulf situation. It involved a complaint by 110 Members of Congress seeking a declaration that events in the gulf had triggered the reporting requirement and, therefore, it sought an order compelling the President to submit the required report.

The President, in his papers in that case, without discussing the merits of the complaint, sought dismissal on a variety of grounds, including equitable discretion and political question.

Judge Revercomb, in his decision in the District, accepted both of those defenses. With respect to equitable discretion, he drew comfort from the fact that a number of resolutions were introduced, following the reflagging decision. None of them was voted on and, therefore, he said, in effect, that the plaintiffs had not exhausted their remedies with their colleagues.

As to political question, Judge Revercomb held that were he to grant the complaint of the plaintiffs, this would result in, in the words of *Baker* v. *Carr,* "embarrassment * * * from multifarious pronouncements by various departments on a single question."

Now, interestingly enough, in all of these cases so far, the courts have usually held that, in principle, war powers cases are justiciable. But in the particular situations, for a variety of reasons, they have held them to be not justiciable.

So, we have this phenomenon of the judges marching up the hill and then marching down again.

What are the lessons to be drawn from the relatively brief history of this kind of litigation?

The principal lesson, I think, is that the courts, while recognizing the importance of the war powers clause and of the War Powers Resolution as reinforcing the war powers clause, have been disinclined to play their constitutional role in this area. Furthermore, they have done so on grounds which sometimes strain credulity.

For instance, judges do not hesitate to find facts in the most complicated antitrust, tax, or discrimination cases. Do they really lack the ability or the standards to decide that a marine receiving hostile fire pay is actually "imminently involved in hostilities"?

Also, every decision of the judiciary which is in conflict with some position of one of the other two branches contains a potential for "embarrassment from multifarious pronouncements." But the function of courts, in the time-honored phrase of Chief Justice Marshall, is to say what the law is and not to avoid embarrassment to the other branches.

I don't think that is what Justice Brennan had in mind in *Baker* v. *Carr.*

Thus, the application of the equitable discretion doctrine to the War Powers Resolution would create a perpetual game of catchup, with Congress having to pass laws to remind the President what his duty already is under the War Powers Resolution and then maybe having to pass a second set of laws, all subject to veto, to remind him to do what they did in the second round of laws.

It's a nightmare.

Now, what does all of this tell us about whether the War Powers Resolution should be repealed, left alone, or amended?

In an ideal society, I think it should be left alone, but this is not an ideal society. For real world purposes, there is nothing intrinsically wrong with the Resolution. What is wrong is Congress' failure to use it and the courts' failure to enforce it.

Could it be improved? Yes, probably. But the attempt to do so would also risk its weakening or demise. That is a political judgment on which I profess no expertise.

If an attempt were to be made to improve it, I would offer a number of suggestions.

One, you might provide for an expedited judicial review procedure, along the lines of that now contained in the Gramm-Rudman Act.

It might say, for instance, that any Member of Congress may bring an action in the U.S. District Court for the District of Columbia, for declaratory and injunctive relief, on the ground that the President has failed to submit a report or terminate the use of U.S. Armed Forces, as required by this Resolution. I refer you to 2 U.S.C. 922 for the Gramm-Rudman model.

Second, an amendment might provide that the awarding of hostile fire pay to members of the Armed Forces constitutes prima facie evidence of the existence of hostilities or imminent hostilities.

Third, an amendment might provide for an automatic funding cutoff coterminous with the date on which the President is required to terminate the presence of U.S. Armed Forces. I believe Senator Adams referred to that possibility earlier.

Amendments such as these may marginally reinforce the constitutional war powers scheme. It goes without saying that such reinforcement is badly needed in this still very nuclear age, when every war threatens to be the last, because every war now is an incipient nuclear war. Ultimately, the Framers' foresight in writing the war powers clause into the Constitution will be vindicated only by a change in the attitude of all three branches: More restraint by the President, less waffling by the Congress, fewer copouts by the courts.

We at the Center for Constitutional Rights believe that the Constitution belongs first and foremost to the people. Along with this priceless possession goes the people's duty to hold the Government's nose to the constitutional grindstone. Another Grenada, another Persian Gulf and you will probably hear from them loud and clear.

[The prepared statement of Mr. Weiss appears in the appendix.]

Senator **Biden**. Thank you very much. I have several questions, but I would first yield to my colleague if he has any questions.

Senator **Adams**. I have just one, Mr. Chairman, and I will submit the rest in writing.

Is there any member of the panel who does not believe that our troops were involved in imminent hostilities in the Persian Gulf?

Mr. **Friedman**. I think it is certainly clear that they were. I think the distinction between whether or not the President gives the Armed Forces the command to shoot or whether he just places them in an area where, with substantial probability if not certainty, they will be shot at is immaterial.

In either situation, it is a war within the meaning of article 1 of the Constitution.

Senator **Adams**. Thank you, Mr. Chairman.

Senator **Biden**. Thank you.

I have several questions.

Let me start with you, Mr. Weiss.

Doesn't Professor Rice make a fairly compelling point that you seem to reinforce: That if we all did our jobs—"all" meaning the courts, the Congress—we would not need a War Powers Act at all?

Mr. **Weiss**. Absolutely. That's what I had in mind when I said that in an ideal world, we would not need one. My question to Professor Rice is, Are we living in an ideal world?

Senator **Biden**. One of the most intriguing things that I have heard in all of these hearings, and I would like you to elaborate on it, Professor Nathan, is your notion of passing legislation now that would provide the ability to specifically eliminate funding for a specific undertaking.

In other words, everyone tells us that the Congress has the power of the purse, the Congress can cut off funding. But, as everyone also acknowledges, that is a very cumbersome process.

Can you elaborate a little bit on what you mean by paragraph (c) of section 7 of your statement: "Financing of wars ought to be——

Mr. **Nathan**. Is this my extended statement?

Senator **Biden**. Oh, you know the point that I'm making, that financing of wars ought to be a facet of new legislation.

What do you mean by that?

Mr. **Nathan**. Well, I am not an expert in crafting language that is serviceable, but I think when an undertaking is contemplated or when it is approved, it seems to me that specific authorization for financing that undertaking ought to be given and no other funds ought to be allocated to it unless requested from Congress.

I know that is difficult, of course.

Senator **Biden**. I don't want to cut you off, but let me ask you this.

Is there any way to utilize the notion, to implement the notion that you are suggesting here, absent an authorization?

You see, we really don't have much problem once we authorize the President to do something. That's not the problem.

Mr. **Nathan**. Why not? You can say "no other funds." I think it should read like the Cooper-Church legislation read: No other funds, except these funds, can be used, and these funds alone.

I think you avoid a lot of shenanigans that way.

Senator **Biden**. Could you prospectively say "if the President is going to use American forces anywhere, for any reason, constitutionally his prerogative or not, then he has to tell us how much it is going to cost, that he has to ask for specific authorization to do it?" Could we do that?

Mr. **Nathan**. I'm not a constitutional lawyer, but I see no reason why you could not.

Mr. **Rice**. I don't think you could, sir, because I believe the President's power, to use Madison's phrase, "to repel attacks" is an inherent power which the Congress simply cannot take away from him. I think the President could be forbidden in advance—take Senator Taft's Iceland example. If the President had gone to Congress and the Congress said "No, you will not send troops to Iceland," he is obliged not to send troops to Iceland.

But I don't think that Congress could forbid the President to take emergency action either to repel or to forestall an imminent attack. I think the sort of device that you are talking about would get involved in that.

Mr. **Nathan**. Well, I think that is a limiting case, "imminent attack." I mean, he would have to demonstrate that this is an imminent attack, it seems to me. "Imminent attack" usually has a certain kind of prima facie evidence to it.

Mr. **Weiss**. Senator, may I add something to that?

Senator **Biden**. Yes, please.

Mr. **Weiss**. Obviously, as this discussion just now has shown, there would be some problems about going to the Congress for advance authorization for any kind of military action. But I don't see any inherent problem in writing a provision that would say, in effect, when the termination point now defined in the War Powers Resolution arrives, either because circumstances occurred in which the President should have filed a report and didn't, or because the President filed a report and did not subsequently get the approval of Congress—namely, 60 days—that is when the funds get cut off for that particular operation, automatically.

If the President did file a report, that would be relatively simple. If he didn't file a report, then you would have to go to the courts to get a determination of whether he should have filed a report.

Senator BIDEN. Yes, and that is the catch.

Mr. RICE. I would make just one point on that.

I think the device just suggested here would be overly broad in that it would apply to Presidential actions which would be fully within his constitutional emergency powers as well as to others. I don't think you can do it.

That's the problem with this whole thing. It is the idea of using this blunt instrument to solve a very precise problem.

Senator BIDEN. Professor Rice, the concept of the "twilight zone," is, as I understand it, that the President may act freely within that zone unless Congress has spoken to the contrary by stating precisely what he is authorized to do.

Mr. RICE. Do you mean Jackson?

Senator BIDEN. Yes.

Mr. RICE. That was in the *Steel Seizure* case, and Jackson was saying that in the context of his tripartite division there, where Presidential powers may either be with Congress' approval, in which case the Presidential power is strongest, or it may be in the absence of congressional approval, just the President by himself, or the weakest case, where it is the President against Congress' prohibition——

Senator BIDEN. He may act freely only if the Congress has not spoken.

Mr. RICE. It depends on the situation. There are some areas, particularly in that second area, where the President is acting and Congress has said nothing where there are concurrent powers, and you just have to look.

What we are dealing with here is an area where, obviously, in my opinion, the ultimate power resides with Congress through the power of impeachment.

If the President is forbidden to take a particular action, in my opinion he is constitutionally obliged not to do it unless, in his judgment, this particular action is mandated by his power to take emergency action to repel attacks and so forth.

Senator BIDEN. One of the things it is hard to get away from, it seems to me, is that if two-thirds of the Congress voted to do anything, it would be very difficult for the President, constitutionally and just plain politically, to continue to do whatever he was doing.

I find it difficult to see the circumstances in which a President would be able to resist a two-thirds vote of the entire Congress to do anything. Even after receiving authorization for his action, if the next day two-thirds of the Congress voted to repeal that and say "come home," the President would be in a very difficult position.

Mr. **Rice**. Right.

We tend to deal with this, if I may, Senator, on a level of abstraction. If you look at the Constitution, it is full of potential disaster conflicts, where the whole thing will break down if you push powers to their extreme. It never has happened that way because there is a practical lubrication in the joints, which really is more political.

Senator **Biden**. Really, I guess what we are trying to do is avoid getting to that point.

Professor Nathan, you apparently wish to comment, and then Mr. Friedman.

Mr. **Nathan**. Yes. I think this idea that if you don't like the action, you impeach the President—or the idea that you really need a joint resolution and a two-thirds override—is politically sort of surreal. Imagine. Here, at the present moment, were a war to be declared, we need only both Houses. And we need only both Houses to pass a law. Yet you can't stop a war unless you muster two-thirds plus one. These kinds of remedies make no sense. Politically, overriding vetoes and impeachment are kind of a nightmare, end of the world remedies, for what has become, alas, an everyday problem.

Senator **Biden**. Right. That's the point I was trying to make.

Mr. **Weiss**. But, Senator, that is where the courts could come in——

Senator **Biden**. I know they could.

Mr. **Weiss** [continuing]. If they had the courage to act. The War Powers Resolution is clear on the procedure and the war powers clause is relatively clear on the allocation of constitutional powers.

So, if the courts did not resort to evasive tactics all the time, then you would not need the confirmatory simple majority confirmation from Congress.

Senator **Biden**. I agree. There are great disagreements on why or whether the courts should refuse to act.

Mr. **Rice**. There is also a question, Senator, if the Court were to take the case—and there is good argument for courts to regard this as justiciable—but if they were, you would still have the question of whether the President is obliged to obey that Court decree if he is convinced that it is trenching on his very definite constitutional prerogative.

You might recall that in *United States* v. *Nixon*, the Court specifically mentioned that President Nixon did not assert his military or foreign affairs powers. I don't think we have to do anything except look at the structure that was provided. I think the Framers left this to be provided precisely by these supermajorities and by this interplay of political activity.

Senator **Biden**. I think in the practical world, again, if the courts and the Congress concluded that the President had exceeded his constitutional authority, you would find that an impeachment process would begin not long after that.

Last year I did a great deal of reading to prepare for hearings relating to the Supreme Court. In going back and reading the cases and the commentary, it was interesting to find in the *Nixon Tapes* case that Nixon was surprised and disappointed that no one sided with him. He may have hoped that if there was a divided Court on the issue, it was still something that could be taken to the people, even if a majority on the Court had voted against him. The Chief Justice, a Republican appointee, was aware of this; that is why he pushed so hard to have close to unanimity on the issue.

On war powers, the practical question is can we mandate the courts to resolve it. It has been suggested by some that we can make it clearer that they have the authority to and that Congress wishes them to.

Mr. WEISS. I think, Senator, the standing problem could be resolved by legislation.

Senator BIDEN. Yes.

Mr. WEISS. Standing has never been a problem so far.

Senator BIDEN. I agree.

Mr. WEISS. I mean, courts always say well, we are going to throw this out on the political question ground, therefore, we don't have to reach standing.

Senator BIDEN. Right.

Mr. WEISS. But I think standing could be disposed of by legislation.

You could not mandate a court to decide something which the Court, in its wisdom, considered to be nonjusticiable as a "political question" question.

Senator BIDEN. I agree.

Mr. WEISS. But I think what you could do—and now we get into what I think Professor Rice is talking about, the real workings of the Constitution, the "lubricating of the joints," rather than the adherence to a specific rigid text—you could send a signal to the courts: "Hey, listen, we really want you to get into this area."

Mr. RICE. Excuse me, Senator, but I'm not so sure that you couldn't mandate that because if there is a case or controversy arising under the Constitution, which there would seem to be, then it is within the judicial power.

The status of the whole political question doctrine is unclear. It is questionable whether there really is such a doctrine. But if there is and if it is an aspect of justiciability, then it would seem that that could well be something that could be overridden by Congress.

I am not certain of that, but I would not rule that out so clearly.

Mr. WEISS. I'm very glad to hear that.

Mr. RICE. Now I'm not arguing for it either. I don't think it is a good idea.

Senator BIDEN. I understand, and it is consistent with your position on other issues.

So, don't get too happy with his position, Mr. Weiss. You would not like the other places that position takes you, if I guess what your predilection would be.

Mr. WEISS. Oh, no. But I am very glad to hear Professor Rice say what he did about the political question doctrine because it is currently under attack from both the left and the right. So, maybe we should get together and hold a conference on it.

Senator BIDEN. All I can say is be careful. He is a very smart gentleman who has a consistent view.

Mr. RICE. I would appreciate it if the record would note that I am on the left end of this panel's table, please. [Laughter.]

Senator **Biden**. Jim, did you have a comment, and then we will close this. You looked like you have something to say.

Mr. **Nathan**. I think it is important if standing is claimed by Congress, that some mechanism that is devised for the most representative of Congress to appear. This is the group that ought to be given standing, although I guess you could try to give standing to anybody and then try the widest group as well.

You don't want these cases to be thrown out. You don't want to go to court and beat your brains out and then say "We tried but we lost."

It seems to me that there was a court case recently where the Court said war powers may be justiciable. "Why are you coming here if Congress has already considered and passed on this and you simply have not had the votes."

It seems to me that what you need is a wide enough body to say we speak for the senior representatives of Congress, or we speak for the relevant committee charged with this responsibility, and we have a complaint.

Senator **Biden**. Well, now that I am chairman of one committee and No. 2 in another, I am beginning to like that idea. I don't know why we don't reside more power in those who hold power in this body, and we could just discard the notions of some of our other Members. [Laughter.]

Your testimony has been helpful.

You have provided a great deal of insight by your testimony. And I would like you, if you have a chance, to be specific by taking a look at my proposed legislation.

Thank you very much.

The hearing is adjourned.

[Whereupon, at 1:15 p.m., the hearing was adjourned, to reconvene at the call of the Chair.]

APPENDIX

The War Powers Resolution, 1973

50 U.S.C. §§ 1541-1548 (1976)

Joint Resolution

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any

provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

Sec. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

Sec. 10. This joint resolution shall take effect on the date of its enactment.

II

100TH CONGRESS
2D SESSION

S. J. RES. 323

Amending the War Powers Resolution to provide expedited procedures for legislation requiring the disengagement of United States Armed Forces involved in hostilities or providing specific authorization for their continued engagement in such hostilities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 19 (legislative day, MAY 18), 1988

Mr. BYRD (for himself, Mr. NUNN, Mr. WARNER, and Mr. MITCHELL) introduced the following joint resolution; which was read twice and referred to the Committee on Foreign Relations

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JOINT RESOLUTION

Amending the War Powers Resolution to provide expedited procedures for legislation requiring the disengagement of United States Armed Forces involved in hostilities or providing specific authorization for their continued engagement in such hostilities, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be referred to as the "War Powers Resolution Amendments of 1988".

SEC. 2. REPEAL.

Section 2(c) of the War Powers Resolution (50 U.S.C. 1541(c); Public Law 93-148), relating to the exercise of war powers by the President under the Constitution, is repealed.

SEC. 3. PERMANENT CONSULTATIVE GROUP.

Section 3 of the War Powers Resolution (50 U.S.C. 1542) is amended—

(1) by inserting "(a)" after "SEC. 3."; and

(2) by adding at the end thereof the following new subsections:

"(b)(1)(A) Except as provided in paragraph (2), in every instance in which consultation is provided under subsection (a), the President shall consult with—

"(i) the Speaker of the House of Representatives and the President pro tempore of the Senate; and

"(ii) the Majority Leader and the Minority Leader of the House of Representatives and the Majority Leader and the Minority Leader of the Senate.

"(B) In order to ensure adequate consultation on vital national security issues, the President and the Members of Congress listed in subparagraph (A) shall establish a schedule of regular meetings of those Members with the President.

"(2) Whenever a majority of the Members listed in paragraph (1)(A) so request, the President shall consult with the permanent consultative group established under subsection (c) unless the President determines that limiting consultation to the Members listed in paragraph (1)(A) is essential to meet extraordinary circumstances affecting the most vital security interests of the United States.

"(c)(1) There is established within the Congress a permanent consultative group composed of—

"(A) the Speaker of the House of Representatives and the President pro tempore of the Senate;

"(B) the Majority Leader and the Minority Leader of the House of Representatives and the Majority Leader and the Minority Leader of the Senate;

"(C) the chairman and ranking minority member of each of the following committees of the House of Representatives:

"(i) the Committee on Foreign Affairs;

"(ii) the Committee on Armed Services; and

"(iii) the Permanent Select Committee on Intelligence; and

"(D) the chairman and ranking minority member of each of the following committees of the Senate:

"(i) the Committee on Foreign Relations;

"(ii) the Committee on Armed Services; and

"(iii) the Select Committee on Intelligence.

"(2) During odd-numbered Congresses, the Speaker of the House of Representatives shall serve as Chairman of the permanent consultative group and the Majority Leader of the

Senate shall serve as Vice Chairman. During even-numbered Congresses, the Majority Leader of the Senate shall serve as Chairman and the Speaker of the House of Representatives shall serve as Vice Chairman.

"(d)(1)(A) In addition to the consultations provided for in subsection (b)(2), the permanent consultative group shall hold such meetings as may be necessary to carry out its responsibilities under section 5(b) whenever called by the Chairman or, in his absence, the Vice Chairman or, in accordance with subparagraph (B), a majority of the membership of the permanent consultative group.

"(B)(i) If a majority of the membership of the permanent consultative group desires the Chairman or, in his absence, the Vice Chairman to call a meeting of the group, such members may file with the Clerk of the House of Representatives and the Secretary of the Senate or their designees a written petition, signed by a majority of the membership of such group, requesting the calling of such meeting, and the Clerk and the Secretary shall make every effort to notify the Chairman or, in his absence, the Vice Chairman of that request.

"(ii) If, within 3 calendar days after the filing of the petition, the Chairman or, in his absence, the Vice Chairman does not call the requested meeting, to be held within 6 calendar days after the filing of the petition, a majority of the membership of the group may file with the Clerk of the

House of Representatives and the Secretary of the Senate, or their designees, a written notice of the date, hour, and location of that meeting, and the Clerk and the Secretary shall notify all members of the group from their respective Houses of Congress that such meeting will be held and shall inform them of its date, hour, and location. The group shall meet on that date and hour and at that location.

"(iii) If both the Chairman and the Vice Chairman are not in attendance at the requested meeting, then the attending ranking Member of the group from the same House of Congress as the Chairman shall preside at that meeting.

"(2) For purposes of section 5(b), a majority of the members of the permanent consultative group shall constitute a quorum.".

SEC. 4. CONGRESSIONAL ACTION; JUDICIAL REVIEW.

(a) IN GENERAL.—Section 5 of the War Powers Resolution (50 U.S.C. 1544) is amended by striking out subsections (b) and (c) and inserting in lieu thereof the following:

"(b)(1) Whenever the United States Armed Forces are engaged in hostilities or other situations described in a report submitted under section 4(a)(1) (or for which such a report was deemed under paragraph (3) to be required to be submitted) outside the United States, its possessions, and territories without a declaration of war or specific statutory authorization, it shall be in order in the Senate or the House of Representatives to consider, in accordance with section 7, a joint resolution described in paragraph (2).

"(2) A joint resolution referred to in paragraph (1) is a joint resolution—

"(A) which is introduced in a House of Congress by the Chairman or Vice Chairman of the permanent consultative group described in section 3, after approval of the group by a recorded, affirmative vote of a majority of those voting, a quorum being present, or, if the Chairman or Vice Chairman is not in the majority, then by a Member of the respective House designated by the permanent consultative group; and

"(B) which either—

"(i) requires the President to disengage such forces from such hostilities or to remove them from such situations, as the case may be, or

"(ii) provides specific authorization for the continued engagement of such forces in such hostilities or for the continued use of such forces in such situations, as the case may be.

"(3) For purposes of this subsection, a report described in section 4(a)(1) shall be deemed to be required to be submitted if the permanent consultative group, by a majority of those voting, a quorum being present, so finds. The permanent consultative group shall cause such finding to be published in the Congressional Record.

"(4) Nothing in this subsection alters or modifies the right of any Member of Congress to introduce a joint resolution or bill in a House of Congress which—

"(A) would require that the President disengage such forces from such hostilities or remove them from such situations, as the case may be; or

"(B) would provide specific authorization for the continued engagement of such forces in such hostilities or for the continued use of such forces in such situations, as the case may be.

"(c) Any Member of Congress may bring an action in the United States District Court for the District of Columbia for declaratory judgment and injunctive relief on the ground that the President or the United States Armed Forces have not complied with any provision of law described in paragraph (1) or (2) of section 6(a).".

(b) CONFORMING AMENDMENT.—The section heading of section 5 of the War Powers Resolution is amended to read as follows:

"CONGRESSIONAL ACTION; JUDICIAL REVIEW".

SEC. 5. PROHIBITION ON USE OF FUNDS.

The War Powers Resolution is amended by striking out section 6 (50 U.S.C. 1545) and inserting in lieu thereof the following:

"PROHIBITION ON USE OF FUNDS

"SEC. 6. (a) No funds appropriated or otherwise made available under any law may be obligated or expended for any activity which would have the purpose or effect of violating—

"(1) any provision of law enacted pursuant to section 7; or

"(2) any other provision of law relating to the actions described in clause (A) or (B) of section 5(b)(4).

"(b) Nothing in this section prohibits the use of funds to remove the United States Armed Forces from hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances.".

SEC. 6. CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTIONS.

(a) IN GENERAL.—The War Powers Resolution is amended by striking out section 7 (50 U.S.C. 1546) and inserting in lieu thereof the following:

"CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTIONS

"SEC. 7. (a) For purposes of this section—

"(1) the term 'joint resolution' means a joint resolution described in section 5(b)(2); and

"(2) the term 'session days' means days on which the respective House of Congress is in session.

"(b) A joint resolution introduced in the House of Representatives shall be referred to the Committee on Foreign Affairs of the House of Representatives. A joint resolution introduced in the Senate shall be referred to the Committee on Foreign Relations of the Senate.

"(c)(1) If the committee to which is referred a joint resolution has not reported such joint resolution (or an identical joint resolution) at the end of 7 calendar days after its introduction, such committee shall be discharged from further consideration of such joint resolution, and such joint resolution shall be placed on the appropriate calendar of the House involved.

"(2) After a committee reports or is discharged from a joint resolution described in section 5(b)(2), no other joint resolution under such section with respect to the same hostilities, or the same situation in which imminent involvement in hostilities is clearly indicated by the circumstances, may be reported by or be discharged from such committee while the first joint resolution is before the respective House of Congress (including remaining on the calendar), a committee of conference, or the President.

"(d)(1)(A) When the committee to which a joint resolution is referred has reported, or has been discharged under subsection (c) from further consideration of such joint resolution, notwithstanding any rule or precedent of the Senate, including Rule 22, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the joint resolution and, except as provided in subparagraph (B) of this paragraph or paragraph (2) of this subsection (insofar as it relates to germaneness and relevancy of amendments), all points of order against the joint resolution and consideration of the joint resolution are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to a motion to postpone. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall be in order, except that such motion may not be entered for future disposition. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the respective House, to the exclusion of all other business, until disposed of, except as otherwise provided in subsection (e)(1).

"(B) Whenever a point of order is raised in the Senate against the privileged status of a joint resolution that has been laid before the Senate and been initially identified as privileged for consideration under this section upon its introduction pursuant to paragraph (2)(A) of section 5(b), such point of order shall be submitted directly to the Senate. The point of order, 'The joint resolution is not privileged under the War Powers Resolution', shall be decided by the yeas and the nays after four hours of debate, equally divided between, and controlled by, the Member raising the point of order and the manager of the joint resolution, except that in the event the manager is in favor of such point of order, the time in opposition thereto shall be controlled by the Minority Leader or his designee. Such point of order shall not be considered to establish precedent for determination of future cases.

"(2)(A) Consideration in a House of Congress of the joint resolution, and all amendments and debatable motions in connection therewith, shall be limited to not more than 12 hours, which, except as otherwise provided in this section, shall be equally divided between, and controlled by, the Majority Leader and the Minority Leader, or by their designees. The Majority Leader or the Minority Leader or their designees may, from the time under their control on the joint resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

"(B) Only amendments which are germane and relevant to the joint resolution are in order. Debate on any amendment to the joint resolution shall be limited to 2 hours, except that debate on any amendment to an amendment shall be limited to 1 hour. The time of debate for each amendment shall be equally divided between, and controlled by, the mover of the amendment and the manager of the joint resolution, except that in the event the manager is in favor of any such amendment, the time in opposition thereto shall be controlled by the Minority Leader or his designee.

"(C) One amendment by the Minority Leader is in order to be offered under a one-hour time limitation immediately following the expiration of the 12-hour time limitation if the Minority Leader has had no opportunity to offer an amendment to the joint resolution prior thereto. One amendment may be offered to the amendment of the Minority Leader under the preceding sentence, and debate shall be limited on such amendment to one-half hour which shall be equally divided between, and controlled by, the mover of the amendment and the manager of the joint resolution, except that in the event the manager is in favor of any such amendment, the time in opposition thereto shall be controlled by the Minority Leader or his designee.

"(D) A motion to postpone or a motion to recommit the joint resolution is not in order. A motion to reconsider the vote by which the joint resolution is agreed to or disagreed to is in order, except that such motion may not be entered for future disposition, and debate on such motion shall be limited to 1 hour.

"(3) Whenever all the time for debate on a joint resolution has been used or yielded back, no further amendments may be proposed, except as provided in subparagraph (B), and the vote on the adoption of the joint resolution shall occur without any intervening motion or amendment, except that a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House may occur immediately before such vote.

"(4) Appeals from the decisions of the Chair relating to the application of the Rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a joint resolution shall be limited to one-half hour of debate, equally divided between, and controlled by, the Member making the appeal and the manager of the joint resolution, except that in the event the manager is in favor of any such appeal, the time in opposition thereto shall be controlled by the Minority Leader or his designee.

"(e)(1) Except as provided in paragraph (2), if, before the passage by one House of a joint resolution of that House, that House receives from the other House a joint resolution, then the following procedures shall apply:

"(A) The joint resolution of the other House shall not be referred to a committee.

"(B) With respect to a joint resolution of the House receiving the joint resolution—

"(i) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

"(ii)(I) the joint resolution of the other House shall be considered to have been read for the third time; and

"(II) the vote on final passage shall be on the joint resolution of the other House, if such joint resolutions are identical, or on the joint resolution of the other House if not identical, with the text of the joint resolution of the first House inserted in lieu of the text of the joint resolution of the second House, and such vote on final passage shall occur without debate or any intervening action.

"(C) Upon disposition of the joint resolution received from the other House, it shall no longer be in order to consider the joint resolution originated in the receiving House.

"(2) If one House receives from the other House a joint resolution before any such joint resolution is introduced in the first House, then the joint resolution received shall be referred, in the case of the House of Representatives, to the Committee on Foreign Affairs and, in the case of the Senate, to the Committee on Foreign Relations, and the procedures in that House with respect to that joint resolution shall be the same under this section as if the joint resolution received had been introduced in that House.

"(f) If one House receives from the other House a joint resolution after the first House has disposed of an identical joint resolution, it shall be in order to proceed by nondebatable motion to consideration of the joint resolution received by the first House, and that received joint resolution shall be disposed of without debate and without amendment.

"(g)(1)(A) The time for debate in a House of Congress on all motions required for the disposition of amendments between the Houses shall not exceed 2 hours, equally divided between, and controlled by, the mover of the motion and the manager of the joint resolution at each stage of the proceedings between the two Houses, except that in the event the manager is in favor of any such motion, the time in opposition thereto shall be controlled by the Minority Leader or his designee. In the case of any disagreement between the two Houses of Congress with respect to a joint resolution which is not resolved, any Member of Congress may make any motion or motions referred to in this subparagraph within 2 session days after action by the second House or before the appointment of conferees, whichever comes first. In the event the conferees are unable to agree within 72 hours after the second House is notified that the first House has agreed to conference, they shall report back to their respective House in disagreement.

"(B) Notwithstanding any rule in either House of Congress concerning the printing of conference reports in the Congressional Record or concerning any delay in the consideration of such reports, such report, including a report filed or returned in disagreement, shall be acted on in the House of Representatives and the Senate not later than 2 session days after the first House files the report or, in the case of the Senate acting first, the report is first made available on the desks of the Senators. Debate in a House of Congress on a conference report or a report filed or returned in disagreement on any such joint resolution shall be limited to 3 hours, equally divided between, and controlled by, the Majority Leader and the Minority Leader, and their designees.

"(2) If a joint resolution is vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to 20 hours in each House of Congress, equally divided between, and controlled by, the Majority Leader and the Minority Leader, and their designees.

"(h) This section is enacted by the Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.".

(b) REPEAL.—Section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (50 U.S.C. 1546a), relating to expedited procedures for certain joint resolutions and bills, is repealed.

PREPARED STATEMENT OF SENATOR PELL—JULY 13, 1988

Today the Foreign Relations Committee commences work on a project of considerable significance—an effort to evaluate and improve the War Powers Resolution of 1973.

Congress passed this law 15 years ago in hope of fostering constructive Executive-legislative interaction in the decision to employ U.S. forces abroad. Unfortunately, this intent has not been fulfilled. Indeed, from the moment of its enactment over President Nixon's veto, the Resolution has itself been an object of dispute rather than an instrumentality of cooperation.

This past year's contentious debate over the Resolution's applicability to the U.S. presence in the Persian Gulf has served to underscore the irony that now surrounds this crucial law. For the motive behind the War Powers Resolution was a determination to establish a procedure that would ensure national unity. The aim was to devise a mechanism, consistent with the Constitution, through which Congress and the President would act together in the momentous decision to commit U.S. forces to hostilities—so that, once committed, America would not again find itself rent internal division.

Critics of the War Powers Resolution continue to characterize it as an idiosyncratic product of its time—an effort to prevent another Vietnam. But that involves a distortion. The War Powers Resolution was not intended to prevent the necessary use of American military power, but rather to prevent the commitment of power unaccompanied by careful analysis and the commitment of national will.

The Framers of the Constitution intended that Congress be an active participant in the decision to commence hostilities. While the War Powers Resolution, in its current form, has failed, a way must be found to give modern meaning to constitutional intent.

Pursuant to this purpose, the committee last December authorized the establishment of a Special Subcommittee on War Powers. Today the subcommittee begins hearings that will provide for a full airing of the constitutional dimensions of the question while considering practicalities as well as principles. The chairman of the subcommittee is Senator Biden, who is completing recuperation from surgery and for whom I will sit in until he returns in a few weeks.

These hearings will extend through August and into September, and will involve former and present Government officials, including President Ford, and a number of eminent constitutional scholars. Upon completing its hearings, the subcommittee will render a report with legislative recommendations to the full committee.

Let me emphasize that the committee's aims is not to satisfy some narrow sense of congressional prerogative, but to devise a war powers mechanism that works. Let me reiterate, too, that this is not an effort to resolve the present dispute over the applicability of the War Powers Resolution to the current situation in the Persian Gulf. While that dispute has helped to give rise to this effort, our endeavor will aim at a long-term solution to the war powers question, not a quick fix for current circumstances.

In this effort, I urge the constructive participation of the administration. It will not be enough for the executive branch simply to adopt the position that the War Powers Resolution and any successor are unconstitutional. For what is constitutional beyond doubt is the intent of the Framers that Congress—the elected representatives of people—be centrally involved in any decision that commits this Nation to war. Our task must be to construct an executive-legislative mechanism that operates effectively; and to create that mechanism will require executive-legislative cooperation.

Let us therefore view this effort not as an institutional struggle but as a constitutional duty. Indeed, having just celebrated our Constitution's 200th anniversary year, we could pay the Founders no greater honor than to approach this task with a spirit of judicious obligation to fulfill the Constitution's intent.

The subcommittee is pleased to be able to commence its hearings with testimony from four people who played a role in the genesis of the law we have set ourselves to evaluate. Chairman Fascell and Congressman Broomfield have since assumed the leadership of the House Foreign Affairs Committee. Senators Eagleton and Mathias have graduated to new careers. All four have records of distinguished service to our country, and the subcommittee is honored by their presence today.

PREPARED STATEMENT OF SENATOR EAGLETON—JULY 13, 1988

INTRODUCTION

I am here to make a plea on behalf of our Founding Fathers. Remember them? Just a year ago—during the Bicentennial of the Constitution—we said they were geniuses. When the nomination of Judge Bork was added to our Nation's 1987 constitutional history platter, we often heard that "what this country needed were more judges who would go back to the original intent of our Founding Fathers." I didn't blow that particular horn last year, but a lot of good old boys certainly did.

This year, as we now meet on the topic of war powers, I am the Gabriel of original intent.

Let's take a look at the Constitution.

Article 1 authorizes Congress, among other things, to "provide for the common defense"; to "declare war"; to "make rules for the Government and regulation of land and naval forces"; to "raise armies and navies"; to "make all appropriations" and to make "all laws which shall be necessary and proper" for carrying out all of these enumerated powers.

In article 2, the President is given power to appoint Ambassadors and he is denominated as "Commander in Chief."

One need not be a constitutional historian to conclude that the Founding Fathers decided that the business of war was too serious a matter to be left to one person. Having experienced enough of George III, they wanted no more unilateral warmaking.

Although the Fathers could not be so omniscient as to provide exact answers to every question that might arise regarding the use of American Armed Forces, they were clear that the power to make war was shared between the Congress and the President. The constitutional provisions were to provide a framework within which the Congress and the President could cooperate in the protection of the Nation from external threat.

In the 200 years of our Constitution, several Presidents have committed American forces without a declaration of war. For example, America has attacked pirates in Tripoli and has chased Pancho Villa in Mexico on unilateral Presidential authority. Congress sometimes sulked about Presidential adventurism, but often as not was happy to have been spared the political burden of ticklish decisionmaking about war.

In Korea, President Truman marched us there under U.N. resolution. Congress, later on, did considerable secondguessing about this, but never felt the itch either to declare war or to stop it.

We inched into Vietnam under Truman, Eisenhower, and Kennedy and then jumped in full force under Johnson with the Gulf of Tonkin Resolution. That resolution sounded a lot less alarming and drastic than a declaration of war, but it had the same legal effect. No doubt about it, Congress had legalized "Johnson's War."

During the interminable agony of Vietnam, Senators and Congressmen first in twos and threes, and later by the score, swore that "we should never get fooled again." Somehow, there had to be a framework that put Congress in a position to exercise its constitutional obligation on the dispatching of American troops into hostilities.

THE CREATION OF THE WAR POWERS ACT

One day in 1970, Frank Church said to me, "We must begin to think about what is going to happen when the Vietnam war is over. We've got to restore the congressional role in the decisionmaking process about how we go to war." He asked me to work up some materials on a constitutionally proper, shared balance between the Congress and the President on the sending of American combat forces into hostilities.

Skipping all of the intermediate steps, Senators Javits, Stennis, and I ended up with the "first cut" of a war powers bill.

S. 2956 recognized the constitutional authority of the Congress and the President to exercise their shared constitutional powers in situations of undeclared war. It spelled out the President's responsibility "to repel attack," "to forestall an imminent attack" on the United States or U.S. Armed forces outside the United States, "to protect or rescue" U.S. nationals abroad. All of that was, both by the Constitution and by historic precedent, singularly up to the President. However, under S. 2956, when the President wanted to use U.S. Armed Forces outside of these time-sensitive, emergency-related situations, he was to seek authorization from the Congress—simple as that. Once again, in emergencies—self-defense, forestalling an attack, rescuing, et cetera—the President acts on his own. Otherwise, if American forces are to be deliberately placed into hostilities, Congress, as contemplated by Madison and Hamilton, must be part of the collective decisionmaking.

The war powers legislation percolated through Congress for a couple of years as the war in Vietnam droned on its bloody way.

THE "COMPROMISE"

Ultimately, a bill as previously described, passed the Senate. A bill based on a much different premise passed the House. It was: "In war the President alone knows best." Out of the Senate-House conference, a "compromise" emerged—a totally illogical, illegitimate child. The President could wage unilateral war for 90 days without congressional authority. After the 90 days, the war would terminate unless Congress authorized its continuance under such time or other constraints as Congress saw fit to impose.

Senator Javits and I had a rather bitter debate as to what had happened in the conference. As I saw it, the Constitution had been stood on its head—the President had been empowered to wage unilateral war whenever and however he desired. Once the troops were sent by the President, for all practical purposes the die was cast—and unalterably so. The Founding Fathers had to be somersaulting in their graves.

Senator Javits believed to his dying day that the bastardized War Powers Act would somehow all work out. I disagreed.

I voted against the final version of the War Powers Act—in a sense I voted against what had once been my own bill. To me, it was untenable and perhaps even unconstitutional in its attempt to give the President the sole power to wage war.

THE WAR POWERS ACT IN PRACTICE

The Act in practice has been a total failure. It has in no way established a shared-power relationship in warmaking. It has in no way established any sense of consensus-building on warmaking. The original Senate bill provided for the shared decision required by the Constitution and the consensus-building that went with such a shared decision of both the President and the Congress.

Every President has abhorred the War Powers Act, all have danced around it, and President Reagan has blatantly ignored it—for example, Lebanon and Persian Gulf. Congress gripes and grouses, but just stands and watches the passing parade as the President alone dispatches troops into hostilities. The courts refuse to resolve the constitutional issue labeling the question as "a nonjusticiable political dispute." That means it's a hot potato—too hot to handle.

What to do?

BYRD-NUNN-MITCHELL-WARNER

You have before you the Byrd-Nunn-Mitchell-Warner bill.

With great respect for these fine men, their bill is a figleaf irrelevancy.

In the interest of time, let me comment on Senator Nunn's statement when the bill was introduced. Senator Nunn found eight shortcomings in the existing law. Fair enough. Maybe it has even more than eight. Then he wrote this.

> We must remember that, under the Constitution, the Founding Fathers gave Congress the power to declare war. We need a war powers act that applies that power to the modern threats that our Nation faces.
>
> This bill will assure that the congressional leadership and the President will consult on matters of national security. It also assures that in the event the President deploys American forces, the leadership will meet and recommend appropriate action to the rest of the Congress. It guarantees that the recommendation of the leadership will be given prompt consideration on the floor of both the House and the Senate. Finally, it requires that if the Congress passes a law, no funds may be spent by the President in contradiction of that law.

Senator Nunn cannot really believe that "The bill will assure that the congressional leadership and the President will consult on matters of national security." On matters that are perceived as touching the turf of the Commander in Chief, Presidents will consult with Congress only on a nominal, superficial basis. Presidents don't trust or respect Congress. Presidents do not view Congress as a partner in a governmental alliance, but as a nuisance or peril to be avoided. Thirty days into office, President Bush or President Dukakis will hold the same view.

Senator Nunn concludes the paragraph with "Finally, it requires that if the Congress passes a law, no funds may be spent by the President in contradiction of that law." The President, by this new law, will be asked to obey the law. Wow. That's getting tough. The truth is, that the Byrd-Nunn-Mitchell-Warner solution adds nothing to what Congress doesn't already have under the Constitution. Of course, Congress can always, through it appropriation or legislative process, enact a statute over the President's terminating an unwanted military operation.

CAN THE WAR POWERS ACT WORK?

In my judgment, the existing War Powers Act is an unworkable mess, but the Byrd-Nunn-Mitchell-Warner bill would continue the mess. The congressional leadership would play an understudy, standby role in the wings and the rest of Congress would sit in the balcony as impotent dummies, waiting to hear the word of the leadership lords.

This is not what the Founding Fathers intended. It cannot, in all conscience, be the role that Members of the Senate and House would willfully impose upon themselves.

For myself, I would go back to the original Senate war powers bill as refined in Senate Foreign Relations Committee Draft No. 2 of July 1977. That bill was based on the Constitution and on the premise of shared powers and consensus-building in warmaking.

But, as a pragmatist, I recognize that the time to enact such a bill came only once—at the end of an exhausting, seemingly interminable war and with a beleaguered President in the White House whose veto could be overridden. That time in history and in legislative opportunity is forever gone.

Unable to truly correct the flaws in the existing law and faced with a proposed cure worse than the known disease, I might, for an instant, consider repealing the whole damned thing. I might, for an instant, consider going back to the basic words of the Constitution and let those words speak for themselves.

Why do I use qualifying phraseology like "might, for an instant"? I do so because total repeal of the War Powers Act might be construed by the Wall Street Journal editorial page and Justice Scalia as legislative history supporting the President's unilateral right to wage war however and whenever he liked. I wouldn't, of course, like to see such a cockamamie interpretation move beyond the Journal and Scalia.

DOES CONGRESS REALLY WANT "TO BE IN ON THE TAKEOFF"?

Finally, as I observed earlier, I came to the conclusion that Congress really didn't want to be in on the decisionmaking process as to when, how, and where we go to war. I came to the conclusion that Congress really didn't want to have its fingerprints on sensitive matters pertaining to putting our Armed Forces into hostilities. I came to the conclusion that Congress preferred the right of retrospective criticism to the right of anticipatory, participatory judgment. Congress is not often reactionary, but it is, more often than not, reactive.

When I was in the Senate, I remember sitting in Majority Leader Baker's office when we were trying to decide, under the War Powers Act, how much time to allow President Reagan to wage war in Lebanon. All of us—everyone of us in Howard Baker's office—knew it was a war and that young Americans would be killed. Here was the opportunity for Congress to show, to use the cliche, that it wanted "to be in on the takeoff as well as the landing." We gingerly and intentionally avoided playing any role. We voted to give a blank check to President Reagan to wage war in Lebanon for—remember how long—a year and a half. The American war in Lebanon didn't last so long—when the mad bomber blew up the Marine barracks, President Reagan, on his own gut judgment, cut the political losses. Congress just listened and watched. Congress was in the balcony.

Since I have left the Senate, I have followed the events in the Persian Gulf. Clearly, the events there come under the operative sections of the act. But, just as clearly there is no congressional determination to force the President's hand on the issue. If the Persian Gulf exercise blows up, Senators and Representatives will be free to point out how things went wrong—how erroneous policies were executed of which they were not a part. If there had been a congressional vote authorizing a Persian Gulf undertaking with some congressional limitations, then congressional fingerprints would be on the job and failure would be a shared result.

I harbor the notion that most Senators and House Members really don't have the political stomach for decisionmaking involving war.

It is with no glee that I express such misgivings.

PREPARED STATEMENT OF SENATOR ADAMS—JULY 13, 1988

I was a Member of the House of Representatives when the War Powers Resolution was enacted into law over President Nixon's veto in 1973. I believed then, as I believe now, that the War Powers Resolution establishes an important process designed to preserve the constitutional balance of power in the warmaking area between the executive and legislative branches of our Government.

For over a year now, I have spent a great deal of time studying—and debating—the concepts associated with the War Powers Resolution. Unlike the largely theoretical debate which took place in 1873, the arguments in 1987 and 1988 have been practical and based in reality.

As I look back at those 2 years, and the decade and a half of experience we have had with the War Powers Resolution, there are reasons to be discouraged. Both Democratic and Republican Presidents have either ignored the law or refused to comply with its provisions. Reluctant Congresses have not aggressively challenged Presidential inaction. The end result has been an extraordinary shift of power from the legislative branch to the executive in situations involving the commitment of American troops in foreign hostile involvements.

I think the record shows—whether you are looking at Vietnam, Cambodia, Lebanon, Grenada, or the Persian Gulf—that this shift in powers has not served us well. Since President Reagan's announcement of his decision to reflag Kuwaiti vessels and provide United States protection for those vessels in the volatile Persian Gulf, I have struggled to use the War Powers Resolution as a vehicle to force a debate on that policy in an effort to build a consensus for a specific course of action. I have failed in that effort. The consequence is that we have been implementing a policy in the gulf which has never been authorized by the Congress or approved by the American people.

In my view, it is a policy of conflict which has resulted in a series of tragic incidents which have take the lives of American and Arab soldiers, as well as the lives of innocent civilians. It is a policy of confusion which has resulted in the projection of an incoherent foreign policy abroad. It is a policy of confrontation which has minimized and, at times ignored, the possibility of diplomatic solutions.

But even those who would reject those conclusions and approve of our policy in the gulf, even those people ought to agree that it is a policy which has been created and implemented exclusively by the executive branch. It illustrates a policymaking process which, at best, ignores the War Powers Resolution and, at worst, ignores the Constitution.

Given both the policy and process questions involved in our Persian Gulf operation, it is easy to understand why this subcommittee was formed.

As we begin this review of the War Powers Resolution, I want to interject a note of caution. There are those who have concluded, based on our experiences to date, that the War Powers Resolution is fatally flawed and need to be "fixed" this year. As frustrated as I have at times been over the past year, I have not reached that conclusion. In fact, in many ways, I have been impressed by the resiliency of the law. It is a simple statute with a simple purpose—to assure, as our Founders intended, that the warmaking power remains a responsibility shared by the executive and legislative branches. Because the War Powers Resolution embodies a constitutional imperative, it is relentless. Like it or not, we have not been able to avoid the judgments it requires us to make. The fact that the Congress did not recognize the existence of "imminent hostilities" last year or last week was our fault, not the fault of the Act.

The War Powers Resolution is not a perfect law. Based on my experiences, I have a number of suggestions for changes in it as do others. During the course of these hearings, I expect that we will have an opportunity to thoroughly review those suggestions. As we do, however, I would simply suggest that there be no "rush to judgment." It took years to develop the War Powers Resolution and modifications to it should be carefully studied.

As we study potential modifications, I would suggest that we review them in light of the central flaw that I see operating in the War Powers Resolution. In my mind, the law can work if the Congress wants it to or if the President wants it to. But it cannot operate if both the President and a determined minority in the Congress are reluctant to implement it. That has been the situation we have faced all too often over the past 15 years.

Over that past year, we have seen the President report to us "consistent with" rather than "pursuant to" the law. We have seen the Congress vote on procedural questions which, amazingly enough, saw us denying the possibility of "imminent hostilities" even after American soldiers had engaged in combat.

Making the law more permissive, rather than more automatic, does not seem to be a reasonable response to the experiences of the past few years. At least it would be unreasonable if we want to accept our constitutional responsibilities.

Making judgments about war and peace is an ominous and high-risk undertaking. But it is a judgment which we, as U.S. Senators, swore to execute to the best of our abilities. In doing so, we do not take power from the Executive—we share it.

We do not want to micromanage conflicts—we want to authorize them. We do not want to use war for political purposes—we want to take politics out of the warmaking process.

In short, the task before us is not to amend the War Powers Resolution at all costs. Rather, our task is to develop improved mechanisms if we can. If that proves to be impossible, then our task is more limited: To resist changes which would result in the unraveling of a procedure designed to allow us to assert our responsibilities under article 1, section 8 of our Constitution.

PREPARED STATEMENT OF SENATOR PRESSLER—JULY 14, 1988

Mr. Chairman, this afternoon we are privileged to have before us two eminent American historians. Their numerous publications, and their wideranging scholarship, bear witness to the vitality and relevance of the history profession. The impressive reputation of our two witnesses is well-deserved, and I welcome them to our committee.

It is especially fitting that on this day, so rich in historical symbolism and meaning, that we turn our attention to history—to the history of the Constitution, to the history of the Republic, and to the history of the governing process. By examining our historical origins and our subsequent national experience, we are, in effect, celebrating the bicentennial of the greatest of all political documents—the Constitution of the United States.

We deal today, specifically, with the history of the war power. How did it originate? How has it been utilized? And how has it been transformed, or transmuted, in our time? In speaking of the war power, I am also making reference to the doctrine of the separation of powers, for the one is closely intertwined with the other.

In their belief in the need for a separation of powers between the three coordinate branches of Government, the Founding Fathers relied on the vision of the celebrated French philosopher, Montesquieu. As Justice Louis Brandeis observed in *Myers* v. *United States* (1926), separation of powers—according to Montesquieu—translated into "security for the people" and was accepted as such by the Founders. Not surprisingly, a modern-day Supreme Court in *Buckley* v. *Valeo* (1976), a half-century later, reemphasized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another."

The war power did not derive from emanations or penumbras, but from the minds of very practical men inside a hot, locked room in Phildelphia on August 17, 1787. They carefully delineated "making war" from "declaring war," a distinction that has confounded many ever since. Making war translates in modern-day language into defending the national security interests of the United States. Delaring war is exactly what that term implies: A formal statement of hostilities which, in turn, triggers a whole series of international legal duties and obligations. A declaration of war, as the French came to say after July 14, 1789, involves a nation in arms, utilizing its major resources and seeking the often elusive goal of military victory over an opposing enemy. That is why Rufus King, at the Constitutional Convention, referred to making war as "an Executive function."

A noted American jurist and legal scholar in a famous essay, published at the turn of the last century, observed that history and law were inevitably bound up with one another. Nowhere is this more apparent than in the significant Supreme Court cas of *Bas* v. *Tingy* (1801), decided 1 year after Congressman John Marshall's much-quoted statement about the President being the sole organ of American foreign relations. In that case, a unanimous Court indicated that the United States could become involved in hostilities without a declaration of war. Members of that Court were contemporaries of the Founders, and two of the first sitting Justices (John Rutledge and James Wilson) were themselves Constitutional Convention participants. Surely, this Court knew the intention of the Founders in such matters. They had lived their own history.

With respect to the Commander in Chief power, historian Clinton Rossiter, author of a landmark text, entitled "The American Presidency," has asserted that "the President's power to command the [armed] forces swells out of all proportion to his other powers." In a revised edition, published at the end of the Eisenhower era, Rossiter lamented: "Congressmen are more likely to needle the President for inactivity and timidity than to accuse him of acting too swiftly and arbitrarily." How things have changed.

If I remember correctly, Professor Schlesinger was one of the sharpest academic critics of President Eisenhower as a "do-nothing" President in foreign policy. We still are stirred by the dramatic words of President John F. Kennedy's Inaugural Address, when he pledged to go anywhere and to pay any price in the cause of freedom and democracy. After Kennedy's tragic assassination, the leaders of his party seemed to have applied a cost-benefit analysis to Presidential powers in the area of U.S. foreign policy

In the 200 years of this Republic, the United States has been involved in approximately 200 military conflicts, beginning on the high seas in 1789 and continuing in 1988 in the Persian Gulf. Was has officially been declared a half dozen times throughout American history. In the nine decades preceding the Constitutional Convention, the countries of the Western World fought in 38 wars, and only 1 of them was declared. At the close of the Argentia Conference in 1940, President Franklin D. Roosevelt confided to his soon-to-be British ally that he intended to wage war, and not to declare it. This is exactly the distinction made by the Framers that hot summer day in Philadelphia, when they distinguished between making war and declaring war.

Yesterday morning, during our first war powers hearing, House Foreign Affairs Committee Chairman Dante Fascell asked: "How do you define 'war'?" The long history of constitutional practice provides the best answer available. The Founders were well aware of the need for national security. That was one of the reasons the Philadelphia Convention was originally summoned. Could it be that the men of Philadelphia did not spend much time on the precise distinction between war and hostilities because they knew the difference, and had no need to debate it at length?

Mr. Chairman, I do not intend to trade the history of the Republic as it relates to the great issues of war and peace. I will leave that to our eminent witnesses. But I do think we ought to recognize that 200 years of state practice have had some legal meaning for the operation of our constitutional system. I don't agree with General von Clausewitz that war is merely diplomacy by other means. I do think, however, that the national interest sometimes mandates the use of armed force, or the threat of armed force. And I do not think that a congressional foreign policy is vastly superior to an executive branch foreign policy. As Secretary of State George Shultz has repeatedly said, "535 Secretaries of State are 534 too many."

Professor Rossiter cogently observed more than a quarter century ago: "The Presidency of the future will grow out of the Presidency of the present. * * *" We cannot afford to make the future hostage to our present whims. History may or may not teach, but it certainly provides examples. It also demonstrates that wrong choices have bad results.

The War Powers Resolution of 1973 was a wrong choice by the Congress. Let us undo the minor constitutional damage that has already been done, before the greater political harm befalls us.

I look forward to the seminar that our witnesses are about to engage in. Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR PRESSLER—SEPTEMBER 16, 1988

Mr. Chairman, once again we are pleased to welcome two distinguished witnesses. A former Secretary of State and a former Secretary of Defense and Attorney General are certainly individuals who have been involved in major foreign policy and national security decisions. Both of them are distinguished lawyers and therefore highly qualified experts on such major legislation as the War Powers Resolution of 1973. If I remember correctly, Mr. Richardson was Attorney General during the initial passage by the Congress of the War Powers Resolution. Secretary Vance served during an administration which did involve itself in an act of humanitarian intervention in April 1980.

Both of our witnesses have had long and distinguished careers in the executive branch of the Government, and both of them are highly knowledgeable in the important area of congressional-executive branch relations. Given the testimony we have already heard during the last several weeks, and during the last several days, cooperation rather than confrontation seems to be the key to a successful foreign policy.

I happen to believe that the War Powers Resolution was a bad idea when it was passed over the President's veto, and that it continues to be a bad idea. It exacerbates rather than ameliorates congressional-Presidential relations. It institutionalizes interbranch conflict, and raises serious legal-political issues which so far have not been capable of either a political or a legal resolution.

The distinguished chairman of the House Foreign Affairs Committee, Dante Fascell, was the first witness before this committee on this issue, and he put it best—informal cooperation on a continuing basis. If the President and the Congress confide in one another, they will have confidence in one another. When that takes place, major international crises will not become, as they did with Vietnam and the war in Southeast Asia, major domestic crises.

Mr. Chairman, the experience of our two witnesses with respect to the war powers is a rich one, and I look forward to their testimony. Thank you, Mr. Chairman.

Chapter 6

INTERNATIONAL AFFAIRS

I. INTRODUCTION—THE ROLE OF THE THREE BRANCHES OF GOVERNMENT

§ 6.2 The Congress

Page 377, add to footnote 31:

31. Note, The Extraterritorial Application of the Constitution—Unalienable Rights, 72 Va.L.Rev. 649 (1986).

§ 6.3 The Court

Page 379, add to footnote 7:

7. See generally, Glennon, Raising the Paquette Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 Nw.U.L.Rev. 321 (1986).

Page 381, add to footnote 18:

18. See generally, Note, The Act of State Doctrine: Resolving Debt Situs Confession, 86 Colum.L.Rev. 594 (1986).

II. THE TREATY MAKING POWER

§ 6.5 Limitations on the Treaty Power

Page 387, add to footnote 6 (from previous page):

6. See generally, Glennon, United States Security Treaties: The Commitment Myth, 24 Colum.J. of Transnational L. 509 (1986).

§ 6.7 Conflicts Between Treaties and Acts of Congress

Page 393, add to footnote 5:

5. United States v. Dion, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986), on remand 800 F.2d 771 (8th Cir.1986) (Bald Eagle Protection Act abrogated any treaty right of Indian to shoot bald eagles).

III. THE WAR POWER

§ 6.9 Introduction

Page 402, to be read as new text after footnote 4

In fact, from 1798 to 1970, there were over 130 cases where the President transferred arms or other war material abroad or actually sent troops, all without any congressional authorization.[4.1]

[4.1] See Appendix at end of § 6.10.

§ 6.10 Historical Development of the War Power

Page 403, add to footnote 8:

8. See also, Appendix at end of this § 6.10.

Page 405, add to end of page:

involvement in. . . . In addition, from 1798 through 1970 (shortly before the 1973 enactment of the War Powers Resolution [19.1]) historical research has shown many instances—137 cases—where the President, without Congressional authorization, has sent American troops into imminent hostilities or transferred arms or other war material abroad. These instances are summarized in the Appendix which follows this section.

[19.1] See § 6.10.

Page 405, to be read at end of page:

President Reagan justified the 1983 American intervention in Grenada on three grounds: a confidential appeal from the Governor General of Grenada; a request for United States help from the Organization of Eastern Caribbean States, which relied on their collective defense treaty; and the need to protect approximately 1000 U.S. nationals on the island.[20]

[20] Riggs, The Grenada Intervention: A Legal Analysis, 109 Military L.Rev. 1, 2 (1985).

APPENDIX

EXECUTIVE ACTION FROM 1798 THROUGH 1970

Cases where the President has sent troops into imminent hostilities or transferred arms or other war material abroad without Congressional authorization.[*]

[*] L. Gordon Crovitz developed this list by extensive historical research in State Department and Congressional reports. The list is published here with permission. See, Crovitz, "Presidents Have a History of Unilateral Moves," The Wall

1798–1800. President Adams responded to France's seizing of U.S. merchant ships by having the navy capture 90 French ships and the marines land on Santo Domingo.

1800. The marines aided the U.S. schooner *Enterprise* against a Spanish man-of-war in the West Indies.

1801–05. The Barbary War against Tripoli began when President Jefferson sent warships into the Mediterranean. Several pirate ships were sunk before Congress was informed of the mission.

1806. Troops crossed the Rio Grande into Spanish territory.

1806–10. Gunboats fought Spanish and French privateers.

1810. Troops seized territory in West Florida held by the Spanish.

1813–14. Marines built a fort to protect ships visiting the Marquesas Islands in the South Pacific, which were claimed by Spain.

1814–15. After 3,000 attacks on U.S. merchant ships, naval engagements were made against pirates throughout the Caribbean, especially off Cuba, Puerto Rico, Santo Domingo and the Yucatan peninsula.

1816–8. President Monroe made attacks on Spanish Florida, one against a fort and the other against Seminole Indians.

1818. The Navy landed at the Columbia River in Oregon, claiming possession of an area claimed by Russia and Spain.

1820–22. Marines protected commerce off the west coast of South America during a revolt against Spain.

1821–22. Naval attacks against Cuba, including the burning of vessels and the taking of booty, before congressional authorization.

1830. Marines helped capture slave ships off Haiti.

1831–32. Marines landed on Falkland Islands to free three seized ships from Argentine colonists.

1833. Marines and sailors landed in Argentina to protect U.S. lives and property during a *revolt* in Buenos Aires.

1835–36. Marines landed at Callao and Lima, Peru to protect U.S. lives and property and the consul during a revolt.

1836. Armed forces occupied territory claimed by Mexico during the Texas war for independence.

1837. Marines captured a Mexican ship after its crew seized two U.S. merchantmen.

Street Journal, Jan. 15, 1987, at 18, col. 3-6. Mr. Crovitz, B.A., University of Chicago, 1980; M.A. (Jurisprudence) Oxford University 1982; J.D., Yale University 1986, is Assistant Editor of the Editorial Page of The Wall Street Journal.

1839. Forces landed in Sumatra and bombed towns to protect U.S. lives and property after attacks on U.S. ships.

1840. A naval squadron landed on the Fiji Islands and burned a village after attacks on American surveying parties.

1842. The Navy occupied Monterey and San Diego, which were controlled by Mexico.

1844. Sailors and marines intervened to protect Americans at China's Canton trading post.

1844. President Tyler deployed forces to protect Texas against Mexico, anticipating Senate approval of a treaty of annexation that was later rejected.

1846–48. President Polk ordered troops into disputed territory with Mexico before the congressional declaration of war.

1849. The U.S.S. *St. Louis* gained the release of an American seized by Austrians in Smyrna (now Izmir, Turkey) by threatening to fire its guns.

1851. After a massacre of foreigners, in Jaffa, Turkey, a U.S. squadron was ordered to display arms along the Turkish coast.

1851. The U.S.S. *Dale* bombarded Johanna Island (east of Africa) and landed a force to punish the local chieftain for imprisoning an American whaling captain.

1852–53. Landings of marines were made to protect U.S. lives and property in Buenos Aires during a revolt.

1853. Marines boarded a vessel in the China's Canton River to put down a mutiny.

1853–54. Commodore Perry led 400 men on his expedition to Japan in 1853. The following year, Perry and 2,500 men took the Bonin and Ryukyus Islands. A commercial treaty signed by Perry was later ratified by the Senate.

1853–55. Forces landed at Greytown, Nicaragua to protect U.S. lives and property during political disturbances. After an American company's property was destroyed and the U.S. minister to Nicaragua assaulted and detained, the U.S.S. *Cyane* bombed the town, sent a landing party and finally burned it. President Pierce later explained the action in a message to Congress.

1854. Marines went ashore in Okinawa and seized a religious shrine to punish the murder of an American. They also landed to enforce treaty provisions.

1854. Part of Commodore Perry's squadron, joined by British marines, landed off Shanghai and Ningpo.

1855. Marines landed in Fiji in retaliation for injuries to wrecked seamen, and fought skirmishes and burned villages.

1855. Forces landed in Montevideo, Uruguay to protect U.S. lives and property during a civil war.

1855. Marines fought pirates on land and sea at Ty Ho Bay, China.

1856. Marines landed in Panama to protect a railroad during a revolt.

1856. President Buchanan ordered 280 officers and men to land in Canton, China during hostilities between the British and Chinese and after an unprovoked attack on an unarmed boat displaying the American flag. The U.S. destroyed four Chinese forts.

1858. Warships landed in Uruguay to protect U.S. lives and property during a revolt in Montevideo.

1858. After British cruisers repeatedly boarded and searched U.S. merchant vessels in the Gulf of Mexico, President Buchanan ordered a naval force to the waters around Cuba with orders to "protect all vessels of the U.S. on the high seas from search or detention. . . ." War with Britain was averted when it abandoned its claim to search ships in peacetime.

1858. Marines and sailors landed on Waia Island, Fiji to avenge the murder of two American traders.

1858–59. The U.S. Navy made a display of force along the Turkish coast after Americans were massacred at Jaffa.

1859. Two hundred soldiers crossed the Rio Grande in pursuit of the Mexican bandit Cortina.

1859. Marines landed to protect Americans in Woosung and Shanghai, China after local disorders.

1860. Marines and sailors landed twice at Kissembo, Portuguese West Africa, to protect U.S. lives and property during warfare between the natives and the Portuguese.

1863. After the Japanese fired on a small American merchantman, the navy fired on three Japanese vessels.

1864. U.S. joined British, French and Dutch warships in an attack on Shimonoseki, Japan to open the straits as required in a commercial agreement.

1865. Going beyond a treaty of 1846, a landing party went ashore at Panama, Colombia to protect U.S. lives and property during a revolution.

1865–66. Fifty thousand troops were sent to the Mexican border to back up a protest against the presence of 25,000 French troops in Mexico, who withdrew.

1866. Marines landed at Newchwang, China to seize and punish Chinese leaders for assaulting the American consul.

1867. Marines landed and occupied Managua and Leon, Nicaragua.

1868. Warships occupied Yokohama and attacked Hiago and Nagasaki in Japan to protect U.S. lives and property.

1868. Marines and sailors landed at Montevideo, Uruguay to protect U.S. lives and property during a revolt.

1869–71. After negotiating a treaty of annexation, President Grant sent a naval force to the Dominican Republic where it remained after the Senate rejected the treaty.

1870. Marines landed in Honolulu to put the U.S. consulate's flag at half-mast in recognition of a royal death after the consul refused and the matter became a local controversy.

1871. Marines and sailors captured five Korean forts after a surveying party was attacked.

1873. After Spain captured and executed 53 crew members from an American steamer captured off Jamaica, President Grant recalled all available ships and threatened war. Spain paid an indemnity to the U.S.

1873–82. Troops repeatedly crossed into Mexico to pursue cattle thieves and Indian marauders. Raids were legitimated in 1882 by a bilateral agreement.

1874. A landing party of 150 men from two vessels maintained order during the election of a Hawaiian king.

1876. A small force landed to preserve order when the town of Matamoras, Mexico was without a government.

1882. More than 100 marines and sailors landed in Alexandria, Egypt to protect U.S. lives and property when the city was being bombed by the British.

1888. Marines landed in Korea and marched to Seoul to protect U.S. lives and property during a revolt.

1888. Warships threatened Haiti until a U.S. merchant vessel was returned and an indemnity paid.

1889. Marines landed in Hawaii to guard U.S. lives and property during revolutionary disorder.

1890. Marines landed in Argentina to protect the consulate in Buenos Aires.

1891. A squadron seized four schooners in areas of disputed sovereignty to regulate sealing.

1891. More than 100 Marines landed at Valparaiso, Chile to protect the American consulate and to protect U.S. lives and property during a revolt.

1893. Marines landed in Hawaii to protect U.S. lives and property during a revolt against Queen Liliukalani.

1894. Marines landed at Bluefields, Nicaragua to protect U.S. lives and property during a civil war.

1894–96. Marines and sailors landed in Korea and marched to Seoul to protect U.S. lives and property during the Sino–Japanese War.

1894–95. Marines were stationed at Tientsin, China and marched as far as Peking to protect U.S. lives and property during the Sino–Japanese War.

1895–96. Marines were sent to Seoul, Korea to protect U.S. lives and property during a revolt.

1896. Marines landed at Corinto, Nicaragua to protect U.S. lives and property during a revolt.

1898. Marines landed at Juan del Sur, Nicaragua to protect U.S. lives and property during a revolt.

1898–99. Marines were stationed at Tientsin and Peking, China to protect U.S. lives and property during a conflict between the dowager empress and her son.

1899. Marines landed at Bluefields, Nicaragua to protect U.S. lives and property during a revolt.

1900–01. President McKinley sent 5,000 troops to protect American interests during the Boxer Rebellion in China.

1903. Marines landed at Puerto Cortez, Honduras to protect U.S. lives and property during a revolt.

1903. Marines landed at Santo Domingo, Dominican Republic to protect U.S. lives and property during a revolt.

1903–04. Marines landed at Beirut to protect U.S. lives and property during a revolt.

1903–04. Marines escorted negotiators from Djibouti to Addis Ababa as they tried to make a treaty with the emperor of Abyssinia.

1903–04. Marines landed during the independence revolution by Panama against Columbia to protect U.S. citizens.

1904. Marines landed at three cites in the Dominican Republic to protect U.S. lives and property during a revolt.

1904. A squadron was sent to Moroccan waters to force the release of a kidnapped American. (President Roosevelt; "We want either Perdicaris alive or Raisuli dead.")

1904–05. Troops went to Seoul to guard the legation during the Russo-Japanese War and to evacuate U.S. citizens.

1905–07. President Roosevelt put into effect a treaty guaranteeing the integrity of the Dominican Republic despite the Senate's failure to ratify it.

1907. Marines intervened during a war between Honduras and Nicaragua.

1910. Marines and sailors landed at Greytown, Nicaragua to protect U.S. lives and property during a revolt.

1910–11. Marines and sailors landed at Puerto Cortez, Honduras to prevent seizure of an American-owned railway.

1912. Troops protected diplomats in Istanbul during the Balkan War.

1912. Marines landed at Guantanamo, Cuba to protect U.S. lives and property during a revolt.

1912–25. The president of Nicaragua asked President Taft to send sailors and marines to protect U.S. lives and property during a civil war. Several battles were fought. A marine detachment remained to guard diplomats in Managua.

1913. Marines landed at Claris Estero, Mexico to protect U.S. lives and property during a revolt.

1914. Marines landed at Port au Prince, Haiti to protect U.S. lives and property during a revolt.

1914. Gunships attacked revolutionaries in the Dominican Republic.

1914. Marines were sent to guard the embassy in Paris on the outbreak of World War I.

1915–34. Troops were sent to Haiti to forestall European intervention to collect debts. Haiti was placed under U.S. military and administrative supervision.

1916–24. President Wilson ordered the occupation of Santo Domingo, Dominican Republic by 3,000 marines.

1917. President Wilson asked Congress for authority to arm U.S. merchant vessels with defensive guns. When Congress refused to pass such a law, President Wilson acted on his own authority to equip the ships with guns and gunners assigned to them by the Navy. War was declared two months later.

1918–19. Troops pursued bandits into Mexico nine times and fought a battle with Mexicans at Nogales.

1918–20. President Wilson acted without congressional approval to help the anti-Bolsheviks against the new Soviet regime. More than 13,000 troops were sent, and battles were fought at Archangel, Vladivostok and the Murmansk Coast near Norway.

1919. At the request of Italy but unknown to Congress, troops were sent to Dalmatia to quell fighting between Italians and Serbs.

1919. Marines landed at Istanbul to protect the consulate during the Greek occupation of the city.

1919. Troops were sent to Honduras to maintain order during a revolt.

1920. Troops were sent to Guatemala to protect U.S. lives and property during a revolt.

1920–2. Marines were sent to protect U.S. radio facilities at Vladivostok.

1921. Naval squadrons demonstrated to prevent war between Panama and Costa Rica.

1922. A naval squadron landed at Smyrna to protect U.S. lives and property during Turkish–Greek warfare.

1924–5. Marines landed at several points in Honduras to protect U.S. lives and property during a revolt.

1926–33. President Coolidge sent more than 5,000 troops to Nicaragua to put down the revolt led by Sandino, which was partly communist-funded. Democrats in Congress called this President Coolidge's "private war" and "imperialism," but did not question his authority to send troops. The U.S. supervised elections before recalling the marines.

1936. Marines evacuated Americans during the Spanish Civil War.

1940. President Roosevelt informed Congress that he had agreed to deliver a flotilla of destroyers to Britain in exchange for military bases in the western Atlantic.

1941. Despite express congressional limitations against using troops outside the Western Hemisphere (Reserves Act of 1940 and Selective Service Act of 1940), FDR occupied Greenland at the request of local authorities following the German invasion of Denmark.

1941. FDR ordered troops to occupy Iceland, with the approval of local authorities, but as in the case of Greenland, in violation of congressional legislation against the sending of troops outside the Western Hemisphere.

1941. FDR ordered troops to occupy Dutch Guiana by agreement with the Dutch government in exile after Holland fell to the Nazis. Again, this violated congressional legislation.

1941. FDR ordered the Navy to patrol shipping lanes to Europe to protect military aid to Britain and the Soviet Union. There were attacks on German submarines before Congress partially repealed the Neutrality Act.

1946. President Truman sent naval carriers to Istanbul to resist the Soviet Union's moves against Turkey and its straits.

1948. Marines were sent to Jerusalem to protect the consular office during the Arab–Israeli War.

1948. Marines were sent to the Mediterranean as a warning to Yugoslavia not to attack 5,000 U.S. troops in Trieste.

1948–49. Marines were sent to Nanking and Shanghai, China to help evacuate Americans from communist forces.

1950–53. President Truman sent forces to protect South Korea after the communists invaded from the north. The war was made solely on the basis of executive authority; there was no declaration of war. The State Department said that the "president, as commander in chief of the armed forces of the U.S., has full control over use thereof."

1954–55. Five carriers evacuated U.S. civilians and military personnel from the Tachen Islands of China.

1956. Marines evacuated 1,500 people, mostly Americans, from Alexandria, Egypt during the Suez crisis.

1957. Marines were sent to Indonesia to protect U.S. lives and property during a revolt.

1958. Marines were stationed off Venezuela to protect U.S. lives and property during a revolt.

1958. Marines and a naval squadron were sent to Indonesia to protect U.S. lives and property during a revolt.

1958. President Eisenhower sent 14,000 marines to Beirut after a Moslem revolt to protect U.S. lives and property.

1959–60. President Eisenhower deployed marines off Cuba to protect U.S. lives and property during the Castro revolution.

1961. President Kennedy sent the Navy, with jet planes, to patrol the Dominican shore during a revolt until the Trujillo brothers fled the country.

1961–73. Twelve thousand troops were sent to the Vietnam War before authorization by Congress or treaty. Full congressional authorization came in the 1964 Gulf of Tonkin Resolution, which approved support of "the determination of the president, as commander in chief, to take all necessary measures to repel any armed attack" on U.S. troops in Southeast Asia.

1962. President Kennedy ordered a quarantine of Cuba during the missile crisis. He deployed 180 Navy ships and a B–52 bomber fully loaded with atomic bombs. Later, under a treaty, the Organization of American States approved the move.

1963. Marines were deployed off the coast of Haiti during a revolt.

1964. President Johnson sent military aid to the Congo and helped transport Belgian troops so that hostages, including Americans, held by rebel forces could be freed.

1965. President Johnson sent 4,500 troops to the Dominican Republic to protect U.S. lives and property during a revolt.

1967. President Johnson sent the 6th Fleet to the Syrian coast as an ultimatum to the Soviet Union that it should not become involved in the Arab-Israeli war.

1967. Military aid and advisers were sent to help President Mobutu of the Congo quell a revolt.

1970. President Nixon dispatched 1,500 marines to the coast of Lebanon to persuade Syria and Iraq not to enter into the conflict between King Hussein of Jordan and Palestinian guerrillas.

§ 6.12 The War Powers Resolution

Page 411, add to footnote 2:

2. Egeland, The Legal Limitations on the Use of Military Force Under the War Powers Resolution. 25 Air Force L.Rev. 146 (1985).

§ 6.13 Military Courts

Page 415, substitute the fourth full paragraph with the following:

(c) Military Law and Its Applicability in Time of Peace

Military law refers to the legal system, including the courts, by which the military forces are governed.[14] Military courts have limited jurisdiction: they can try only persons who were members of the armed forces at the time of the offense charged; there is no requirement, however, that there be any "service connection" to the offense charged.[14.1] The Court reached that conclusion only after travelling down a long road, as discussed below.

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[14] Present military law is codified in the Uniform Code of Military Justice, 10 U.S.C.A., ch. 47.

See generally, S. Adye, A Treatise on Courts Martial (1786); 1 W. Winthrop, Military Law and Precedents (Military Law) (2d ed. 1896, 1920 reprint); G. Davis, A Treatise on the Military Law of the United States 437 (3d rev. ed. 1915); Weiner, Courts–Martial and the Bill of Rights: The Original Practice I, 72 Harv.L.Rev. 1 (1958); Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 12 Vand.L.Rev. 435 (1960); Nelson & Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn.L.Rev. 1 (1969); Comment, O'Callahan and Its Progeny: A Survey on Their Impact on the Jurisdiction of Courts–Martial, 15 Vill.L.Rev. 712 (1970); Cooper, O'Callahan Revisited: Severing the Service Connection, 76 Mil.L.Rev. 165 (1977); Tomes, The Imagination of the Prosecutor: The Only Limitation to Off–Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker, 25 Air Force L.Rev. 1 (1985); J. Horbaly, Court-Martial Jurisdiction (1986).

[14.1] Soloria v. United States, ___ U.S. ___, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), rehearing denied ___ U.S. ___, 108 S.Ct. 30, 97 L.Ed.2d 819 (1987) overruling O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969).

Page 417, to be read as new text after second full paragraph:

The service-connected requirement led to confusion in the lower courts, especially in cases involving drug offenses.[23.1] Moreover, the *O'Callahan* holding does not reconcile easily with the broad power of Congress to "make Rules for the Government and Regulation of the land and naval Forces,"[23.2] and is not well supported by historical understanding. Thus, in *Solorio v. United States,*[23.3] the Court overruled *O'Callahan* and held that it is Constitutional to convene a court martial to try a serviceman who was a member of the armed forces at the time of the offense charged. Military jurisdiction depends solely on the defendant's status as a member of the armed forces and not on the "service connection" of the offense charged.

[23.1] See discussion in Cooper, O'Callahan Revisited: Severing the Service Connection, 76 Mil.L.Rev. 165, 172-82 (1977); Tomes, The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker, 25 Air Force L.Rev. 1, 13–31 (1985).

Compare, e.g., United States v. Wilson, 2 M.J. 24 (C.M.A.1976) (*off-post* robbery and assault of a fellow serviceman held *not to be* service connected), with United States v. Scott, 15 M.J. 589 (A.C.M.R.1983) (serviceman's *off-post* murder of another serviceman held *to be* service connected because the crime had its basis in on-post conduct of the participants).

[23.2] U.S. Const. art. I, § 8, cl. 14.

[23.3] ___ U.S. ___, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), rehearing denied ___ U.S. ___, 108 S.Ct. 30, 97 L.Ed.2d 819 (1987).

Judicial Deference to Military Judgment. The Court also relied on the fact that the courts usually defer to military judgment. E.g., Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (free exercise of religion); Chappell v. Wallace, 462 U.S. 296, 300–05, 103 S.Ct. 2362, 2365–68, 76 L.Ed.2d 586 (1983) (no implied cause of action for racial discrimination); Rostker v. Goldberg, 453 U.S. 57, 64–66, 70–71, 101 S.Ct. 2646, 2651–52, 2654–55, 69 L.Ed.2d 478 (1981) (sex discrimination); Brown v. Glines, 444 U.S. 348, 357, 360, 100 S.Ct. 594, 601, 602–03, 62 L.Ed.2d 540 (1980), on remand 618 F.2d 623 (9th Cir.1980) (free expression); Middendorf v. Henry, 425 U.S. 25, 43, 96 S.Ct. 1281, 1291-92, 47 L.Ed.2d 556 (1976), on remand 536 F.2d 303 (9th Cir.1976) (right to counsel in summary court-martial proceedings); Schlesinger v. Councilman, 420 U.S. 738, 753, 95 S.Ct. 1300, 1320–11, 43 L.Ed.2d 591 (1975) (availability of injunctive relief from an impending court-martial); Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2561–62, 41 L.Ed.2d 439 (1974) (due process rights and freedom of expression).

Chapter 6

INTERNATIONAL AFFAIRS

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I. INTRODUCTION—THE ROLE OF THE THREE BRANCHES OF GOVERNMENT

The United States in its capacity as a sovereign nation must interact with other countries in the international realm, for the ability of a nation to conduct foreign relations is inherent in the concept of sovereignty.[1] Because specific constitutional references to foreign relations are, however, sparse, much of the foreign affairs power has evolved from constitutionally implied powers and extraconstitutional sources. Our effort in this section to understand the constitutional sources of our foreign relations will be first to study the roles of the President, Congress and the courts in foreign affairs as set forth in the text of the Constitution. Then we shall look closer at specific areas of foreign affairs, the treaty power, executive agreements, and the war power. Finally, we will consider the constitutional limits placed on any Congressional definition of "treason."

§ 6.1 The Executive

Traditionally the President has been considered responsible for conducting the United States' foreign affairs.[1] Justice Sutherland, in the leading case of *United States v. Curtiss-Wright Export Corp.*,[2] acknowledged this principle in a unanimous opinion:

> [T]he President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." [3]

Blackstone had earlier recognized the historical concept of executive predominance in foreign relations indicating in his *Commentaries*, "What is done by the royal authority, with regard to foreign powers is the act of the whole nation." [4]

Such plenary executive power is not, however, found anywhere in the text of the Constitution. Nor will any examination of the affirmative grants of foreign affairs power in the Constitution reveal that the President is the "sole organ" of foreign relations.

Specific enumerations of the executive's foreign affairs powers appear in Article II of the Constitution. The President is empowered to make treaties, with a concurrence of two-thirds of the Senate, and to appoint ambassadors, public ministers and consuls with the Senate's advice and consent.[5] Additionally, the chief executive is authorized, as the representative of the United States, to receive ambassadors and public ministers.[6] The Commander-in-Chief power, constitutionally delegated to the President, also profoundly affects United States' international relations.[7] Although these provisions attest to the fact the President has an active role in foreign affairs, the executive, in actuality, has gone far beyond these express grants in conducting international relations.

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[1] L. Henkin, Foreign Affairs and the Constitution 16 (1972); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936).

§ 6.1

[1] L. Henkin, Foreign Affairs and The Constitution 37 (1972).

[2] 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

[3] 299 U.S. at 319, 57 S.Ct. at 220.

[4] I, W. Blackstone, Commentaries 252 (Cooley ed. 1871).

[5] U.S. Const. art. II, § 2.

[6] Id. § 3.

Hamilton's Rationale. What sources, in addition to express Constitutional provisions, does the President receive his foreign affairs powers from? Alexander Hamilton, in support of the theory of presidential supremacy in foreign affairs, wrote under the pseudonym "Pacifus" a series of articles published in *The Gazette of the United States* supporting George Washington's "Proclamation of Neutrality," issued in 1793 after the outbreak of war between Great Britian and France. In these articles Hamilton argued that the first clause of Article II, "the executive power shall be vested in a President of the United States. . . ." was a general grant of power to the executive and that the following specific grants in Article II, except when expressly limited, serve to interpret the general grant.

Hamilton concluded that any foreign affairs power not explicitly granted to the Congress devolves by implication upon the president through the executive power clause.[8] As examples, Hamilton cited the President's power to recognize governments and terminate relations with foreign nations under the auspices of the constitutional provision authorizing the executive to receive foreign ambassadors and consuls.[9] Although treaties are subject to the advice and consent of the Senate, the President, by implication, is empowered to continue or suspend the treaty on his own initiative Hamilton believed. Hamilton warned in *The Federalist* of the danger of restricting the executive's powers too severely.[10]

President Washington's Position. These implied Constitutional powers were recognized as early as George Washington's administration. Washington, by receiving "Citizen" Genet in accord with the Constitutional provisions allowing the President to receive foreign ambassadors and ministers, recognized the revolutionary government of France, and later, by demanding Genet's recall, ended diplomatic relations with France without consulting Congress.[11] Washington also established historical precedent for limiting Congress's role in the area of treaty making when he refused to comply with the House of Representatives' request to give to Congress papers relevant to the negotiations involving the Jay treaty in 1796. The executive's treaty negotiation powers were, Washington believed, exclusive.[12] The President alone was empowered to designate individuals to conduct foreign affairs negotiations abroad and to determine what should be included in international agreements.[13]

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[7] Id. § 2.

[8] E. Corwin, The President: Office and Powers 179–81 (4th Rev.Ed.1957), citing from A. Hamilton, Works 76 (Hamilton, ed.)

[9] U.S.Const. art. II, § 3

[10] See The Federalist Nos. 67, 70; Corwin, The President, supra note 8, at 16–17.

[11] U.S.Const. art. II, § 3; E. Corwin and L. Koenig, The Presidency Today 30 (1956); Corwin, The President, supra note 8, at 181–82.

The Supreme Court indirectly legitimized these extensions of the constitutional foreign affairs power in *Marbury v. Madison*.[14] In *Marbury* the Court stated that judicial review of conflicts between the executive and Congress over the foreign affairs power would be inappropriate, terming disputes of this nature as inherently political questions.[15]

Theories Based on the President's Role as "Commander-in-Chief" and His Duty to "Take Care" that "The Laws Be Faithfully Executed." Implied foreign affairs powers have also been extrapolated from the Commander-in-Chief clause and the Constitutional provision that the executive shall "take care" that "the laws be faithfully executed."[16] The extension of executive foreign affairs power on the basis of these two grants has not been as successful as Hamilton's claim to the presidential foreign affairs power premised on the "executive power clause" discussed above.[17]

The power attributed to the Commander-in-Chief will be treated later in section III dealing with the War Power.

The clause empowering the executive to "take care" that laws are "faithfully executed" has been employed to justify executive action to insure treaty provisions are faithfully adhered to.[18] Presidents have even authorized forceful intervention in foreign conflicts under the auspices of this clause contending that the duty to see all laws are faithfully executed also encompasses international law. These assertions have, however, often been thought to be unpersuasive because it is generally understood that this clause applies to international law only to the extent it has been incorporated into the law of the United States in situations occurring either within the United States or affecting American citizens or the government.[19]

The Curtiss-Wright Case. The Supreme Court acknowledged the unique role of the executive in *United States v. Curtiss-Wright Export Co.*[20] This case involved a controversy surrounding a presidential

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[12] Corwin, The President, supra note 8, at 181–83.

[13] Corwin & Koenig, supra note 8, at 31.

[14] 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[15] 5 U.S. (1 Cranch) at 166.

[16] U.S.Const. art. II, § 3.

[17] Henkin, supra note 1, at 42.

[18] Id. at 54–55.

[19] Id. at 55. For example, troops have been sent under presidential authority to Panama (1882), Cuba (1903), Haiti (1916), Korea (1950), Vietnam (1960's); Matthews, The Constitutional Power of the President to Conclude International Agreements, 64 Yale L.J. 345, 360 n. 88, 367 & n. 115–120 (1955).

[20] 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). See generally, Lofgren, United States v. Curtiss-Wright Export Corpora-

Embargo Proclamation issued May 28, 1934,[21] prohibiting the sale of arms to countries involved in the Chaco conflict in South America. Authorization for this declaration was granted in a joint congressional resolution passed earlier on the same day empowering the President to issue a proclamation limiting arms and ammunition sales to those involved in the conflict.[22] Revocation of the proclamation occurred in November of 1935.[23]

The defendants, indicted in 1936 for conspiring to sell arms to Bolivia, challenged the joint resolution claiming it was an unconstitutional delegation of authority. The Supreme Court upheld the resolution, finding the proclamation valid. Justice Sutherland, writing for the majority, addressed the role of the President in international relations:

> [T]he federal power over external affairs in origin and essential character [is] different from that over internal affairs [and] . . . participation in the exercise of the power is significantly limited. In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the senate; but he alone negotiates.[24]

Sutherland also quoted with approval a statement issued on February 15, 1816 by the Senate Committee on Foreign Relations:

> The President is the Constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations . . .. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.[25]

Sutherland concluded that it was important to realize that presidential authority to issue the proclamation came not only from the joint resolution of Congress but also from the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .." This power did not need to be based on an act of Congress, the Court recognized, although it was "of course" to be exercised in subordination to express provisions of the Constitution.[26]

A pragmatic look at the international scene supported this view of the Constitutional framework. The President:

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tion: An Historical Reassessment, 83 Yale L.J. 1 (1973).

[21] 48 Stat. 1744.

[22] 48 Stat. 811.

[23] 49 Stat. 3480.

[24] 299 U.S. at 319, 57 S.Ct. at 220.

[25] 299 U.S. at 319, 57 S.Ct. 220 quoting U.S. Senate Reports, Committee on Foreign Relations vol. 8 at 24 (1816).

[26] 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936). See Nowak & Rotunda, A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, The Foreign Affairs Power, and the Rule of the Court, 29 U.C.L.A.L.Rev. 1129, 1149 (1982).

> not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries. . . . He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary and the premature disclosure of it productive of harmful results.[27]

Although Sutherland depicts presidential predominance in foreign affairs, it should not be forgotten that in that case the President was acting in accord with congressional policy. Justice Jackson in his concurrence in *The Steel Seizure Case* [28] interpreted the *Curtiss-Wright* decision as dealing with situations arising when the presidential actions are in harmony with an act of Congress, not when the President acts contrary to Congress.[29] The Jackson interpretation would place a significant limitation on the theory of an unrestrained executive plenary foreign affairs powers.

The Supreme Court reaffirmed much of the reasoning of *Curtiss-Wright* as to the unique nature of the President's foreign affairs power when it refused to review an executive order concerning the involvement of United States citizens with foreign air transportation in *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*[30] In that case the Civil Aeronautics Board, with the express approval of the President, granted an overseas air route to Chicago and Southern Air Lines and denied it to its rival, the Waterman Steamship Corporation. The proceedings were not challenged as to their regularity, but Waterman nonetheless sought review of the CAB decision as approved by the President. The Court recognized that Congress could delegate "very large grants of its power over foreign commerce to the President." [31] And the President possesses his own foreign affairs power. In the *Waterman* case the Court found the President drew his powers from both sources.

The Court in that case, where the President was not acting in defiance of Congressional direction, reasoned:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . .. [T]he very nature of executive decisions as to foreign policy is political, not judicial.[32]

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[27] 299 U.S. at 320, 57 S.Ct. at 221.

[28] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

[29] 343 U.S. at 635–636 n. 2, 72 S.Ct. at 870–871 n. 2 (Jackson, J., concurring).

[30] 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948) (Jackson, J., for the Court).

[31] 333 U.S. at 109, 68 S.Ct. at 435.

[32] 333 U.S. at 111, 68 S.Ct. at 436.

In *Waterman* the Court therefore concluded, in a 5 to 4 opinion, that whatever portion of the CAB order which emanated from the President was not subject to judicial review. The CAB orders, before presidential approval, are premature and not subject to review. After such presidential approval, they "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." [33]

Thus by constitutional exegesis, practical experience, and Congressional acquiescence, the executive has usually predominated the foreign affairs sphere, but this expansive international relations power is not plenary.[34]

WESTLAW REFERENCES

curtis* +1 wright /p president executive /p foreign /s affair nation policy relation

§ 6.2 The Congress

The continual controversy existing between Congress and the executive as to the extent of each branch's foreign affairs power centers on whether Congress and the president act as constitutional equals in this sphere or whether the executive initiates foreign policy while the Congress acts merely to implement the president's policy.[1] The importance of Congressional participation in international affairs was recognized during the early stages of United States' foreign policy.

Madison's Rationale. In response to Alexander Hamilton's "Pacifus" articles supporting presidential supremacy in foreign affairs James Madison wrote a series of letters under the name of "Helvidius." Madison stated in these writings that Congress, not the President, was empowered to determine United States foreign policy. Hamilton, Madison argued, was attributing quasi-monarchical powers to the Executive branch reminiscent of the role of royalty in British foreign affairs.[2]

However one would decide the Hamilton-Madison debate, the fact remains that Congress plays a vital role in the foreign affairs scenario. Success or failure of executive foreign policy depends, to a great extent, on the support of Congress. Congress received foreign affairs powers from express and implied constitutional grants.

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[33] 333 U.S. at 114, 68 S.Ct. at 437. *Waterman* has been read not to preclude judicial review if the CAB's actions are beyond its powers, so that legally it could not place anything before the president. E.g., Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), affirmed by an equally divided Court, 391 U.S. 461, 88 S.Ct. 1715, 20 L.Ed.2d 748 (1968), rehearing denied 393 U.S. 957, 89 S.Ct. 370, 21 L.Ed.2d 369 (1968).

[34] See generally, Paust, Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined, 9 Hastings Const.L.Q. 719 (1982).

§ 6.2

[1] E. Corwin, The President: Office and Powers (4th Rev.Ed.1957) at 184–85.

[2] Id. at 180–82, citing 6 J. Madison, Writings 138 (Hunt, Ed.)

The specific Constitutional provisions granting Congress authority in foreign affairs matters delegate legislative power, and Article I, § 8 defines these powers broadly: "Congress shall have Power to provide for the common Defence, . . ."[3] to regulate foreign commerce,[4] and to define and punish Piracies and Felonies committed on the high Seas, and Offences against the law of Nations."[5] Additionally, Congress is empowered to declare war, to make rules of war, grant letters of marque and reprisal,[6] and to raise, support and regulate an army and a navy.[7] Two-thirds of the senate must consent to treaties before they are ratified. The Senate also is authorized to advise the president on the contents of the treaty.[8]

These express grants have been used extensively to validate congressionally created foreign policy.

The Power Over Foreign Commerce. The commerce clause[9] legitimizes congressional legislation regulating United States foreign trade. With the increased importance of international business transactions in relation to the world and national economies, foreign commerce has devoloped into a vital area of foreign affairs. Consequently, Congressional control of foreign commerce has a tremendous impact on the structure of United States foreign policy.[10]

Other Congressional Powers. Congress's power to declare war[11] directly checks the executive's foreign affairs power. These war powers will be discussed in more detail in section III of this Chapter. Specific constitutional grants enabling Congress to define and punish offenses against international law[12] empower Congress to create legislation regulating areas such as international air piracy, counterfeit foreign currency and foreign expropriations of the property of the United States or its citizens.[13] Through these provisions Congress creates binding foreign policy law.

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[3] U.S.Const. art. I, § 8, cl. 1.

[4] Id. § 8, cl. 3.

[5] Id. § 8, cl. 10.

[6] Id. § 8, cl. 11.

[7] Id. § 8, cls. 12, 13.

[8] Id. art. II, § 2.

[9] Id. art. I, § 8, cl. 3. For a discussion of the exclusive nature of Congress's power to regulate foreign commerce see United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) affirmed 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329 (1955), discussed below in § 6.8, infra.

[10] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) (state tax on instrumentalities unconstitutional because such tax may subject foreign commerce to risk of multiple burdens and may impair federal uniformity in an area where federal uniformity is essential). Cf. Independent Warehouses v. Scheele, 134 N.J.L. 133, 137, 45 A.2d 703, 705 (1946), affirmed 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90, 6 L.Ed. 23 (1824); Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations 107 U.Penn.L.Rev. 903, 925 (1959).

[11] U.S.Const. art. I, § 8, cl. 11.

[12] Id. § 8, cl. 10.

[13] E.g., 18 U.S.C.A. § 1651, 49 U.S.C.A. § 1472(i) (air piracy); United States v. Arjona, 120 U.S. 479, 484–88, 7 S.Ct. 628, 630–32, 30 L.Ed. 728 (1887) (Congress has the power to define and punish the offenses which disrupt harmonious foreign relations); The Hickenlooper Amendment, Foreign Assistance Act of 1961, § 620(e) as amended, 22 U.S.C.A. § 2370(e) (Congress authorizes the President to suspend foreign

Implied Congressional Powers. Congress has expanded its foreign affairs powers by reading implied grants to influence foreign policy into express Constitutional provisions. Article I, section 8 authorizes Congress:

> to make all Laws which shall be necessary and proper for carrying into the execution the . . . Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.[14]

The "necessary and proper" clause has been used effectively to check presidential foreign affairs power because the President relies on congressional legislation to enact his foreign affairs policy.

Congress can stymie implementation of executive international policy by refusing to appropriate necessary funds.[15] Foreign aid programs depend on Congressional authorization as provided for in the "spending power" clause.[16] Congress, under the auspices of the "postal power" clause, has authorized international postal agreements.[17] These constitutionally implied foreign affairs powers provide a basis for many of the congressional actions which influence foreign policy.

The Supreme Court has acknowledged the existence of a constitutionally implied power authorizing Congress to regulate foreign affairs. In *Perez v. Brownell* [18] the Court held that Congress was acting within its foreign affairs power by stating in the Nationality Act of 1940 [19] that any United States citizen voting in a foreign political election would lose his citizenship.[20] Justice Frankfurter, writing for the Court, asked:

> [W]hat is the source of power on which Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the nation . . .. [A] federal Government to conduct the affairs of that nation must be held to have granted that Government the powers indispensible to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations . . . [i]t must also be able to reduce to a minimum

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aid to any nation that has seized U.S. property or repudiated or nullified existing contracts with U.S. citizens or businesses when the foreign government fails to give full compensation for such acts within a reasonable time).

[14] U.S.Const. art. I, § 8, cl. 18.

[15] L. Henkin, Foreign Affairs and the Constitution 76–79 (1972).

[16] U.S.Const. art. I, § 8, cl. 1.

[17] Id. § 8, cl. 7, see e.g. 39 U.S.C.A. §§ 505, 506; L. Henkin, Foreign Affairs and the Constitution 77 (1972).

[18] 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958).

[19] 54 Stat. 1137 § 401 as amended Act of Sept. 27, 1944, 58 Stat. 746.

[20] 356 U.S. 44, 62, 78 S.Ct. 568, 578, 2 L.Ed.2d 603 (1958), overruled in Afroyim v. Rusk, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 257 (1967).

> the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.[21]

Though the precise holding of this case was later overruled there was no doubt cast on the reasoning and principle that Congress was constitutionally empowered to legislate on such matters.[22]

A constitutional doctrine used to legitimize Congressional involvement in foreign affairs was also enunciated in *Fong Yue Ting v. United States*.[23]

> The United States are a sovereign and independent nation and are vested by the Constitution with the entire control of international relations and with all the powers of government necessary to maintain that control . . .. The Constitution . . . speaks with no uncertain sound upon this subject. . . . The power . . . being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress.[24]

The United States, as a sovereign nation, possesses a "foreign affairs power" which is an inherent attribute of sovereignty.[25] Justice Sutherland in the *Curtiss-Wright* [26] case acknowledged that the "foreign affairs power" arising from the sovereign status of the United States expanded Congress' legislative authority in international relations matters.

This broad "foreign affairs power" has been used as a basis for a wide variety of congressional legislation. Alien immigration and registration laws were promulgated on the strength of the "foreign affairs power." [27] Congress, on the basis of sovereignty, may be able to compel United States citizens residing abroad to return to the United States for legal proceedings and to answer for conduct engaged in abroad.[28] Presumably under this power Congress has authorized the Court to modify the act of state doctrine as recognized by the executive so that some acts of foreign governments affecting United States citizens may be challenged.[29] The extent of this congressional "foreign affairs power" at present is uncertain. Congress has yet to exercise this power as fully as the Supreme Court implies that it is empowered to.[30]

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[21] 356 U.S. at 57, 78 S.Ct. at 575.

[22] Perez v. Brownell, 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958), overruled in Afroyim v. Rusk, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967); L. Henkin, Foreign Affairs and the Constitution 326 n. 39 (1972).

[23] 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893).

[24] 149 U.S. at 711, 713, 13 S.Ct. at 1021–22.

[25] E.g., Burnet v. Brooks, 288 U.S. 378, 396, 53 S.Ct. 457, 461–62, 77 L.Ed. 844 (1933).

[26] United States v. Curtiss-Wright Exporting Corp., 299 U.S. 304, 318–19, 57 S.Ct. 216, 220–21, 81 L.Ed. 255 (1936).

[27] The Chinese Exclusion Case, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893).

[28] Cf. Vance v. Bradley, 440 U.S. 93, 103–109, 99 S.Ct. 939, 946–49, 59 L.Ed.2d 171 (1979); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 245–46, 80 S.Ct. 297, 303–04, 4 L.Ed.2d 268 (1960); L. Henkin, Foreign Affairs and the Constitution 75–76 (1972).

[29] Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932); Ban-

To What Extent Does the Constitution Follow the Flag; Does the Constitution Apply to the Territories? One area important where the extent of Congressional power—and, in particular, the constitutional limitations on that power—are uncertain concerns the power over the territories. While certainly Congress has the power to govern its territories, it is not always clear to what extent the Constitution follows the Flag, that is, to what extent the Constitution applies to territories which are acquired but not incorporated into the United States.[31]

In the beginning of the twentieth century the Court held that the requirement of uniformity of taxes imposed by Congress did not apply to Puerto Rico.[32] The Court at that time saw the need to grant flexibility to Congress in administering its territories not previously subject to common law traditions.[33] However, the Court later held or otherwise indicated that other clauses of the Constitution do apply to Puerto Rico.[34] Moreover, because Congress may make constitutional provisions applicable to territories by statute even though they would not otherwise be controlling, the Court will attach great weight to a legislative determination that a particular constitutional provision may practically and beneficially be applied in a territory.

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co Nacional de Cuba v. Farr, 383 F.2d 166, 182 (2d Cir. 1967), certiorari denied 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968), rehearing denied 390 U.S. 1037, 88 S.Ct. 1406, 20 L.Ed.2d 298 (1968).

[30] L. Henkin, Foreign Affairs and the Constitution 74–76 (1972); Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U.Pa.L.R. 903, 922–23 (1959).

[31] See generally, Sutherland, The Flag, The Constitution and International Agreements, 68 Harv.L.Rev. 1374 (1955); Green, Applicability of American Laws to Overseas Areas Controlled by the United States, 68 Harv.L.Rev. 781 (1955); Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan.L.Rev. 587 (1949).

[32] Downes v. Bidwell, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901) (Art. I, § 8, cl. 1 does not apply to Puerto Rico).

[33] See, e.g., Dorr v. United States, 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128 (1904) (no constitutional requirement that territorial government of the Philippines provide jury trial in criminal cases); Balzac v. Puerto Rico, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922) (no constitutional requirement of jury criminal cases in Puerto Rico, which was not an incorporated territory of the United States even though its residents had been granted United States citizenships).

[34] E.g., Balzac v. Puerto Rico, 258 U.S. 298, 314, 42 S.Ct. 343, 349, 66 L.Ed. 627 (1922) (Court applies, without discussion, first amendment in Puerto Rico); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668–69 n. 5, 94 S.Ct. 2080, 2084, n. 5, 40 L.Ed.2d 452 (1974), rehearing denied 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974) (Court applies due process clause in Puerto Rico because " 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States.' ") (quoting Magruder, C.J., in Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953); Examining Bd. v. Flores De Otero, 426 U.S. 572, 599–601, 96 S.Ct. 2264, 2279–81, 49 L.Ed.2d 65 (1976) (equal protection guarantee applies to Puerto Rico); Califano v. Torres, 435 U.S. 1, 4 n. 6, 98 S.Ct. 906, 908, n. 6, 55 L.Ed.2d 65 (1978) (per curiam) (Court assumes without deciding that constitutional right to travel extends to Puerto Rico).

Thus the Court concluded in *Torres v. Puerto Rico*[35] that Congress' implicit determinations and long experience establish that the fourth amendment restrictions on search and seizure apply to Puerto Rico. The Court did not decide whether the fourth amendment applied directly or by operation of the fourteenth amendment. Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun concurred. They argued that the older cases restricting the applicability of constitutional guarantees in Puerto Rico and cited by the majority should not be given any expansion assuming their validity in modern times.[36]

Clearly, the Constitution grants extensive foreign affairs powers to the Congress as well as to the executive. A third party, the Court, also is authorized constitutionally to participate in the formation of foreign affairs policy. It is to the role of the Court that we now turn.

WESTLAW REFERENCES

digest,synopsis(congress! /s foreign /8 affair nation policy relation)

necessary /2 proper /p congress! /s foreign /s affair nation policy relation

hickenlooper /4 amendment

§ 6.3 The Court

Although the executive and legislative branches of the federal government dominate United States foreign affairs, the Supreme Court also influences foreign policy. Specific constitutional provisions in Article III, § 2 indicate that the Court is in a position to wield substantial power in international affairs. Historically, however, the Court frequently defers to the judgment of Congress and the executive when a conflict which may have impact on foreign relations arises.

Judicial Jurisdiction. The Article III grant of judicial power to the federal courts extends to foreign affairs by use of the following language:

> All Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made—or which shall be made under their authority;—to all cases affecting Ambassadors, other public Ministers and Consuls; . . . to Controversies to which the United States shall be a Party, . . . to Controversies . . . between a State or Citizen thereof, and foreign States,

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[35] 442 U.S. 465, 470, 99 S.Ct. 2425, 2429, 61 L.Ed.2d 1 (1979). Cf., e.g., Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950), certiorari denied 340 U.S. 939, 71 S.Ct. 480, 95 L.Ed. 677 (1951), rehearing denied 341 U.S. 907, 71 S.Ct. 607, 95 L.Ed. 1345 (1951) (court assumes, "and we think it probably so," that fourth amendment extends to protect U.S. citizens in foreign countries under occupation by our armed forces).

[36] 442 U.S. at 475, 99 S.Ct. at 2431–32 (Brennan, J., concurring). See also § 6.5, infra. But see Chief Justice Burger's dictum in Haig v. Agee, 453 U.S. 280, 308, 101 S.Ct. 2776, 2782–83, 69 L.Ed.2d 640 (1981) ("Assuming, *arguendo*, that First Amendment protections reach beyond our national boundaries, ...").

> Citizens or Subjects . . .. In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original jurisdiction.[1]

On the basis of these provisions the Court exercises jurisdiction in cases involving foreign nations,[2] suits by United States citizens against aliens or foreign diplomats,[3] and suits to interpret and enforce treaty terms.[4] The Court also hears cases arising under the "Laws of the United States"[5] which include all laws made in pursuance of the Constitution.[6]

Because the Congress is constitutionally authorized to define and punish international law violations, thereby incorporating international law into United States law, the Constitution thus grants the Court jurisdiction over cases involving international law.[7] Consequently the Court will occasionally address issues involving international law and will make pronouncements that affect both the structure of United States foreign policy and international law.

The Political Question Doctrine and Foreign Affairs. The Court hesitates to exercise any authority in the area of foreign affairs that would exceed the scope of these express constitutional grants. Although the Supreme Court is empowered to review acts of the legislature and executive to insure conformance with constitutional provisions, the political question doctrine is an important exception to this judicial review power,[8] and demonstrates the Court's reluctance to take an active role in formulating foreign policy. Justice Brennan, in Baker v. Carr,[9] characterized a case involving a political question stating:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[10]

The area of foreign affairs often fits squarely within the Court's definition of political questions:

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§ 6.3

[1] U.S.Const. art. III, § 2.

[2] E.g., Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964), on remand 272 F.Supp. 836 (S.D.N.Y.1965), judgment affirmed 383 F.2d 166 (2d Cir. 1967), certiorari denied 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968), rehearing denied 390 U.S. 1037, 88 S.Ct. 1406, 20 L.Ed.2d 298 (1968).

[3] 28 U.S.C.A. § 1251.

[4] E.g., Terlinden v. Ames, 184 U.S. 270, 22 S.Ct. 484, 46 L.Ed. 534 (1920); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816).

[5] U.S.Const. art. III, § 2.

[6] Id. at art. VI.

[7] U.S.Const. art. I, § 8. See The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900).

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66, 2 L.Ed. 60 (1803) (discussion of judicial review). On political questions see generally § 2.16, supra.

[9] 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), on remand 206 F.Supp. 341 (M.D.Tenn.1962).

[10] 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), on remand 206 F.Supp. 341 (M.D.Tenn.1962).

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views.[11]

Justice Brennan continued, citing a passage from *Oetjen v. Central Leather Co.*[12]

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.[13]

The *Baker* Court indicated there are some instances when the political question doctrine will not exempt foreign affairs issues from judicial review, but these exceptions are primarily limited to situations where the judiciary is acting in the absence of any conclusive action by the executive or Congress.[14]

In practice the Court employs the political question rationale to abstain from foreign affairs cases only infrequently. Primarily, in order to maintain judicial independence and integrity the Court refrains from reviewing executive and legislative action relating to foreign affairs by deciding that the political branches are acting within the scope of their constitutional authority.[15]

Interpreting International Law. The Supreme Court exercises considerable influence over foreign affairs legislation. The federal judiciary, acting in a quasi-legislative capacity, interprets laws, international law, executive agreements and treaties.[16] The Court's authority to construe international law was discussed in *The Paquete Habana* where the Court stated: "International law is a part of our law and must be ascertained and administered by the courts of justice . . . ." [17]

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[11] 369 U.S. at 211, 82 S.Ct. at 707 (footnotes omitted).

[12] 246 U.S. 297, 302, 38 S.Ct. 309, 310–11, 62 L.Ed. 726 (1918).

[13] 369 U.S. at 211 & n. 31, 82 S.Ct. at 707, n. 31.

[14] 369 U.S. 186, 212–13, 82 S.Ct. 691, 707–08, 7 L.Ed.2d 663 (1962), on remand 206 F.Supp. 341 (M.D. Tenn. 1962), citing Terlinden v. Ames, 184 U.S. 270, 285, 22 S.Ct. 484, 490, 46 L.Ed. 534 (1902) (Court can construe a treaty to decide if it has been terminated in the absence of conclusive governmental action involving the treaty); The Three Friends, 166 U.S. 1, 63, 66, 17 S.Ct. 495, 503, 41 L.Ed. 897 (1897) (Court can construe executive declarations to determine if American neutrality standards have become operative); Ex parte Peru, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943) (Judicial action regarding immunity of foreign ship is permissible in absence of executive declaration).

[15] L. Henkin, Foreign Affairs and the Constitution 213–14, 449–50, n. 26 (1972). See, e.g., Williams v. Suffolk Insurance Co., 38 U.S. (13 Pet.) 415, 420, 10 L.Ed. 226 (1839). (It is not within the Court's province to review actions of the executive done in accordance with its constitutional functions); see also, United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634–35, 4 L.Ed. 471 (1818); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 322, 4 L.Ed. 381 (1818).

[16] L. Henkin, Foreign Affairs and the Constitution 216 (1972).

Federal Common Law and the Act of State Doctrine. The Court extended the scope of this "judicial legislation" in the foreign affairs area. In the leading case of *Banco Nacional De Cuba v. Sabbatino* [18]

In that case, the Supreme Court established a doctrine which had a profound impact on United States foreign relations: the principle theory asserted was "Federal common law" which was binding on the nation.[19]

The complex fact situation in *Sabbatino* involved basically a controversy between a United States commodity broker and the Cuban government over the title to Cuban sugar sold in New York. Banco Nacional, on behalf of the Cuban government, sued the commodity broker, Farr, Whitlock and Company, for conversion of bills of lading and the proceeds from the sale of the sugar. In defense, Farr, Whitlock argued that the proceeds belonged not to the Cuban government but to the Cuban sugar company owned primarily by residents of the United States. The Castro regime, Farr, Whitlock asserted, had illegally expropriated the property of this American owned business in violation of international law. The Cuban government's title to the sugar was therefore invalid under international law.[20]

The District Court and the Second Circuit agreed and, holding that Cuba had violated international law, ruled against Banco Nacional.[21] The Supreme Court reversed, relying on the "act of state" doctrine to bar judicial condemnation of Cuba's expropriation actions even though the expropriation violated customary international law.[22] The act of state doctrine "in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." [23]

Writing for the majority, Justice Harlan stated that failure to adhere to the act of state doctrine and give effect to the expropriation might interfere with or embarrass the executive branch's foreign affairs policy. The United States, arguing *amicus curiae*, urged that the Court reverse the lower courts on these same grounds.[24] In deciding to uphold the act of state doctrine, however, the Court was not arguing that it was bound to follow the directions of the executive branch. Harlan, protecting the judicial integrity of the Court, held that although the act of state doctrine is not within the text of the Constitution, the doctrine does have " 'constitutional' underpinnings;" [25] "[T]he scope of the act of state doctrine must be determined according to federal law." [26]

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[17] 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900).

[18] 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964).

[19] L. Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino, 64 Colum.L.Rev. 805, 806 (1964).

[20] 376 U.S. 398, 401–08, 84 S.Ct. 923, 926–30, 11 L.Ed.2d 804 (1964).

[21] 193 F.Supp. 375 (S.D.N.Y.1961), affirmed 307 F.2d 845 (2d Cir. 1962).

[22] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–37, 84 S.Ct. 923, 939–45, 11 L.Ed.2d 804 (1964).

[23] 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964).

[24] 376 U.S. 398, 432–33, 84 S.Ct. 923, 942–43, 11 L.Ed.2d 804 (1964); see also Argument of Deputy Attorney General Katzenbach, 32 U.S.L.W. 3158 (U.S. Oct. 29, 1963).

The Court established the act of state doctrine as federal common law and held that the federal judiciary will not examine expropriation acts of a recognized sovereign within its own territory in the absence of a treaty even if the taking violates customary international law.[27]

The Court's decision was made independently of congressional or executive directives. To that extent, its decision to uphold the act of state doctrine was based upon the Court's belief that it can create foreign relations law. This exercise of judicial power does have important limits, even though the reference to " 'constitutional' underpinnings" was somewhat less than crystal clear. While it may hint that the Court's definition was constitutional in origin and therefore Congress cannot change it, the language of the majority opinion suggests otherwise. Thus, immediately after the reference to " 'constitutional' underpinnings" the Court stated: "It [the act of state doctrine] arises out of the basic relationships between branches of government in a system of separations of powers." [28] Later the Court stated:

> [We] decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, *in the absence of* a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[29]

The better view of *Sabbatino* is that it exemplifies the creation of federal common law,[30] not federal constitutional law. The constitutional underpinnings of the act of state doctrine relate more to the separation of powers than to the constitutional origins of the doctrine. Thus, Congress can change the act of state doctrine and, perhaps, by statute, require the courts to look to "customary international law."

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[25] 376 U.S. 398, 423, 84 S.Ct. 923, 938, 11 L.Ed.2d 804 (1964).

[26] 376 U.S. at 427, 84 S.Ct. at 940 (footnote omitted).

[27] 376 U.S. at 428, 84 S.Ct. at 940.

[28] 376 U.S. at 423, 84 S.Ct. at 938.

[29] 376 U.S. at 428, 84 S.Ct. at 940 (emphasis added).

[30] See, e.g., Hay, Unification of Law in the United States: Uniform State Laws, Treaties and Judicially Declared Federal Common Law, in Legal Thought in the United States of America Under Contemporary Pressures: Reports from the United States of America on Topics of Major Concern as Established for the VIII Congress of the International Academy of Comparative Law 261, 280–81, 289 (J. Hazard & W. Wagner, eds. 1970).

This view of *Sabbatino* is somewhat supported by subsequent events. Congress became concerned over the theories advocated in *Sabbatino*. Shortly after the decision was handed down Congress effectively overruled the *Sabbatino* interpretation of the act of state doctrine by revising the Hickenlooper amendment provisions regarding acts of states.[31] The Supreme Court subsequently denied certiorari in a case involving this legislation, *Banco Nacional de Cuba v. Farr*,[32] which was a suit arising out of the *Sabbatino* sugar transactions where the lower courts applied the new statute and not the *Sabbatino* decision.

In a later decision involving Cuban expropriation of United States citizen's property by the Cuban government, *First National City Bank v. Banco Nacional de Cuba*,[33] the divided Court deferred to the opinion of the executive branch in areas touching foreign affairs. Justice Rehnquist, writing for himself, Chief Justice Burger, and Justice White, acknowledged that the executive had advised the Court that the act of state doctrine should not be applied in the situation under consideration. His plurality opinion recognized, "the primacy of the Executive in . . . foreign relations," concluding:

> where the Executive Branch, . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.[34]

Not all of the Court was in accord with the theory of judicial acquiescence to the executive and Congress in foreign affairs. In the concurring opinion of Justice Powell and the dissent of Justice Brennan, the justices emphasized the importance of maintaining the integrity and independence of the judiciary.[35] Brennan was particularly adamant in his dissent, stressing that any decision should be made on the basis of constitutional authority and not upon recommendations of the executive.[36]

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[31] 22 U.S.C.A. § 2370(e)(2); see also the divided Court opinion in First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 761–62, 92 S.Ct. 1808, 1810–11, 32 L.Ed.2d 466 (1972), rehearing denied 409 U.S. 897, 93 S.Ct. 92, 34 L.Ed.2d 155 (1972), on remand 478 F.2d 191 (2d Cir. 1973) (plurality opinion of Rehnquist, J.).

Provisions of title 28 of the United States Code have been enacted (in October 21, 1976 to be effective 90 days after that) which also relate to the *Sabbatino* issue. See 28 U.S.C.A. § 1330 (Actions against foreign states); 28 U.S.C.A. Chapter 97 (Jurisdictional Immunities of Foreign States). See particularly 28 U.S.C.A. § 1605 of Chapter 97 (General exceptions to the jurisdictional immunity of a foreign state).

[32] 243 F.Supp. 957 (S.D.N.Y.1965), affirmed 383 F.2d 166 (2d Cir. 1967), certiorari denied 390 U.S. 956, 88 S.Ct 1038, 19 L.Ed.2d 1151 (1968), rehearing denied 390 U.S. 1037, 88 S.Ct. 1406, 20 L.Ed.2d 298 (1968).

[33] 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed. 2d 466 (1972), rehearing denied 409 U.S. 897, 93 S.Ct. 92, 34 L.Ed.2d 155 (1972), on remand 478 F.2d 191 (2d Cir. 1973).

[34] 406 U.S. at 767–68, 92 S.Ct. at 1813.

[35] 406 U.S. at 773–76, 776–796, 92 S.Ct. at 1815–17, 1817–27.

[36] 406 U.S. at 776–796, 92 S.Ct. at 1817–27.

Relying on *Banco Nacional de Cuba v. Sabbatino*,[37] the Court has deferred to the political branch and held that "it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue." [38] Ruling that foreign nations were allowed to sue as "persons" within the meaning of the antitrust laws, allowing private antitrust treble damage actions, the Court specifically referred to a letter from the Legal Adviser of the State Department indicating that it anticipated no foreign policy problems from its holding allowing foreign nations to sue as "persons" under the antitrust laws.[39] Congress responded to this decision by amending the Clayton Act in order to eliminate, in general, the right of foreign governments to recover treble damages.[40]

WESTLAW REFERENCES

sabbatino /p foreign /s affair nation policy relation
"paquete habana" /p international /5 law

II. THE TREATY MAKING POWER

§ 6.4 Introduction

Constitutional provisions confer the treaty making power to the federal government, specifically to the President and the Senate. The Constitution empowers the President ". . . by and with the Advice and Consent of the Senate, to make treaties provided two thirds of the Senators present concur." [1] Other language expressly prohibits states from entering, in their own right, into treaties or alliances.[2] Treaties are proclaimed in the text of the Constitution to be the supreme law of the land and binding upon states.[3] Federal judicial power, in addition, is constitutionally extended to encompass cases involving treaties made under the authority of the federal government.[4] Another constitutional directive relevant to the treaty power is the necessary and proper clause,[5] which enables Congress to enact all law needed to implement and enforce treaties.

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[37] 376 U.S. 398, 408–12, 84 S.Ct. 923, 929–32, 11 L.Ed.2d 804 (1964).

[38] Pfizer, Inc. v. Government of India, 434 U.S. 308, 320, 98 S.Ct. 584, 591, 54 L.Ed.2d 563 (1978), rehearing denied 435 U.S. 910, 98 S.Ct. 1462, 55 L.Ed.2d 502 (1978). The Court also cited Jones v. United States, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691 (1890) for this proposition.

[39] 434 U.S. 308, 319 n. 20, 98 S.Ct. 584, 591 n. 20, 54 L.Ed.2d 563 (1978) rehearing denied 435 U.S. 910, 98 S.Ct. 1462, 55 L.Ed. 2d 502 (1978). The dissent objected to the reliance on this letter and argued that the decision as to whether foreign nations could sue should be left to Congress. 434 U.S. 308 at 329 n. 3, 98 S.Ct. 584, at 596 n. 3 (Burger, C.J., joined by Powell & Rehnquist, JJ., dissenting); 434 U.S. 308, 331 n. 2, 98 S.Ct. 584, 597 n. 2, 54 L.Ed.2d 563 (1978), rehearing denied 435 U.S. 910, 98 S.Ct. 1462, 55 L.Ed.2d 502 (1978) (Powell J., dissenting).

[40] See 15 U.S.C.A. § 15(b).

§ 6.4

[1] U.S.Const. art. II, § 2, cl. 1.

[2] U.S.Const. art. I, § 10, cl. 3; art. I, § 10, cl. 1.

[3] U.S.Const. art. VI, cl. 2.

[4] U.S.Const. art. III, § 2, cl. 1.

[5] U.S.Const. art. I, § 8, cl. 18. See, Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

The Treaty-Making Process. From these provisions a specific treaty making process has developed. Generally the executive appoints and supervises a team of individuals who negotiate the agreement. After a satisfactory agreement is concluded the executive submits the proposed treaty to the Senate. If the treaty is approved by two-thirds of the Senate, the president then ratifies it and the treaty becomes an agreement binding as an international obligation.[6] Its effectiveness as domestic law depends on its being either self-executory or, if it is executory, there being the required implementing legislation.[7]

Interpreting Treaties. It is proper for the courts to turn to the records of the drafting and negotiation of a treaty in order to interpret it, and to resolve ambiguities in the text.[8]

WESTLAW REFERENCES

treaty /5 power /p "federal government"
necessary /2 proper /p treaty

§ 6.5 Limitations on the Treaty Power

Although there are no express limitations on treaty making in the text of the Constitution the Supreme Court has endeavored to define the scope of the treaty power. The basic Constitutional provision is:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ..[1]

This clause at one time had been interpreted by legal authorities to suggest that treaties were equal to the Constitution.[2] As a consequence

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[6] L. Henkin, Foreign Affairs and the Constitution 130 (1972).

[7] See § 6.6, infra.

[8] Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32, 63 S.Ct. 672, 677–78, 87 L.Ed. 877 (1943): "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." See also, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 261, 104 S.Ct. 1776, 1787, 80 L.Ed.2d 273 (1984), rehearing denied ___ U.S. ___, 104 S.Ct. 2691, 81 L.Ed.2d 885 (1984); Air France v. Saks, 470 U.S. ___, ___, 105 S.Ct. 1338, 1343, 84 L.Ed.2d 289, 297, on remand 760 F.2d 238 (9th Cir. 1985).

Day v. Trans World Airlines, Inc., 528 F.2d 31, 35–36 (2d Cir. 1975), certiorari denied 429 U.S. 890, 97 S.Ct. 246, 50 L.Ed.2d 172 (1976); Maugnie v. Companie Nationale Air France, 549 F.2d 1256 (9th Cir. 1977), certiorari denied 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977).

Fothergill v. Monarch Airlines, Ltd., [1980] 2 All E.R. 696 (H.L.).

2 C. Hyde, International Law 72 (1922).

§ 6.5

[1] U.S.Const. art. VI, cl. 2.

[2] Nowak & Rotunda, A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Courts, 29 U.C.L.A.L.Rev. 1129, 1134–55 (1982); L. Henkin, Foreign Affairs and the Constitution 137 (1972).

See Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920) where Justice Holmes wrote: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so the theory that treaties were not subject to any constitutional limitations developed.

The Supreme Court addressed this problem in *Geofroy v. Riggs*[3] where Justice Field in often quoted dicta, discussed the constitutionally implied limitations on the treaty power.

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear . . .. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments . . .. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent . . .. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.[4]

Thus, the specific restraints of the Bill of Rights and other similar constitutional restraints do exist. Also, it has been argued that, because the treaty power extends to all proper subjects of negotiation, it does not include any matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal."[5]

The definitive pronouncement on this constitutional question was made by Justice Black's opinion in *Reid v. Covert*:[6]

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when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention."

[3] 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642 (1890).

[4] 133 U.S. at 266–67, 10 S.Ct. at 296–97; see also Ware v. Hylton, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796); Asakura v. Seattle, 265 U.S. 332, 341, 44 S.Ct. 515, 516, 68 L.Ed. 1041 (1924).

[5] Hearings on S.J.Res. 1, Before a Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 183 (1955) (testimony of Secretary of State Dulles). Treaties dealing with and promoting human rights are considered within the treaty power. Restatement of the Law, 2d Foreign Relations Law of the United States, Reporter's Note following § 118 (1965).

See also, Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 486, 478 N.Y.S.2d 597, 604, 467 N.E.2d 245, 252 (1984), (Simons, J.) (citing an earlier edition of this treatise) certiorari denied ___ U.S. ___, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985).

[6] 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). Justice Black announced the judgment for the Court; his opinion was joined in by only three other Justices (Warren, C.J., and Douglas and Brennan, JJ.), but none of the other justices, either concurring or dissenting, questioned his analysis of Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). There was no opinion for the Court. Justice Whittaker took no part in the case; Justice Frankfurter concurred in a separate opinion; Justice Harlan also concurred in another separate opinion; and Justice Clark, joined by Justice Burton, dissented.

Following Justice Black's opinion in Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), a special U.S. court, sitting in allied occupied West Berlin, ruled that two East German citizens who were

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.[7]

Black concluded that Constitutional provisions limit the acts of the president, the joint actions of the president and the Senate, and consequently they limit the treaty power. Given these limitations on the scope of the treaty making power, the Supreme Court has found treaties to be equal in status to congressional legislation, and, as expressly provided in the text of the Constitution, the supreme law of the land.[8]

Treaties and the Tenth Amendment. The states have sometimes argued that the tenth amendment imposes additional limitations upon the treaty power. Asserting that under the Constitution they retain control over certain matters, the states contended that the federal government cannot alter these reserved powers through treaties. The Supreme Court confronted this issue in *Hauenstein v. Lynham.*[9]

Hauenstein was a suit by the heirs of a Swiss citizen who died intestate owning property in Virginia; the plaintiffs sought to recover the proceeds from the sale of the property by the local escheator. The heirs, invoking provisions of a treaty between the United States and Switzerland, prevailed over the local law preventing such aliens from taking property by descent or inheritance. The Court stated that treaties are the supreme law of the land and superior to the laws and constitutions of the individual states.[10] "It must always be borne in mind that the Constitution, laws, and treaties of the United States are

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charged with hijacking a Polish airliner and landing it in the U.S. military zone, were entitled to the full protection of the U.S. Constitution, including a trial by a jury of their peers. The special court system was established by the 1945 rules of occupation, and sitting by designation was a U.S. District Judge from New Jersey. The special court was never forced to convene before, and under the rules of procedure applicable to it, the judge's ruling is not appealable. Nat'l Law Jrl., Mar. 26, 1979, at 9, col. 1; N.Y. Times, Mar. 15, 1979, at A3, col. 1–3. Thus, the Constitution may follow the flag not only as to U.S. citizens but also as to aliens, at least when they are not enemy aliens. See § 6.2, supra.

[7] 354 U.S. at 16, 77 S.Ct. at 1230. See also, Geofroy v. Riggs, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642 (1890); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242–43, 21 L.Ed. 523 (1872); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620–21, 20 L.Ed. 227 (1870); Doe v. Braden, 57 U.S. (16 How.) 635, 657, 14 L.Ed. 1090 (1853); New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736, 9 L.Ed. 573 (1836).

[8] U.S.Const. art. II, § 2; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 360, 4 L.Ed. 97 (1816); Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314–315, 7 L.Ed. 415 (1829); Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920).

Cf. Stotzky & Swan, Due Process Methodology and Prisoner Exchange Treaties, 62 Minn.L.Rev. 733 (1978); Robbins, A Constitutional Analysis of the Prohibition against Collateral Attack in the Mexican-American Prisoner Exchange Treaty, 26 U.C.L.A.L.Rev. 1 (1978). See Paust, The Unconstitutional Detention of Prisoners by the United States Under the Exchange of Prisoner Treaties, in R. Lillich, ed., International Aspects of Criminal Law: Enforcing United States Law in the World Community 204–27 (1981).

[9] 100 U.S. (10 Otto) 483, 25 L.Ed. 628 (1879).

[10] 100 U.S. (10 Otto) at 483–89.

as much a part of the law of every State as its own local laws and Constitution." [11]

Any tenth amendment limitation on the federal treaty power was flatly rejected in the landmark case of *Missouri v. Holland.*[12] Initially Congress had enacted a statute to protect migratory birds in danger of extinction.[13] This Act was subsequently held invalid by the lower federal courts for lack of a specific constitutional provision empowering Congress to regulate matters of this nature.[14] Later a treaty was concluded with Great Britain involving the same issues as the statute had covered. New statutes were passed to implement the treaty.[15] In *Missouri v. Holland* the state brought a bill in equity to prevent the Migratory Bird Treaty and the regulations made pursuant to this agreement from being enforced by the federal game warden.

Missouri claimed that the treaty and new statutes interfered with her tenth amendment reserved rights and were as a consequence void. Justice Holmes, writing for the Court, concluded that the treaty and statutes did not interfere with rights reserved by states.

> To answer this question it is not enough to refer to the Tenth Amendment . . . because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8 as a necessary and proper means to execute the powers of the Government . . .. It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits . . . to the treaty making power . . ..[16]

Holmes then rejected the state's argument that the same constitutional limitations applying to acts of Congress should also apply to treaties. He reasoned:

> An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. . . . Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do

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[11] 100 U.S. (10 Otto) at 490.

[12] 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

[13] Act of March 4, 1913, C. 145, 37 Stat. 847.

[14] United States v. Shauver, 214 F. 154 (E.D.Ark. 1914); United States v. McCullagh, 221 F. 288 (D.Kan. 1915).

[15] Migratory Bird Treaty Act of July 3, 1918, 16 U.S.C.A. §§ 703–711.

[16] 252 U.S. 416, 432, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920).

> not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . .[17]

What Holmes perhaps meant is that before the Treaty the migratory bird act (assuming the correctness of the earlier decisions) did not implement any federal power. After the Treaty—which itself was consistent with federal powers and not violative of any federal limitations—the migratory bird act did implement a federal power, the treaty power. Observing that the provisions of the agreement did not contravene any constitutional provisions, Holmes concluded that any limitation upon the treaty would have to be based upon the general terms of the tenth amendment. But the treaty power is specifically delegated to the federal governments and the tenth amendment only purports to apply to nondelegated powers.

Matters of national interest are best protected by national action Holmes reasoned. Because the problem of protecting migratory birds was national in scope no one state could provide as complete a solution as the treaty and resulting statutes.[18] Although Missouri could have regulated the birds in the absence of a treaty, treaties and accompanying statutes are binding both throughout the nation and within the territory of a state. States exercise control over most of their internal activities but a treaty may override such power.[19]

It has also been argued that the treaty must be a proper subject for negotiation, for the treaty power does not extend to matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal." [20]

The Bricker Amendment. Attempts to limit federal treaty making power by constitutional amendment have been unsuccessful.[21] During the 1950's proponents of the Bricker Amendment campaigned for a legislative overruling of the *Missouri v. Holland* [22] decision. These individuals were concerned that portions of Justice Holmes' dicta in *Missouri v. Holland* could be interpreted to mean that treaties were not subject to constitutional limitations as were acts of Congress.[23] Ultimately Congress rejected the Bricker Amendment. Constitutional provisions and Supreme Court decisions were found to provide adequate restraints on federal power making the amendment unnecessary.[24]

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[17] 252 U.S. at 432–33, 40 S.Ct. at 383. See also Hay, Supranational Organizations and United States Constitutional Law, 6 Va.J. of Internat'l Law 195, 198 n. 10 (1966).

[18] 252 U.S. at 434–35, 40 S.Ct. at 383–84.

[19] 252 U.S. at 434, 40 S.Ct. at 383–84.

[20] Hearings on S.J.Res. 1, Before a Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 183 (1955) (testimony of Secretary of State Dulles). See also, Restatement of the Law, 2d, Foreign Relations Law of the United States § 117(1) (1965).

[21] S.J.Res. 1, 83d Cong., 1st Sess., 99 Cong.Rec. 6777 (1953).

[22] 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

[23] 252 U.S. at 433, 40 S.Ct. at 383. Proponents of the Bricker Amendment were specifically concerned with Justice Holmes' statement, that "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when

The President's Power to Terminate Treaties. For a time, efforts to limit the treaty power focused on the President's authority to terminate treaties. If the Constitution requires a two-thirds vote of the Senate in order to ratify a treaty, the Constitution, it was argued, must also require a two-thirds vote before the President can abrogate a treaty. A fragmented Court rejected this claim in *Goldwater v. Carter.*[25]

In that case, several Senators and others sued for declaratory and injunctive relief against President Carter after he announced that he planned to terminate the mutual defense treaty with Taiwan, the Republic of China. The President gave the one year notice which the termination clause of the treaty required. He also recognized the Peoples Republic of China (the Peking Government) rather than the Nationalist Government of Taiwan as the Government of China.

The Court, without opinion, granted certiorari and ordered the district court to dismiss the complaint. Justice Rehnquist, joined by Chief Justice Burger and Justices Stevens and Stewart, concurred in the judgment and filed a statement concluding that the "basic question presented by the petitioners in this case is political and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[26] Justice Brennan dissented and rejected the majority's view of the political question doctrine. However, he nonetheless would not question the presidential decision because it rested on the Presi-

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made under the authority of the United States," in Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920).

[24] See generally L. Henkin, Foreign Affairs and the Constitution 146–47 (1972). See also, Lockwood, The United Nations Charter and United States Civil Rights Litigation: 1946–1955, 69 Iowa L.Rev. 901 (1984).

For a discussion of constitutional and Supreme Court case law limitations on treaty-making see, Association of the Bar of the City of New York—Committee on Federal Legislation, The Risks of the 1956 Bricker Amendment 4–7 (1956); Nowak & Rotunda, A Comment on the Creation and Resolution of a "Nonproblem": Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Courts, 29 U.C.L.A.L.Rev. 1101 (1982). Reid v. Covert, 354 U.S. 1, 16–17, 77 S.Ct. 1222, 1230–31, 1 L.Ed.2d 1148 (1957).

Using International Law to Aid in the Interpretation of American Civil Liberties Law. For an analysis of how emerging human rights norms in international law may be used to add to the development of domestic civil rights law, see generally, Christenson, The Use of Human Rights Norms to Inform Constitutional Interpretation, 4 Houston J. of Internat'l Law 39 (1981); Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analysis, 52 U.Cinn.L.Rev. 3 (1983). See also, D'Amato, The Concept of Human Rights in International Law, 82 Colum.L. Rev. 1110 (1982).

[25] 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed 2d 428 (1979). See generally, e.g., Note, Resolving Treaty Termination Disputes, 129 U.Pa.L.Rev. 1189 (1981).

[26] 444 U.S. at 1001, 100 S.Ct. at 536.

dent's exclusive power to recognize foreign governments. The President abrogated the treaty with Taiwan because he recognized the Peking Government.[27]

Only Justice Powell's concurrence firmly rejected the political question doctrine, either as broadly held by Justice Rehnquist or as more narrowly held by Justice Brennan. Powell argued that there were judicially discoverable and manageable standards because decision in this case "only" required the Court to interpret the Constitution.[28] Nonetheless he concurred in the dismissal of the case on the grounds that the issue was not ripe and would not be until Congress chose to "confront the President," and reached a "constitutional impasse."[29] He hinted that if the Senate would pass a resolution declaring that its approval was necessary for the termination of any mutual defense treaty and further declared that it intended the resolution to have retroactive effect, that might then make the case ripe.

WESTLAW REFERENCES

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geofroy +2 riggs /p treaty
missouri +2 holland /p treaty
terminat! abrogat! /s treaty /s president
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§ 6.6 Executory and Self-Executing Treaties

Although no provisions in the Constitution discuss the nature of a treaty, the Supreme Court has recognized that two types of treaties exist. Treaties may be either executory—that is a ratified treaty which requires implementing legislation before it takes effect as domestic law—or self-executory—that is, a ratified treaty, which takes effect as domestic law immediately upon ratification.

This distinction was made in the case of *Foster v. Neilson*[1] where the Court indicated that treaties are:

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[27] 444 U.S. at 1007, 100 S.Ct. at 539.

[28] 444 U.S. at 999, 100 S.Ct. at 534–35. Cf. Roberts, J., in United States v. Butler, 297 U.S. 1, 62, 56 S.Ct. 312, 317–18, 80 L.Ed. 477 (1936):

> "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

Powell also rejected the other tests, outlined in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), on remand 206 F.Supp. 341 (M.D.Tenn.1962) to determine whether there was a political question. See § 2.16, supra.

[29] 444 U.S. at 998, 100 S.Ct. at 534.

Justice Marshall concurred in the dismissal but without any opinion. Justice Blackmun, joined by Justice White, did not reach the merits and would have set the case for oral argument and plenary consideration.

§ 6.6

[1] 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829). Compare United States v. Percheman, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833), where the Supreme Court held that the same treaty was self-executing, after the Court examined the Spanish text and Spanish grammatical usage. See generally, Restatement of the Law, 2d, Foreign Relations Law of the United States § 154 (1965).

> to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[2]

Similarly, in *Whitney v. Robertson*[3] the Court again acknowledged that executory treaties have no effect until the necessary legislation is enacted.

WESTLAW REFERENCES

digest,synopsis(treaty /p self-executing)

§ 6.7 Conflicts Between Treaties and Acts of Congress

While treaties as well as federal statutes are the supreme law of the land, the Constitution provides no solution for the dilemma arising when provisions of a self-executing treaty conflict with acts of Congress.[1] In *Whitney v. Robertson*[2] the Supreme Court addressed the issue of modifying a treaty by subsequent acts of Congress. The case involved a dispute arising between the United States and the Dominican Republic over the terms of a sugar trade treaty to which the two nations were parties.

The Court stated that constitutionally treaties and legislative acts are equal, both being the supreme law of the land. When the treaty and statute:

> relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other . . ..[3]

Acts of Congress passed after the date of the treaty, the Court held, control over the treaty terms. Similarly, a self-executing treaty is valid as domestic law and takes precedence over a federal law enacted earlier.

In the *Chinese Exclusion Case*[4] the Supreme Court affirmed the lower court's decision that an act excluding Chinese laborers from the United States was a constitutional exercise of legislative power even though it conflicted with an existing treaty. The Court rationalized that treaties being equivalent to acts of the legislature, they can, like statutes, be repealed or amended. When a conflict between treaty and statutory provisions develops, the Court stated, ". . . the last expression of the sovereign will must control."[5]

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[2] 27 U.S. (2 Pet.) at 314.

[3] 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888).

§ 6.7

[1] U.S.Const. art. VI, cl. 2.

[2] 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed 386 (1888).

[3] 124 U.S. at 194, 8 S.Ct. at 458.

[4] Chae Chan Ping v. United States. 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889).

However, as a rule of interpretation, a treaty "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[6] The courts will not find that ambiguous congressional action has implicitly repealed a treaty. And *a fortiorari*, legislative silence is insufficient to repeal a treaty.[7]

WESTLAW REFERENCES
"chinese exclusion case" /p treaty

§ 6.8 Executive Agreements

Although the Constitution expressly confers only a treaty making power upon the President, a power to be exercised with the advice and consent of the Senate, it does not provide that such treaties be the exclusive means by which the United States assumes an international commitment. Thus, through the use of executive agreements, Presidents have concluded a variety of international agreements on their own authority without this required approval.[1] These executive agreements, while they cannot be termed treaties as they lack the constitutional requirement of consent by the Senate, frequently cover the same subject matter as treaties.[2]

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[5] 130 U.S. at 600, 9 S.Ct. at 628.

See also, Cook v. United States, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933) (because of treaty of 1924, Court invalidates search and seizure of certain vessels, although such search and seizure authorized by earlier enacted feral law of 1922); Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), certiorari denied 411 U.S. 931, 93 S.Ct. 1897, 36 L.Ed. 390 (1973); 21 Op.Atty.Den. 347 (1896); Restatement, 2d, Foreign Relations Law of the United States, § 145(2) (A.L.I.1965).

[6] Cook v. United States, 288 U.S. 102, 120, 53 S.Ct. 305, 311, 77 L.Ed. 641 (1933). See, Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13, 88 S.Ct. 1705, 1710–11, 20 L.Ed.2d 697 (1968); Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 690, 99 S.Ct. 3055, 3076, 61 L.Ed.2d 823 (1979), footnote 16 of this opinion modified, 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979), on remand 605 F.2d 492 (9th Cir. 1979), appeal after remand 641 F.2d 1311 (9th Cir. 1981); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 261, 104 S.Ct. 1776, 1783, 80 L.Ed.2d 273 (1984), rehearing denied ___ U.S. ___, 104 S.Ct. 2691, 81 L.Ed.2d 885 (1984).

[7] Weinberger v. Rossi, 456 U.S. 25, 32, 102 S.Ct. 1510, 1516, 71 L.Ed.2d 715 (1982); cf. Bacardi Corp. of America v. Domenech, 311 U.S. 150, 161–63, 61 S.Ct. 219, 225–26, 85 L.Ed. 98 (1940).

§ 6.8

[1] See, e.g., Proclamation No. 2761A, 12 Fed.Reg. 8863 (1947) (U.S. participation in GATT, The General Agreement on Tariffs and Trade). Weinberger v. Rossi, 456 U.S. 25, 30 n. 6, 102 S.Ct. 1510, 1514, n.6, 71 L.Ed.2d 715 (1982). For a discussion regarding the number of executive agreements concluded by the president on behalf of the United States, see L. Henkin, Foreign Affairs and the Constitution 173, n. 1 (1972).

[2] The history and nature of executive agreements is discussed extensively in: McDougal and Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: Parts I and II, 54 Yale L.J. 181, 534 (1945), and Borchard, Treaties and Executive Agreements, A Reply, 54

The Types of Executive Agreements. There are basically four types of executive agreements.[3] First, the President may conclude an executive agreement based on his exclusive presidential powers, such as the power as commander-in-chief of the armed forces pursuant to which he conducts military operations with our allies, or his power to receive foreign ambassadors and recognize foreign governments.[4] Second, the President may conclude an executive agreement in pursuance of an authorization contained in a prior treaty.[5] Third, the President may derive his power to conclude an executive agreement from prior Congressional authorization. That is, the House and Senate together delegate certain powers to the President which he exercises together with his independent powers in the areas of foreign affairs.[6] Fourth, the President may obtain Congressional confirmation by both Houses of an agreement negotiated by the Executive.[7]

The Pink Case. The Supreme Court discussed the status of the executive agreement in the leading case of the *United States v. Pink.*[8] *Pink* involved a dispute over the title to the New York assets of a Russian insurance company. Russia had nationalized all her insurance

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Yale L.J. 616 (1945). See also, Kefauver, The House of Representatives Should Participate in Treaty Making, 19 Tenn.L.Rev. 44, 48 (1945).

[3] Restatement of the Law, 2d, Foreign Relations of the United States §§ 119–121 (1965); Hay, Supranational Organizations and United States Constitutional Law, 6 Va.J. of Internat'l Law 195, 204–09 (1966).

[4] Restatement of the Law, 2d, Foreign Relations of the United States, § 121 (1965). See id. at comment *b*. A typical illustration:

> "The President makes an agreement with state A whereby the United States will transfer to A a number of destroyers in exchange for the lease of areas for naval and air bases in certain territory of A. The agreement is valid under the President's powers as chief executive and commander-in-chief. Cf. Arrangement with Great Britain Respecting Naval and Air Bases, 54 Stat. 2405, E.A.S. No. 181, 3 Dept. State Bull. 199 (1940). Cf. 39 Ops.Atty.Gen. 484 (1940)."

Id. at Comment *b*, Illustration 2. It has been argued that the president's power to "faithfully execute" the laws, U.S.Const. art. II, § 3, furnishes the president additional and independent power as a basis for executive agreements. But this view is a minority one and is too open-ended to be acceptable.

[5] See, e.g., Restatement of the Law, 2d, Foreign Relations Law of the United States, § 119, comment *b*, Illustration 1:

> "The United States and state A make a security treaty providing, among other things, that the two states may make administrative agreements governing the disposition of United States forces in A. Pursuant to that provision, the President of the United States makes an executive agreement defining jurisdiction over United States forces in A. The executive agreement is constitutional. Cf. Wilson v. Girard, 354 U.S. 524 (1957)."

[6] See, e.g., id. at § 120, Comment *a*, Illustration 1:

> "An act of Congress provides that when the President finds that existing duties or import restrictions of the United States or any foreign country are unduly burdening or restricting the foreign trade of the United States, he may enter into trade agreements with foreign governments and proclaim such modifications of existing duties and other import restrictions as may be necessary to carry out any such foreign trade agreement, provided that reductions or increases in any duty rate shall not exceed 50 per cent of any existing rate . . . . This agreement [of the president] is constitutional . . . ."

[7] See id. at § 120, Comment *b*.

[8] 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

companies in 1918 and 1919 by decrees intended to include the foreign assets of all Russian insurance businesses.[9] In 1933, President Roosevelt and the Soviet government concluded the Litvinov Assignment, an executive agreement whereby the United States agreed to recognize the Soviet Government; in return, the Soviet Union assigned its interests in the assets of the Russian insurance company located in New York to the United States government. This agreement was the first type of executive agreement discussed above: it was entered into pursuant to the President's constitutional authority.

Under the terms of the executive agreement the United States became entitled to the property; the rights of the United States were to be superior to the claims of the corporation and foreign creditors.[10] The Supreme Court found that the New York state court's policy not to recognize the Soviet government and the state's refusal to enforce the Litvinov Assignment ran counter to the executive agreement made by President Roosevelt in connection with his recognition of the Government of the U.S.S.R.[11] Thus, the state's refusal was invalid, because it conflicted with the executive agreement.

Justice Douglas, writing for the Court, noted that the Litvinov Assignment was an international compact, an executive agreement, which did not require Senate approval.[12] Citing language from *United States v. Curtiss-Wright Export Corp.*,[13] Douglas stated that the President is the "sole organ of the federal government" in foreign affairs.[14] Failure to find the Litvinov Assignment binding upon the United States and conclusive on the courts would usurp the function of the executive.

> A treaty is a "Law of the Land" under the supremacy clause . . . of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.[15]

Just as state law yields to treaties, Douglas indicated, so must provisions of the executive agreement prevail over state policy.[16] The Court found that the provisions of the Litvinov Assignment passing the vested Soviet right in the property to the United States must be recognized as valid by New York.[17]

Pink and the Fifth Amendment. The basic purpose of the Litvinov Assignment was to settle outstanding American claims against the U.S.S.R. at the same time that the United States agreed to recognize the Soviet Government. The U.S.S.R. assigned to the United States the U.S.S.R's interests in certain Russian properties expropriated by the Soviet Union but located outside of the U.S.S.R. The United States expected to use these assets to pay off claims by the United States and by United States citizens against the U.S.S.R., because "the existence of unpaid claims against Russia and its nationals, which were held in this country, and which the Litvinov Assignment was intended to secure, had long been one impediment to resumption of friendly relations between these two great powers." [18]

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[9] 315 U.S. at 210, 62 S.Ct. at 556.

[10] 315 U.S. at 234, 62 S.Ct. at 567.

[11] 315 U.S. at 231–32, 62 S.Ct. at 566–67. See also Moscow Fire Insurance Co. v. Bank of New York & Trust Co., 280 N.Y. 286, 20 N.E.2d 758 (1939), aff'd by an equally divided Court, sub nom., United States v. Moscow Fire Insurance Co., 309 U.S. 624, 60 S.Ct. 725, 84 L.Ed. 986 (1940) (New York Court of Appeals refused to recognize the superiority of the United States' claims on the basis of the Litvinov Assignment over the claims of others).

[12] 315 U.S 203, 229, 62 S.Ct. 552, 565, 86 L.Ed. 796 (1942). United States v. Belmont, 301 U.S. 324, 330, 57 S.Ct. 758, 760–61, 81 L.Ed. 1134 (1937).

[13] 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936).

[14] 315 U.S. at 229, 62 S.Ct. at 565.

[15] 315 U.S. at 230, 62 S.Ct. at 565.

[16] 315 U.S. at 230–31, 62 S.Ct. at 565–66.

[17] 315 U.S. at 234, 62 S.Ct. at 567.

The U.S.S.R., by decree, had intended to confiscate all of the assets of the First Russian Insurance Company. This decree was intended to have an extraterritorial effect and thus to include the New York branch.[19] However, if the U.S.S.R. assigned the assets of this branch to the United States, as the Litvinov Assignment intended,[20] the United States might appear to be, in effect, confiscating property in violation of the fifth amendment protections of due process and just compensation. The United States, it was said, would be taking advantage of foreign expropriations: if the United States could not itself confiscate an insurance company located in New York, the United States should not be able to use its assets. Thus, many contemporary commentators labeled *Pink* as proof that the Court would allow executive agreements to override unconstitutional takings of property.[21]

In fact, the Court, speaking through Justice Douglas, carefully noted that all the claims of domestic creditors and all claims arising out of the New York branch had already been paid.[22] Other creditors—who were not United States citizens and whose claims did not arise out of transactions with the New York branch—made claims on the one million dollars still held by the New York Superintendent of Insurance, who was distributing the remaining assets to claimants.[23] New York, as a matter of local law, had determined a priority for unsecured

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18. 315 U.S. at 225, 62 S.Ct. at 563. For a useful discussion of the history of nonrecognition see Anderson, Recognition of Russia, 28 Am.J. Int'l L. 90 (1934).

19. 315 U.S. at 224, 62 S.Ct. at 562.

20. Id.

21. See, e.g., Jessup, Editorial Comment: The Litvinov Assignment and the Pink Case, 36 Am.J. Int'l L. 282, 282 (1942): "From the point of view of our constitutional law, the decision [in United States v. Pink] may well mark one of the most far-reaching inroads upon the protection which it was supposed the fifth amendment accorded to private property." (footnote omitted). Note, Effect of Soviet Recognition Upon Russian Confiscatory Decrees, 51 Yale L.J. 848, 853 (1942): "The logical result of the Court's position is that an international executive agreement according recognition may grant priority to anyone over anyone, ignoring 'due process' limitations on the exercise of the power." (footnote omitted). See also Finch, The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits, 48 Am.J. Int'l L. 57, 67 (1954) (arguing that *Pink* sanctioned violations of the fifth amendment); Jessup, The Litvinov Assignment and the Belmont Case, 31 Am.J. Int'l L. 481, 483–84 (1937).

22. 315 U.S. at 211, 227, 62 S.Ct. at 556.

23. Id.

creditors.[24] The Supreme Court simply held, as a matter of federal law, that the United States, as a creditor, had priority over foreign creditors whose unsecured claims did not even arise out of transactions with the New York insurance company. Therefore, the Court concluded that the federal government had not unconstitutionally taken property and that the executive agreements did not otherwise violate the Bill of Rights.[25] If property had been taken, nothing in *Pink* suggests that just compensation would be unavailable. Moreover, *Pink* did not imply that the President had unlimited power to enter into agreements which might have an unconstitutional effect on persons whether or not residing in the United States. *Pink* merely reaffirmed the President's ability to enter into agreements which would override state law, provided the agreement itself did not violate any provision of the Bill of Rights.[26]

The Iranian Assets Litigation. The broad presidential power to settle foreign claims by use of executive agreements is well illustrated by *Dames & Moore v. Regan.*[27] After Iranians seized the American Embassy in Tehran on November 4, 1980, and held the occupants hostage, President Carter, acting pursuant to his powers under the International Emergency Economic Powers Act, issued a blocking order that froze all the Iranian Government assets subject to the jurisdiction of the United States. There followed lengthy negotiations and, with the mediation of Algeria, Iran released the American hostages on January 20, 1981 after the United States and Iran signed an Agreement concerning the settlement of claims.

That Agreement required the United States to terminate all suits brought in the U.S. courts against Iran and to "nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration" before an Iran-United States Claims Tribunal.[28] President Carter, and later President Reagan, signed a series of executive orders to implement this agreement. These orders purported to nullify all attachments, liens, or other non-Iranian interests in Iranian assets subject to President Carter's November 14, 1979 freeze of Iranian assets.

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[24] 315 U.S. at 211, 62 S.Ct. at 556. Cf. Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 28 S.Ct. 337, 52 L.Ed. 625 (1908).

[25] Cf. Rogers, The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause, 96 Harv.L.Rev. 973 (1983).

[26] See also United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). Dicta in *Belmont* portended the result in *Pink*. The actual holding in *Belmont* was quite limited. The Court said only that the United States had a cause of action against the stake holders of the Russian funds. No adverse claimant to those funds was a party in the *Belmont* case. See generally, P. Hay & R. Rotunda, The United States Federal System: Legal Integration in the American Experience 56–60 (Giuffrè Milan 1982).

[27] 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). See generally, Symposium: Dames & Moore v. Regan, 29 U.C.L.A.L.Rev. 977–1159 (1982)—Brownstein, The Takings Clause and the Iranian Claims Settlement, id. at 984; Carter, The Iran-United States Claims Tribunal: Observations of the First Year, id. at 1076; Miller, Dames & Moore v. Regan: A Political Decision by a Political Court, id. at 1104; Nowak & Rotunda, A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Court, id. at 1129.

[28] 453 U.S. at 665, 101 S.Ct. at 2979.

Petitioner sued for declaratory and injunctive relief against the enforcement of the Executive Orders and the Treasury Department's implementing regulations claiming that they were unconstitutional to the extent that they "adversely affect petitioner's final judgment [on a contract claim] against the Government of Iran and the Atomic Energy Organization [of Iran], its execution of that judgment in the state of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks." [29]

The Court, per Justice Rehnquist, upheld the constitutionality of the Executive Orders relying in large part on Justice Jackson's seminal analysis in *Youngstown Sheet & Tube Co. v. Sawyer.*[30] The Court's opinion in *Dames & Moore* was narrowly drafted and attentive to the civil liberties implications when it held that if the President's freeze amounted to a taking of property, the Government must provide just compensation. This opinion provides no support for the proposition that the President has inherent authority to sign an Executive Agreement which is inconsistent with any of the other provisions of the Bill of Rights. On the contrary, the decision reaffirms the supremacy of the Bill of Rights.[31]

The Court first concluded that Congress, by statute, had explicitly authorized the President to nullify the post-freeze attachments and to direct that the blocked Iranian assets be transferred to the New York Federal Reserve Bank and later to Iran.[32] The purpose of this statute is to "permit the President to maintain the foreign assets at his disposal for use" as a "bargaining chip" when negotiating with a hostile nation.[33]

Independent of the attachments of the Iranian assets were the underlying claims against Iran. The Court was not able to find any explicit authority to suspend the claims pending in the U.S. Courts.

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[29] 453 U.S. at 667, 101 S.Ct. at 2980.

[30] 343 U.S. 579, 634, 72 S.Ct. 863, 888, 96 L.Ed. 1153 (1952), cited, e.g., at 453 U.S. at 661–62, 674, 101 S.Ct. at 2977–78.

[31] See 453 U.S. at 660–61, 688, 101 S.Ct. at 2976–77. See generally, Nowak & Rotunda, A Comment on the Creation and Resolution of a "Nonproblem": Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Court, 29 U.C.L.A.L. Rev. 1129 (1982). See also, Trimble, Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction, and a New Raid on the Treasury, 84 Colum.L.Rev. 317 (1984); Marks & Grabow, The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence, 68 Cornell L.Rev. 68 (1982).

[32] The Court relied on the "plain language" of the International Emergency Economic Powers Act, 50 U.S.C.A. § 1702, its legislative history, and the legislative history and cases interpreting the Trading with the Enemy Act, 50 U.S.C.A.App. § 5(b), from which was drawn the pertinent language of § 1702.

[33] 453 U.S. at 673, 101 S.Ct. at 2983. See also, Propper v. Clark, 337 U.S. 472, 493, 69 S.Ct. 1333, 1345, 93 L.Ed. 1480 (1949), rehearing denied 338 U.S. 841, 70 S.Ct. 33, 94 L.Ed. 514 (1949).

However, while there was no evidence of contrary congressional intent, there was evidence of legislative intent to invite broad presidential action, and there was a long history of congressional acquiescence of similar presidential conduct. "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." [34]

The exercise of presidential power in this case did not unconstitutionally divest the federal courts of jurisdiction, any more than a finding of sovereign immunity divests the courts of jurisdiction. Rather the President has directed the federal courts to apply a different rule of substantive law.[35]

Petitioner also charged that the suspension of its claims constituted a taking of their property without just compensation, but the Court found this question not ripe for review. However the majority did find ripe the question whether petitioner would have a remedy at law in the Court of Claims if in fact there was a taking. And the Court held that if there were a taking the Court of Claims would have jurisdiction to provide compensation.[36]

When Executive Agreements Conflict with Federal Statutes. Although cases such as *United States v. Pink*,[37] and *Dames & Moore v. Regan* [38] indicate that executive agreements are as binding upon the nation as ratified treaties, questions still remain as to what extent an executive agreement is equivalent to a treaty. To what extent does an executive agreement override an earlier enacted federal statute? And when does a federal statute override an executive agreement promulgated earlier?

United States v. Guy W. Capps, Inc.[39] is a leading lower court decision discussing these issues. *Capps* involved an executive agreement between Canada and the United States regulating potato exports by Canada. This agreement was the third type of executive agreement discussed above.[40] The Fourth Circuit stated:

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[34] 453 U.S. at 680, 101 S.Ct. at 2987. See also 453 U.S. at 679, n. 8, 101 S.Ct. at 2986, n. 8: "At least since the case of the 'Wilmington Packet' in 1799, Presidents have exercised the power to settle claims of United States Nationals by executive agreement."

[35] 453 U.S. at 684–85, 101 S.Ct. at 2989–90.

[36] 453 U.S. at 688–90, 101 S.Ct. at 2991–92. Stevens, J., concurred and would have held that the question as to the jurisdiction of the Court of Claims was not ripe. Powell, J., concurred and dissented in part. He would not have decided whether the president's nullification of the attachments represented a taking. The majority, in a footnote, had rejected petitioner's argument that although the president, when he froze assets, could have forbidden attachments, "once he allowed them the President permitted claimants to acquire property interests in their attachments." The Court, rather, concluded that "because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation." 453 U.S. at 674 n. 6, 101 S.Ct. at 2983–84, n. 6.

[37] 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

[38] 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

[39] 204 F.2d 655 (4th Cir. 1953), affirmed on other grounds 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329 (1955).

See Swearingen v. United States, 565 F.Supp. 1019, 1021 (D.Colo.1983) (Matsch, J.), citing this section of an earlier edition of this treatise.

> [T]he executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreement, was unenforceable in the courts of the United States for like reason.[41]

The court found this executive agreement invalid because the Executive branch had not properly exercised those powers delegated to it by earlier federal statutes:

> There was no pretense of complying with the requirements of [the Agricultural Adjustment Act of 1948]. . . . Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the Agricultural Adjustment program, it was necessary that the provisions of this statute be complied with and an executive agreement excluding such exports which failed to comply with it was void.[42]

Although the Supreme Court has not ruled on this issue directly and affirmed on other grounds,[43] the *Capps* decision suggests that the executive agreements might not be completely equal to treaties in all respects. The Restatement of the Law, (second) Foreign Relations Law of the United States, has summarized the effect on domestic law of an executive agreement entered into pursuant to the president's constitutional authority, the first type of executive agreement described above:

> (1) An executive agreement, is made by the United States without reference to a treaty or act of Congress, conforming to the [appropriate] constitutional limitations . . . and manifesting an

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[40] The executive agreement was claimed to have derived its authority from prior Congressional authorization. See § 6.8, supra.

[41] 204 F.2d at 658. The court also stated that no cause of action had been created by Congress for this type of injury. Id.

On the president's powers to regulate international economic affairs, see generally J. Jackson, Legal Problems of International Economic Relations, Chapter 4 (1977).

[42] 204 F.2d at 658–59. The Circuit Court also said that the executive agreement is invalid because it affects foreign commerce and the president does not have the power to regulate interstate and foreign commerce since that power is vested in the Congress by the Constitution. This dictum is unpersuasive. "If the President cannot make agreements on any matter on which Congress could legislate, there could be no executive agreements with domestic legal consequences, since, we have seen, the legislative powers of Congress has few and far limits." L. Henkin, Foreign Affairs and the Constitution 181 (1972).

[43] 204 F.2d 655, 658 (4th Cir. 1953), affirmed on other grounds 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329 (1955). See also, Seery v. United States, 127 F.Supp. 601, 606 (Ct.Cl.1955); American Bitumals & Asphalt Co. v. United States, 146 F.Supp. 703, 708 (Cust.Ct.1956), reversed on other grounds 246 F.2d 270 (C.C.P.A.1957), certiorari denied 355 U.S. 883, 78 S.Ct. 150, 2 L.Ed.2d 113 (1957); Consumer's Union v. Rogers, 352 F.Supp. 1319 (D.D.C.1973).

intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States.

(a) supersedes inconsistent provisions of the law of the several states, but

(b) does not supersede inconsistent provisions of earlier acts of Congress.[44]

The position of the Restatement, (second)—that an executive agreement entered into by the President pursuant to his constitutional authority, the first type of agreement described above, does not supersede earlier acts of Congress [45]—may not be entirely correct when the president is in fact entering into an agreement pursuant to his *inherent* presidential authority in the field of foreign relations.[46] The Reporter's Notes to the First Tentative Draft of the Restatement of the Law, Foreign Relations Law of the United States (Revised) rejects the position of the Restatement, (second) [47] and the black letter of the Restatement (Revised) also does not adopt the view of the Restatement, (second). [48]

In short, if the President has authority under the Constitution or otherwise to promulgate an executive order, and if that order is consistent with previously enacted federal law, then that executive agreement is also the supreme law of the land and must prevail over contrary state law; such an executive agreement probably also must prevail over earlier Congressional enactments *if* the President is, in fact, entering into an agreement pursuant to his exclusive presidential authority in the field of foreign relations. If the President's authority to promulgate an executive agreement does not derive from his exclusive presidential powers—if, for example, it does not derive from his power to recognize foreign governments or his power as commander-in-chief—then the executive agreement should not be able to override an earlier enacted federal statute.

WESTLAW REFERENCES

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[44] Restatement of the Law, 2d, Foreign Relations Law of the United States, § 144(1) (1965).

[45] See text at nn. 3–4, supra.

[46] P. Hay & R. Rotunda, The United States Federal System: Legal Integration in the American Experience 59–60 (Giuffrè, Milan 1982).

[47] Tent.Draft No. 1, at 70 (Reporter's Notes to § 135) (April 1, 1980).

[48] Id. at 64, § 135(1). See also, id. at 66, Comment (a).

III. THE WAR POWER

§ 6.9 Introduction

Constitutional language suggests that the president and Congress share the war power, the dominant authority being vested in the legislature. Congress declares war and is delegated power to tax and finance expenditures necessary for defense. Additionally, Congress determines the rules of warfare, is empowered to raise and support an army and navy and makes all laws necessary and proper for exercising the war power.[1] The President, the Constitution provides, is the Commander-in-Chief of the armed forces.[2]

However, it is sometimes argued that the Commander-in-Chief clause, read in concert with provisions vesting executive power in the President to see that the laws are faithfully executed and peace preserved, authorizes the President to use military force where required to protect national interests unless Congress prohibits such action.[3] After all, the Constitution does not delegate to Congress the power to "conduct" war or to "make" war; it only delegates the power to "declare" war. While an early draft of the Committee on Detail gave Congress the power to "make" war, the framers substituted "declare" in the final draft.[4]

WESTLAW REFERENCES

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§ 6.10 Historical Development of the War Power

The nature of the executive and congressional war powers has been the subject of a long debate—a debate which was initiated when the Constitution was written and continues to the present day. The framers, believing the power to declare war should be granted to the body most broadly representative of the people, vested the power to declare war in Congress.[1]

Alexander Hamilton writing on the executive's role in the *Federalist Papers* endorsed a limited Commander-in-Chief power.

> The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. . . . [The Commander-in-

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§ 6.9

[1] U.S.Const. art. 1, § 8.

[2] U.S.Const. art. 2.

[3] See E. Corwin, The President: Office and Powers 134 (4th rev. ed. 1957). See generally, Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 So.Calif.L.Rev. 863 (1983).

[4] 2 M. Farrand, The Records of the Federal Convention of 1787, at 313, 318–19 (Rev. ed. 1937). See Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771, 1773 (1968).

§ 6.10

[1] C. Berdahl, War Powers of the Executive in the United States 79 (1921).

> Chief power] would amount to nothing more than the command and direction of the military and naval forces, as first general and admiral of the Confederacy.[2]

Hamilton believed the President was powerless to declare war and to raise armies.[3] However, he expressed fear that the war power would be construed to prohibit raising armies in peace time thereby preventing the nation from preparing to defend itself against future invasions.[4]

James Madison, sharing Hamilton's apprehension, asserted that interest in self preservation would prevail over any constitutional barriers that limited military preparations and precautions unless there was a war.[5] Although the framers intended to place a constitutional check upon the President's power to involve the nation in war, they also wanted to be certain that the President had authority to mobilize military forces to repel sudden attacks.[6]

Historical Justifications for Presidential Military Interventions. Historically Presidents have justified their authorization of military intervention abroad without congressional approval on three basic theories: Self defense, neutrality and collective security.[7] First, Presidents have asserted they have power to order defensive military action in response to aggression without consulting Congress. The second theory, the neutrality theory, was developed as a justification for military intervention in foreign countries to protect United States nationals and property. The executive could send troops abroad for a limited security purpose but the troops were to be neutral to any conflict in the foreign country. Third, presidential authorization of military intervention without prior congressional approval, has been justified as within the executive's power under collective security agreements such as the Organization of American States (O.A.S.), The North Atlantic Treaty Organization (N.A.T.O.) and the South East Asian Treaty Organization (S.E.A.T.O.).[8]

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[2] A. Hamilton, The Federalist Papers, No. 69 at 417–18 (Rossiter ed. 1961).

[3] Id. at 18.

[4] A. Hamilton, The Federalist Papers, No. 25 at 162–67 (Rossiter ed. 1961).

[5] J. Madison, The Federalist Papers, No. 41 at 256–64 (Rossiter ed. 1961).

[6] 2 M. Farrand, The Records of the Federal Convention of 1787 at 313, 318–19 (rev. ed. 1937).

[7] The "Pacificus" and "Helvidius" letters on the foreign affairs power also reflect the sentiments of Madison and Hamilton on the division of the war power between the president and Congress. Madison argued the foreign affairs power could be used to commit the nation to a course of action leading to war. He concluded that, by virtue of the constitutional provision expressly granting Congress the power to declare war, the foreign affairs power must also be vested in Congress. The opposing argument was adopted by Hamilton who perceived the determination of the direction of foreign policy to be an inherently executive power although the implementation of such power depended upon subsequent acts of Congress. E. Corwin The President: Office and Powers 177–81 (4th rev. ed. 1957).

[8] The "Yale Paper"—Indochina: The Constitutional Crisis 116 Cong.Rec. S 7117–S 7123 (May 13, 1970). See generally, Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771, 1778–85. (1968).

Self defense was the first theory used to justify expansion of executive war power. Hamilton, for example, strongly criticized President Jefferson's hesitation to take aggressive action against Tripoli without the consent of Congress after the Beys declared war against the United States. Hamilton wrote that no congressional approval was necessary for any defensive military action taken by the president as long as the United States was not the aggressor.[9]

Subsequent presidents have relied on the self defense theory many times since Hamilton made this argument. For example, during the Mexican American War, Congress, after heated debate, upheld President Polk's orders authorizing the United States troops to attack first in self defense if the enemy crossed the Rio Grande into disputed territory.[10]

The Supreme Court specifically approved of this theory in the *Prize Cases*,[11] a case which arose during the Civil War. The Supreme Court found President Lincoln had the right to blockade southern states without a congressional declaration of war. Writing for a five to four majority, Justice Grier stated that the President has the power to determine if hostilities are sufficiently serious to compel him to act to suppress the belligerency or take defensive measures:

> He [the President] has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.
>
> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." [12]

The executive, the Court indicated, was also empowered to determine what degree of force should be used to respond to the conflict.[13]

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[9] A. Hamilton, Works of Alexander Hamilton 746–47 (J. Hamilton ed. 1851); Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771, 1779 (1968).

[10] Act of May 13, 1846, ch. 16, 9 Stat. 9. Later, however, the House of Representatives amended a resolution of thanks to General Taylor to include language charging that Polk had unconstitutionally and unnecessarily involved the United States in a war. Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771, 1780 n. 50 (1968).

[11] 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1863).

[12] 67 U.S. at 668, 17 L.Ed. at 477.

[13] 67 U.S. at 670, 17 L.Ed. at 477.

Actions of Presidents in this century have led to a steady erosion of the congressional war making power. Under the guise of the neutrality theory Theodore Roosevelt sent troops to Panama in 1903. The troops in reality were being used to fight the Colombian Army.[14] President Truman ordered troops to South Korea to repel the invasion by North Korea without seeking authorization from Congress. Although Truman described involvement in Korea as a police action, not a war, public opposition to the president's action developed as the nation became deeply involved in a major military conflict.[15] During the subsequent administration President Eisenhower was careful to seek congressional approval prior to authorizing military involvement in Formosa and the Suez crisis.[16]

A modern trend has been for the President to secure general Congressional authorization to fall back upon in case the executive's power to authorize military intervention in foreign conflicts is later attacked. President Kennedy justified the adoption of the quarantine during the Cuban missile crisis on the basis of a joint Congressional resolution and the United States' O.A.S. collective security arrangement.[17] The marines sent to the Dominican Republic by President Johnson were initially justified under the neutrality theory as necessary to protect United States' nationals. Later the neutrality rationale was dropped and the explanation was then made that the President was authorized to order the troops to Santo Domingo under the provisions of the Rio Treaty adopted pursuant to the O.A.S. charter.[18] President Johnson relied upon the Commander-in-Chief clause and the Gulf of Tonkin resolution to justify his authorization of escalated military involvement in Viet Nam.[19]

WESTLAW REFERENCES

"prize cases" (67 +3 635) /p war

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[14] S. Bemis, A Diplomatic History of the United States 515–19 (4th ed. 1955).

[15] R. Leckie, The Wars of America 850–58 (1968).

[16] T. Bailey, A Diplomatic History of the American People 834–44 (6th ed. 1958). See generally Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771, 1791–93 (1968).

[17] See Presidential Proclamation No. 3504, 27 Fed.Reg. 10,401 (1962) where Kennedy justified the quarantine and accompanying measures taken against Cuba and the Soviet Union on the basis of the joint resolution and a resolution passed by the Organization of American States authorizing the quarantine.

See also 2 A. Chayes, T. Ehrlich and A. Lowenfeld, International Legal Process 1107–09 (1969).

[18] 2 A. Chayes, T. Ehrlich and A. Lowenfeld, International Legal Process 1179–82 (1969). Excellent accounts of the Dominican Republic Crisis are given in, N.Y. Times, Apr. 29, 1965, at 1, col. 8 and N.Y. Times, May 3, 1965, at 10, col. 1.

[19] Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771, 1793 (1968) citing U.S. Dept. of State, The Legality of the United States Participation in the Defense of Viet Nam, 54 Dept. State Bull. 474, 484–85 (1966).

§ 6.11 Economic Regulations and the War Power

The power of the President and Congress to impose economic regulations in times of war provides insight into the nature and scope of the war power. In *Woods v. Cloyd W. Miller Co.*[1] the Supreme Court reversed the District Court. The lower court had held that Congress' authority to regulate rent by virtue of the war power ended with the Presidential Proclamation terminating World War II hostilities.[2] The Supreme Court found that the war power sustained Title II of the Housing and Rent Act of 1947.

The Court relied on a passage from *Hamilton v. Kentucky Distillers*[3] which had included in the war power the power "to remedy the evils which have arisen from [the war's] rise and progress" and continues until the emergency has ended. Thus, cessation of hostilities is not necessarily the end of a war.[4] Because the power to wage war is the power to wage it successfully,[5] the context of a war or preparations for a war or its winding down may justify extensive legislative and executive power.[6]

The Steel Seizure Case. In *Youngstown Sheet & Tube Co. v. Sawyer*[7] the Supreme Court discussed the president's power to impose economic regulations under the Commander-in-Chief clause and other constitutional provisions. Apprehensive that an impending steel worker's strike would endanger national security, President Truman issued an executive order instructing Secretary of Commerce Sawyer to seize and operate many of the nation's steel mills,[8] Truman justified the executive order as valid under the constitutional and statutory power vested in him as President and Commander-in-Chief.

Pursuant to the president's order, the Secretary of Commerce seized the steel mills. Sawyer directed the presidents of the mills to operate their facilities in compliance with regulations which the Department of Commerce issued. Truman immediately informed Congress of these events, but the legislature failed to take any action.[9]

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§ 6.11

[1] 333 U.S. 138, 68 S.Ct. 421, 92 L.Ed. 596 (1948).

[2] Id. at 140, 68 S.Ct. at 422.

[3] 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194 (1919).

[4] 333 U.S. 138, 141, 68 S.Ct. 421, 423, 92 L.Ed. 596 (1948).

[5] E.g., United States v. Macintosh, 283 U.S. 605, 622, 51 S.Ct. 570, 574, 75 L.Ed. 1302 (1931); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413 (1934); Hirabayashi v. United States, 320 U.S. 81, 93, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774 (1943). Thus the war power has been used to justify internment of Japanese-American citizens in World War II. See, e.g., Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), rehearing denied 324 U.S. 885, 65 S.Ct. 674 (1945). Probably *Korematsu* is no longer good law as to its specific result.

[6] E.g., L. Henkin, Foreign Affairs and the Constitution, 321 n. 15 (1973).

[7] 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). See generally, Freund, The Year of the Steel Case, 66 Harv.L.Rev. 89 (1952); Lea, The Steel Case, 47 Nw.U.L. Rev. 289 (1952).

[8] 343 U.S. at 583, 77 S.Ct. at 865. Executive Order 10340 April 8, 1952. 17 Fed. Reg. 3139 (1952).

[9] 343 U.S. at 583, 77 S.Ct. at 865.

Congress had previously enacted legislation providing methods for handling situations of this nature but, had expressly refused to authorize governmental seizure of property.[10]

The steel companies filed suit against Secretary of Commerce Sawyer in the district court praying for declaratory judgment and injunctive relief. The district court granted the plaintiffs a preliminary injunction which the appellate court stayed. The Supreme Court, in an expedited proceeding, affirmed the district court's order in a six to three decision finding the executive's seizure order invalid.[11]

Justice Black wrote the opinion for the Court in which Justices Frankfurter, Douglas, Jackson and Burton concurred. Justice Clark concurred in the judgment of the Court. Although the appeal was made from the lower court's decision to issue a preliminary injunction, Black stated that the issue of the Constitutional validity of President Truman's order was ripe for determination.

The Court found that no express or implied statutory provision authorized the President's seizure order [12] and rejected the argument that the order should be upheld as a valid exercise of the President's Commander-in-Chief power. In response to the government's contention that numerous cases have found military commanders entitled to broad powers, Black stated:

> Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's law-makers, not for its military authorities.[13]

Black also concluded that the executive power vested in the President by the Constitution, particularly his duty to see that the laws are faithfully executed, refuted the idea that the chief executive can make laws.[14] Congress has "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" in the federal government.[15] The "necessary and proper" clause applies to Congress, not to the executive branch.

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[10] Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 Colum. L.R. 53, 55–56 (1953). Congress provided alternative solutions for similar problems in the Defense Production Act of 1950, 50 U.S.C.A.App. § 2071 (1952); The Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C.A. §§ 141-197 (1952); and the Selective Service Act of 1948, 50 U.S.C.A.App. §§ 451–462 (1952).

[11] 343 U.S. at 584–86, 72 S.Ct. at 865–66.

[12] 343 U.S. at 584–86, 72 S.Ct. at 865–66. See Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 Ind. L.J. 515, 520–21, 524–25 (1982), for a discussion and analysis of the method by which a majority of the justices in this case treated Congress' silence as an expression of congressional intent to forbid the seizure of the steel mills. Cf. Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv.L.Rev. 892 (1982).

[13] 343 U.S. at 587, 72 S.Ct. at 867.

[14] 343 U.S. at 587, 72 S.Ct. at 867. See generally, Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 So.Calif.L.Rev. 863 (1983); see also, Winterton, The Concept of Extra-Constitutional Executive Power in Domestic Affairs, 7 Hastings Const.L.Q. 1 (1979) (contends that the

In his concurring opinion Justice Frankfurter indicated he was not drawing conclusions as to what powers the President would have had in the absence of legislation applicable to the seizure.[16] What was at issue was the President's authorization of the steel seizure after Congress had expressly refused to support this course of action.

> In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority . . . .[17]

Frankfurter warned, however:

> It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[18]

Prior incidents of industrial seizures, Frankfurter concluded, did not indicate a past history of Congressional acquiescence of executive authority in this area.[19]

Justice Douglas stated in his concurring opinion that the branch of government with "the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment." [20]

Justice Jackson's Three-Part Analysis. Justice Jackson, in his separate concurrence, argued that the President's powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." [21] The scope of the President's war powers, Jackson believed, depended upon the conditions existing at the time the executive asserted his authority. He developed a three part analysis.

First, when the "President acts pursuant to an express authorization of Congress, his authority is at its maximum." [22] If the President had seized the steel mills pursuant to Congressional grant of authority the constitutional validity of his action would probably have been upheld.

Secondly, if the President acted:

Constitution, by express terms or reasonable implication, does not confer the broad power claimed by some Presidents).

[15] 343 U.S. at 588–89, 72 S.Ct. at 867.

[16] 343 U.S. at 597, 72 S.Ct. at 890–91.

[17] 343 U.S. at 602, 72 S.Ct. at 893.

[18] 343 U.S. at 610–11, 72 S.Ct. at 897.

[19] 343 U.S. at 613, 72 S.Ct. at 898.

[20] 343 U.S. at 631–32, 72 S.Ct. at 887.

[21] 343 U.S. at 635, 72 S.Ct. at 870.

[22] 343 U.S. at 635, 72 S.Ct. at 870.

> in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia . . . may sometimes . . . enable, if not invite, measures on independent presidential responsibility.[23]

When, however, the President acts contrary to the express or implied will of Congress then the executive power falls to the third part of the analysis, an extremely low level, his "lowest ebb" of authority. The President can then:

> rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution.[24]

Jackson concluded that the steel seizure order was contrary to the will of Congress and, as a consequence, could only be upheld if such seizures were found to be within the power of the executive and beyond the scope of congressional authority.[25] And the President's actions were not of that type.

Justice Burton stated in his concurrence that the seizure order was repugnant to the separation of powers theory.[26] In a concurring opinion, Justice Clark indicated that although the President has extensive authority to act in times of national emergency this power is subject to limitations prescribed by Congress.[27]

In the dissent, Justice Vinson, joined by Justices Reed and Minton, rationalized that the President was within the scope of his constitutional authority when he ordered the steel mills seized as an emergency situation existed.[28]

WESTLAW REFERENCES

regulat! control! /5 rent /p war /s power

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youngstown /p commander-in-chief

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[23] 343 U.S. at 637, 72 S.Ct. at 871. (emphasis added).

[24] 343 U.S. at 637–38, 72 S.Ct at 871.

[25] 343 U.S. at 640, 72 S.Ct. at 872–73.

The Court endorsed and applied Jackson's analysis in Dames & Moore v. Regan, 453 U.S. 654, 669, 101 S.Ct. 2972, 2981, 69 L.Ed.2d 918 (1981), but noted that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."

[26] 343 U.S. at 655–60, 72 S.Ct. at 880–82, 96 L.Ed. at 1209–12.

[27] 343 U.S. at 660–67, 72 S.Ct. at 882–86, 96 L.Ed. at 1212–15.

[28] 343 U.S. at 667–710, 72 S.Ct. at 929–49, 96 L.Ed. at 1215–36.

§ 6.12 The War Powers Resolution

The ability of the executive to deploy the military to foreign nations to fight in informal wars created a growing discontent with what many have regarded as the President's assumption of congressional war power during the Viet Nam conflict. To restore what has been argued to be the balance intended by the framers, Congress passed the War Powers Resolution over a presidential veto on November 7, 1973. It is reprinted in part in the margin.[1]

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§ 6.12

[1]

PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing [setting forth "the circumstances necessitating the introduction of armed forces," "the constitutional and legislative authority" under which it occurred, "the estimated scope and duration of the hostilities," and "such other information as the Congress may request."]

CONGRESSIONAL ACTION . . .

Sec. 5. . . . (b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States . . . .

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions

The War Powers Resolution restricts the executive's authority to involve the United States in foreign controversies without Congressional approval. Specific provisions of the Resolution, however, ensure that the President has authority to send to military into combat without requesting authorization from Congress if the United States or one of her territories is attacked.[2]

The War Powers Resolution raises many interesting and unresolved questions. Is the Resolution binding? If it is, who has standing to sue claiming a violation of the provisions? No specific language in the Resolution resolves the standing issue. Perhaps Justice Brennan's theory, expressed in the different context of other cases—that the only requirement for standing is injury in fact[3]—could provide a basis for military personnel sent abroad in violation of the resolution to sue the President.

If standing is found to exist, it may well be that judicial review of cases under this law is foreclosed by the doctrine of political questions.[4]

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and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution. . . .

INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law . . ..

(2) from any treaty . . . or . . ..

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution. . . .

[2] War Powers Resolution, 50 U.S.C.A. §§ 1541–48, § 2 C(3).

See generally, Franck, After the Fall: The New Procedural Framework for Congressional Control Over the War Power, 71 Am.J. of Internat'l L. 605 (1977). Vance, Striking the Balance: Congress and the President Under the War Powers Resolution, 133 U.Pa.L.Rev. 79 (1984).

[3] See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (Brennan, J., concurring); Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) (Brennan, J., concurring).

[4] See, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), certiorari denied ___ U.S. ___, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984), affirming 558 F.Supp. 893 (D.D.C.1982) (holding that the issue whether a report is required to be submitted under § 4(a)(1) of the War Powers Resolution is a political question, at least in the context of El Salvador combat).

The impact on foreign affairs of a judicial decision contrary to the President's military actions already underway may suggest that questions regarding provisions of the War Powers Resolution should be considered nonjusticiable and immune from judicial review as political questions.

Even if this War Powers Resolution were reviewable and subject to litigation, its constitutionality may be subject to a presidential claim that the resolution improperly seeks to subtract from his inherent powers. However, in that case, the War Powers Resolution should still be relevant, for under Justice Jackson's analysis in the Steel Seizure case, the President's war powers should be at their lowest ebb: if he would act contrary to the War Powers Resolution, he would then have only his own powers minus any Constitutional powers of Congress to reduce his powers.[5]

Legislative Veto. Even without raising the spectre of inherent presidential powers, it is now clear that section 5(c) of the War Powers Resolution is an unconstitutional legislative veto and therefore invalid in the wake of *Immigration and Naturalization Service v. Chadha.*[6] Section 5(c) purports to allow Congress to force the President to withdraw U.S. armed forces engaged in hostilities outside the territorial United States. *Chadha* requires that action having "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials,"[7] must be subjected to the possibility of presidential veto. But section 5(c) is not subject to a presidential veto. "Adoption of a concurrent resolution under section 5(c) would have the purpose and effect of altering the rights and duties of the President [and thus] the majority opinion [in *Chadha* was also] invalidating the legislative veto provision in the War Powers Resolution."[8]

WESTLAW REFERENCES
"war power resolution"

§ 6.13 Military Courts

(a) Overview

Military courts were established by Congress pursuant to its Article I power to make rules for the government and regulation of the land

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See generally, § 2.16 supra, for an analysis of the political question doctrine.

[5] For further discussion, see generally, Carter, The Constitutionality of the War Powers Resolution, 70 Va.L.Rev. 101 (1984); Glennon, The War Powers Resolution Ten Years Later: More Politics than Law, 78 Am. J. of Internat'l L. 571 (1984); Smolla, The Supreme Court and the Temple of Doom: A Short Story, 2 Const. Commentary 41 (1985).

[6] 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed. 2d 317 (1983). See § 10.8.

[7] 462 U.S. at 952, 103 S.Ct. at 2784.

[8] Glennon, The War Powers Resolution Ten Years Later: More Politics Than Law, 78 Am. J. of Internat'l L. 571. 577 (1984).

and naval forces and its power to make laws which are necessary and proper for implementing that power.[1] During war or insurrection, military courts dispense justice to both civilian and military transgressors. In wartime, even when civil courts continue to function and try nonmilitary crimes, enemy combatants may be tried by courts martial under the law of war[2] whether the crimes were committed in a war zone or through entrance by stealth into a non-combatant zone.

Martial law can be declared if, by reason of civil disturbance or invasion, the civil courts cannot function. During the period of martial law, all crimes are tried by courts martial. Martial law must end when civil courts can again function; court-martial under the law of war can occur at least until peace has been declared.

During peacetime, military courts play the limited role of governing members of the armed forces. Although courts-martial may try members of the armed forces whether they are stationed within the United States or on foreign soil, these courts do not have jurisdiction to try those family members who accompany the servicemen, nor do they have jurisdiction to try civilian employees. Courts-martial can only try servicemen while they are actively in the military and only then if the crime is service-connected.

The United States Supreme Court has severely limited the jurisdiction of courts-martial because courts-martial are not Article III courts. Because they are courts established under Article I, they do not need to provide most constitutional safeguards for defendants. Courts-martial do not have an independent judiciary with life tenure,[3] do not provide a jury of the accused's peers,[4] do not provide legal counsel for the accused in all non petty offenses,[5] and do not require indictment by grand jury.[6]

Moreover, Article III courts, including the United States Supreme Court, do not have the power to directly review decisions of courts-martial. Military prisoners may petition Article III courts to grant a writ of habeas corpus, but review in even collateral proceedings is limited to ascertaining that the military court had jurisdiction and that it considered the defendant's claims. Civil courts cannot correct errors in the military court's procedure or conclusions. A civil court, furthermore, generally must abstain until the conclusion of the military trial before granting the writ of habeas corpus.

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§ 6.13

[1] U.S.Const. art. I, § 8.

[2] The law of war is a branch of international law that prescribes the rights and obligations of belligerents and other persons resident in a theatre of war. For an explication of the law of war, see 2 Winthrop, Military Law and Precedents, The Law of War (2d ed.; 1920 reprint).

[3] See, e.g., 10 U.S.C.A. § 826. The requirement of an independent judiciary is found in Article III of the Constitution and applies only to Article III courts.

[4] See, e.g., 10 U.S.C.A. § 825.

[5] Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), on remand 536 F.2d 303 (9th Cir.1976).

[6] U.S.Const. amend. V; Ex parte Milligan, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866).

(b) Martial Law and the Law of War

Martial law, when applicable, supercedes civilian by granting control of persons and property to military rule and court martial. It is not a true body of law but the principle upon which the military is given control of the law. As Blackstone stated:

> [M]artial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is . . . in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.[7]

Ex parte Milligan[8] gave the United States Supreme Court the opportunity to discuss the parameters of the declaration of martial law. Milligan was arrested in Indiana on the orders of the commander of the Indiana military district and tried by court-martial. He was convicted and sentenced to be hanged. He applied for a writ of habeas corpus to the Supreme Court, contending that he, as a civilian and citizen of a non-rebelling state, was not under the jurisdiction of a court-martial.

The Supreme Court sustained Milligan's contention, holding that martial law "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed . . .. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."[9] If the invasion has ended, there is no basis for martial law. Even if the right of habeas corpus is lawfully suspended, as it may be during time of War or insurrection, a prisoner thus denied habeas corpus is, nevertheless, entitled to a civilian trial with full Constitutional protections.[10]

In 1946, the Supreme Court in *Duncan v. Kahanamoku*[11] was faced with a congressional act authorizing the declaration of martial law in case Hawaii were to be threatened with invasion. The Court avoided a constitutional decision on Congress' power to establish martial law by construing "martial law" in the act to authorize merely vigorous action for the maintenance of an orderly civil government and not to authorize the supplanting of civil courts by courts martial.

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[7] 1 Blackstone, Commentaries 413.

[8] 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866).

[9] 71 U.S. (4 Wall.) at 121, 127 (emphasis in original).

[10] 71 U.S. (4 Wall.) at 126. But see Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), holding that Japanese-American citizens could be subjected to military authority under Congress's war power, even though civilian courts were functioning.

Suspension of the Writ of Habeas Corpus. The Constitution permits the writ of habeas corpus to be suspended in time of war or insurrection. U.S.Const. art. I, § 9. The suspension would prevent civil courts from hearing habeas petitions from either civilian or military prisoners. However, Congress must declare the suspension. See, Ex parte Bollman, 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807) 1 Winthrop, Military Law and Precedents (Military Law) 830 (2d ed., 1920 reprint).

[11] 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946).

Rules protecting civilians from courts martial while civil courts can function, do not insulate combatants in a war from military jurisdiction. Thus, the Supreme Court in *Ex parte Quirin,*[12] permitted trial by court-martial of eight saboteurs who entered the United States secretly and without uniforms. Their status as combatants removed them (including one claiming American citizenship) from the purview of *Milligan's* holding that citizens of states with open civilian courts could not be tried by court martial.

In re Yamashita[13] extended the jurisdiction of military tribunals to guard against the immediate renewal of the war and military conflict and to remedy the evils which the military operations produced. The Court concluded that at least until peace has been officially recognized by treaty or proclamation, military commissions can try violations of the law of war committed before the cessation of hostilities.

The fifth amendment due process provision does not apply in these circumstances. The Court held that such trials were not subject to the Articles of War standards for military trials because the Articles of War applied only to trials for members of the American army and for prisoners of War who committed crimes while prisoners.

(c) Military Law and Its Applicability in Time of Peace

Military law refers to the legal system, including the courts, by which the military forces are governed.[14] Military courts have limited jurisdiction; they can try only military personnel for service-related crimes.

Military Personnel While in Service. In *United States ex rel. Toth v. Quarles,*[15] the United States Supreme Court held that only present military personnel were subject to court martial. Toth received an honorable discharge after serving in Korea; five months later, he was arrested and tried by court-martial for a murder committed in Korea while he was in the army. The Supreme Court noted that millions of citizens were veterans and that allowing military courts to take jurisdiction on the basis of past association with the military would remove from many citizens the protections of civil trial.

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[12] 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942), order affirmed 317 U.S. 1, 317 U.S. 18, 63 S.Ct. 2, 87 L.Ed. 3, 87 L.Ed. 7 (1942), order modified 63 S.Ct. 22 (1942).

[13] 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946).

[14] For a discussion of the history of military law, see 1 Winthrop, Military Law and Precedents (Military Law) (2d ed., 1920 reprint). Present military law is codified in the Uniform Code of Military Justice, 10 U.S.C.A., ch. 47.

[15] 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

Family Members of Military Personnel and Civilian Employees. After an initial ruling to the contrary, the Court extended the *Toth* ruling in *Reid v. Covert*[16] to remove from military jurisdiction family members who accompanied army personnel to foreign bases. In *Covert*, the civilian wife of an air force sergeant residing on base with him in England was convicted by court-martial of killing her husband. The trial was held pursuant to an executive agreement with England that crimes committed on American army bases could be tried by American courts-martial rather than by English courts. The United States Supreme Court held that, at least in capital offense cases, the military could not try a civilian. Justice Black, in a plurality opinion indicated that the agreement with England which permitted the American court-martial was required to conform to the Constitutional constraints on trials. Because civilian spouses are not members of the land and naval forces, Congress had no power to provide for their trial by other than in an Article III court in conformity with Constitutional restraint.[17]

At this time, however, there was not yet a ruling limiting on courts-martial jurisdiction in noncapital cases because Justices Frankfurter and Harlan found that only capital cases should be excluded from military jurisdiction in these circumstances. Three years later, the Court clarified and expanded *Reid* in *Kinsella v. United States ex rel. Singleton*[18] when it excluded from court-martial jurisdiction civilian family members being tried for noncapital offenses.

Other Supreme Court cases held that civilian employees of the armed forces, like civilian family members, were not within the purview of military court jurisdiction in either capital cases[19] or noncapital cases.[20]

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[16] 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), on rehearing, reversing 351 U.S. 470, 76 S.Ct. 886, 100 L.Ed. 1342 (1956).

[17] Note that *Reid* applied constitutional protections to the family members who accompanied the American soldiers to foreign bases. The mere fact that the bases were abroad did not serve to negate the application of the U.S. Constitution. See also, e.g., Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950), certiorari denied 340 U.S. 939, 71 S.Ct. 480, 95 L.Ed. 677 (1951), rehearing denied 341 U.S. 907, 71 S.Ct. 607, 95 L.Ed. 1345 (1951) ("For present purposes we assume and we think probably so, that the protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces."); Cf. Biddle v. United States, 156 F. 759, 761 (9th Cir. 1907).

See generally, Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan.L.Rev. 587 (1949); Green, Applicability of American Law to Overseas Areas Controlled by the United States, 68 Harv.L.Rev. 781 (1955). Sutherland, The Flag, the Constitution, and International Agreements, 68 Harv.L.Rev. 1374 (1955).

But cf. Haig v. Agee, 453 U.S. 280, 308, 101 S.Ct. 2766, 2783, 69 L.Ed.2d 640 (1981) (Court assumes, arguendo, "that the First Amendment protections reach beyond our national boundaries . . .").

[18] 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960).

[19] Grishan v. Hagan, 361 U.S. 278, 80 S.Ct. 310, 4 L.Ed.2d 279 (1960).

[20] McElroy v. United States ex rel. Gugliando, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960).

The Requirement that the Crime Be Service-Connected. Military court jurisdiction is limited to particular types of crimes as well as to particular persons. In *O'Callahan v. Parker*,[21] the Supreme Court invalidated the court martial conviction of a serviceman in Hawaii who had attempted to rape a girl while he was on leave and dressed in civilian clothes. The Court held that only *service-connected* crimes could be tried by court martial. The Court decision noted that the fifth amendment excepts from indictment by grand jury only those cases arising in the land or naval forces when in actual service in time of war or public danger. The Court decided that a soldier on leave was not "in actual service," at least when the crime was unconnected to the soldier's military duties. Therefore, the soldier must be indicted and have a civilian trial.

Two years later in *Relford v. Commandant*,[22] the Court upheld the court martial conviction of a serviceman accused of raping several civilian women. The Court found that *O'Callahan* did not apply because these crimes were committed by a serviceman on the military base against women properly on the base; the crimes were service-connected.[23]

Trial by Host Country. Through this series of decisions discussed above, the Supreme Court intended to augment the constitutional protections available to civilians accompanying the military forces, and to the military for nonservice-connected offenses. But if military personnel are subject to U.S. court-martial jurisdiction for offenses while in a foreign host country, the United States may allow the host country try the offender. After all, the host country is a sovereign nation which normally has the exclusive jurisdiction to punish offenses against its laws committed within its borders unless it consents, either expressly or impliedly, to surrender of its jurisdiction.[24]

For discussions of military court jurisdiction over civilians and civilian-military hybrids, see Bishop, Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners, 112 U.Penn.L.Rev. 317 (1964); Everett, Military Jurisdiction over Civilians, 1960 Duke L.J. 366; Girard, The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis, 13 Stan.L.Rev. 461 (1961).

[21] 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed. 2d 291 (1869).

Applicability Abroad. If the serviceman commits his offense abroad, lower courts have usually not applied the *O'Callahan* rule. E.g., Wimberley v. Laird, 472 F.2d 923 (7th Cir.1973), certiorari denied 413 U.S. 921, 93 S.Ct. 3071, 37 L.Ed.2d 1043 (1973) See generally, Mills, O'Callahan Overseas, 41 Ford.L.Rev. 325 (1972).

For analysis of *O'Callahan*, see generally,

Nelson & Westbrook, Court-Martial Jurisdiction over "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L.Rev. 1 (1969); Everett, O'Callahan v. Parker—Milestone or Millstone in Military Justice?, 1969 Duke L.J. 853.

[22] 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed. 2d 102 (1971).

[23] *Retroactivity.* In Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973), a plurality of the Court held that *O'Callahan* should have only prospective application. A majority of the Court adhered to the service-connected crime requirement for military court jurisdiction.

[24] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287, 293 (1812); Wilson v. Girard,

The leading decision in this area is *Wilson v. Girard.*[25] Girard was a U.S. soldier stationed in Japan. He was involved in a service-connected incident which caused the death of a Japanese woman. The United States turned Girard over to the Japanese authorities pursuant to an administrative agreement which had been authorized by a treaty with Japan. This agreement provided that the United States would have jurisdiction over offenses committed in Japan by members of the U.S. Armed Forces unless the United States waived its jurisdiction. The Supreme Court, in a per curiam opinion, held that this waiver of jurisdiction was constitutional.

(d) Limitations on Judicial Review of Military Courts by Civil Courts

Military courts form a separate judicial system from the Article III judicial system of civil courts. As noted previously, many constitutional protections for criminal defendants do not apply to court martial of servicemen.[26] Congress, after creating the military court system for the governing of the armed forces, provided for many years that court-martial decisions could be reviewed by an appeals panel within the military and by the Secretary of Defense or the President if the offense is capital. By statute, Congress declared that military criminal proceeding shall be final and conclusive and binding upon all departments, courts, agencies, and officers of the United States.[27]

The 1983 Change in the Law. This situation was changed in 1983, when Congress enacted the Military Justice Act of 1983.[28] In one of the provisions of this Act,[29] "Congress, for the first time in our

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354 U.S. 524, 529, 77 S.Ct. 1409, 1412, 1 L.Ed.2d 1544 (1957) (per curiam).

[25] 354 U.S. 524, 77 S.Ct. 1409, 1 L.Ed. 2d 1544 (1957) (per curiam).

[26] See § 6.13(a), supra. See also Everett New Look in Military Justice, 1973 Duke L.J. 649.

[27] 10 U.S.C.A. § 876. See Gusik v. Schilder, 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950) (holding that the finality of court-martial determination does not prevent collateral attack in civil courts).

For a summary of intramilitary review procedures, see Wacker, The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals, 10 Harv.Civ.Rights—Civ.Liberties L.Rev. 33 (1975).

[28] P.L. 98-209 (Dec. 6, 1983). See generally, 3 Cong. & Admin. News 2182 et seq. (1983).

[29] See 28 U.S.C.A. § 1259, which provides for certiorari review in the following instances:

"(1) Cases reviewed by the Court of Military Appeals under section 867(b)(1) of title 10.

"(2) Cases certified to the Court of Military Appeals by the Judge Advocate General under section 867(b)(3) of title 10.

"(3) Cases in which the Court of Military Appeals granted a petition for review under section 867(b)(3) of title 10.

"(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Military Appeals granted relief."

See also, 10 U.S.C.A. § 867(h)(1): "Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of Title 28. The Supreme Court may not review by a writ of certiorari under such section any action of the Court of history, has conferred on the Supreme Court of the United States jurisdiction to undertake a direct review of military appeals."[30] This review of military appeals is under the certiorari jurisdiction of the Supreme Court. However, notwithstanding this significant change, it is important to understand the pre-1983 law; first because it illustrates how the Supreme Court assumed a limited jurisdiction by means of collateral review over military cases even when the statutes appeared to circumscribe its powers; second, because the new statutory provisions for direct review do not curtail the possibility of collateral attack; and third, because the new provisions for direct review are selective and limited in scope—they do not open the floodgates of direct review in all cases.

The Assumption of Collateral Review. In *Smith v. Whitney*,[31] the Supreme Court held that unless statutes governing the court-martial system expressly provide for *direct* review of courts-martial by civilian courts, there is not direct review; however, there is the possibility of *collateral* review in certain instances. This collateral attack is exercised by means of the writ of habeas corpus.

The Distinction Between Direct and Collateral Review. The Court distinguished direct from collateral review in *Dynes v. Hoover*.[32] Unless a statute otherwise provides, a final court martial sentence:

> is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the *subject-matter or charge*, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. . . . Persons . . . belonging to the army and the navy are not subject to illegal or irresponsible courts martial . . . . In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress . . . .[33]

Thus, civilian courts can review military court decisions for constitutional defects in jurisdiction; it was on this basis that the Supreme Court limited court martial jurisdiction over service-related crimes perpetrated by military personnel.[34] Civil courts also have jurisdiction

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Military Appeals in refusing to grant a petition for review." On this subsection (h)(1), see 3 Cong. & Admin. News 2184 (1983).

[30] Boskey and Gressman, The Supreme Court's New Certiorari Jurisdiction Over Military Appeals, 102 F.R.D. 329 (1984); Boskey and Gressman, The Supreme Court's New Certiorari Jurisdiction Over Military Appeals, 105 S.Ct. at XCII (1984).

[31] 116 U.S. 167, 6 S.Ct. 570, 29 L.Ed. 601 (1886). See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1208–38 (1970); Cooke, The Death Penalty in Courts Martial: United States v. Matthews, 31 Fed.Bar News & Journal 245 (1984).

[32] 61 U.S. (20 How.) 65, 15 L.Ed. 838 (1857).

[33] 61 U.S. at 81, 15 L.Ed. at 844 (emphasis in original).

[34] See § 6.13(c), supra.

to review nonconstitutional jurisdiction issues; military courts have no common law powers and must obey statutory limits on their jurisdiction.[35]

In *Hiatt v. Brown*,[36] the Supreme Court held that a federal court should not review such matters as propositions of law, sufficiency of evidence, or competency of counsel in a court-martial proceeding. The federal court could review the military's exercise of discretion conferred by statute to refuse counsel to a defendant only if a gross abuse of that discretion had given rise to a defect in the court-martial's jurisdiction.

The Court reaffirmed this position in *Burns v. Wilson*.[37] In *Burns*, petitioners asserted that their confessions had been coerced. A plurality of four justices suggested that some review beyond merely establishing court-martial jurisdiction was proper. A civil court should not reevaluate evidence but should determine if the military court had given fair consideration to every significant defense. However, even if the court found an error in the military court's procedure or evaluation of the evidence, it should not overturn the decision; the military court need only consider the defense.[38]

In *Middendorf v. Henry*,[39] the Court heard a habeas petition in which several soldiers complained that they had been denied counsel in a summary court martial. The Court denied the petition on the merits, holding that a summary court martial, which by statute cannot sentence a defendant to more than forty-five days incarceration, is not a criminal proceeding and no counsel is required, at least when the defendants had the opportunity to choose a type of court martial which could give longer sentences but at which counsel would have been provided.[40] The defendants had waived their right to counsel in writing, and the military court had not determined the constitutionality of the waiver. Although the Court did not discuss the level of review appropriate, *Henry* fits the *Burns* mold: a federal court may hear a claim that the court martial has not considered.

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[35] See McClaughry v. Deming, 186 U.S. 49, 22 S.Ct. 786, 46 L.Ed. 1049 (1902); 1 Winthrop, Military Law and Precedents, (Military Law) (2d ed., 1920 reprint).

[36] 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691 (1950), rehearing denied 339 U.S. 939, 70 S.Ct. 672, 94 L.Ed. 1356 (1950).

[37] 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), rehearing denied 346 U.S. 844, 74 S.Ct. 3, 98 L.Ed. 363 (1953).

[38] Before *Burns*, a majority of the Court had expressed a similar view of the limited review available on habeas petition. In Humphrey v. Smith, 336 U.S. 695, 69 S.Ct. 830, 93 L.Ed. 986 (1949), the Court refused to consider the defendant's guilt or innocence in a habeas action. In Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691 (1950), rehearing denied 339 U.S. 939, 70 S.Ct. 672, 94 L.Ed. 1356 (1950), the Court refused to consider a due process challenge based on insufficiency of evidence and incompetence of counsel.

Whelchel v. McDonald, 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141 (1950), rehearing denied 340 U.S. 923, 71 S.Ct. 356, 95 L.Ed. 666 (1951) foreshadowed *Burns*, with the Court holding that the defendant must have the opportunity to present an insanity defense for a military court to retain jurisdiction. Later the Court heard a case, Jackson v. Taylor, 353 U.S. 569, 77 S.Ct. 1027, 1 L.Ed.2d 1045 (1957), rehearing denied 345 U.S. 944, 77 S.Ct. 1421, 1 L.Ed.2d 1542 (1957), in which the Court decided on the merits a military review board's jurisdiction to reduce sentence imposed by court martial. The Court, however, refused to review the sentences.

One commentator suggests that habeas review for military prisoners is narrower than habeas review for civilians only because a court reviewing a court martial conviction will not find that the court martial lost jurisdiction by having deprived the accused of constitutional rights. Weiner, Courts Martial and the Bill of Rights: The Original Practice, 72 Harv.L.Rev. 1, 296–97 (1958). Another commentator, however, suggests that habeas review of court martial should be broader than review of civilian courts. See Development in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1216–25 (1970) (also suggesting that lower courts actually do provide fuller review).

[39] 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed. 2d 556 (1976), on remand 536 F.2d 303 (9th Cir. 1976).

Challenges to the Constitutionality of Military Regulations. A civil court can also hear a challenge to the constitutionality of the particular statute or regulation which a defendant has violated, but the grounds for such a challenge are limited. In *Parker v. Levy*,[41] an officer had exhorted enlisted personnel to refuse to fight in Viet Nam. The officer was court martialed for his refusal to obey the command of a superior officer to establish a training program and for "conduct unbecoming an officer" for his exhortations. The officer challenged his convictions, claiming that the regulations were overbroad and too vague to satisfy the due process requirement of notice.

The Court upheld the statutes on two grounds: first, that they had been interpreted sufficiently to give notice of what type of conduct was proscribed, and second, that the defendant could have no reasonable doubt that his conduct was unlawful. Justice Rehnquist, writing for a majority of the Court, noted that because of the need to maintain military discipline, Congress could legislate with greater breadth and flexibility when prescribing rules for the military than it could when legislating for civilian society.[42]

Abstention. Because the Supreme Court has emphasized the necessity for comity between the civil and military courts,[43] civil courts should wait to review the basis of a court martial until the issues are clear. Nevertheless, a federal court does not have to abstain from hearing a habeas petition during a court-martial proceeding. In *Parisi v. Davidson*,[44] the defendant claimed conscientious objector status while he was in the armed forces. His claim was denied, and he was ordered to board a plane to Viet Nam. He refused and was court martialed. The Supreme Court held that, under these circumstances, a federal court did not need to abstain from hearing an appeal of the denial of conscientious objector status during the military trial for disobeying orders. The Court noted that the defendant had exhausted his military administrative remedies and he had no other course by which to challenge the decision. He could raise his conscientious objector claim at the court martial as a defense to the charge, but even if the court-martial accepted his claim, the court martial would not release him from the armed forces. The Court concluded that the two hearings were independent; the civil court did not need to abstain.

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[40] The Court relied on Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972) (holding that probation revocation was not a criminal proceeding for which counsel must be provided). Subsequently, the Parole Act, 18 U.S.C.A. §§ 3006A, 4214, has been interpreted to provide a statutory right to counsel. Baldwin v. Benson, 584 F.2d 953 (10th Cir. 1978). Other types of courts-martial provide counsel as a statutory requirement; the Court did not discuss the constitutional necessity behind the statute.

[41] 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974).

[42] 417 U.S. at 756–57, 94 S.Ct. at 2561–62.

[43] Parisi v. Davidson, 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972), mandate conformed 456 F.2d 686 (9th Cir.1972); Gusik v. Schilder, 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950).

[44] 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972), mandate conformed 456 F.2d 686 (9th Cir. 1972).

In 1975 in *Schlesinger v. Councilman*,[45] the Court limited *Parisi*, holding that (although the district court had subject matter jurisdiction over the court martial habeas petition) the balance of factors governing exercise of federal equitable jurisdiction suggested that the court abstain until the completion of court martial proceedings. Normally, a federal court should not interfere with a court martial if the defendant's only injury would be standing trial at the court martial and if the court martial could resolve the defendant's claim.

WESTLAW REFERENCES

(a) *Overview*

di court-martial

(b) *Martial Law and The Law of War*

"ex parte milligan" /p martial military /3 law court

(c) *Military Law and Its Applicability in Time of Peace*

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The Requirement That the Crime Be Service-Connected

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(d) *Limitations on Judicial Review of the Military Courts by Civil Courts*

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IV. TREASON AND CORRUPTION OF BLOOD

§ 6.14 History and Purpose

The treason clause in Article III, section 3 is essentially definitional. Treason against the United States can take only two forms: levying war against the United States, or adhering to enemies of the United States by giving them aid and comfort.[1] The clause also expressly defines the proof necessary to establish treason. The accused must confess in open court or two witnesses must testify to the same overt act, which alone (or with circumstantial evidence) establishes the crime of treason. The treason clause, through definition, limits Congress' and the courts' ability to define treason [2] and their ability to change the requirements of proof of treason.

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[45] 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed. 2d 591 (1975).

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[1] The Framers intended that the language "adhering to their Enemies, giving them Aid and Comfort," U.S.Const. art. III, § 3, cl. 1, be interpreted as "adhering to [the United States'] Enemies, [by] giving them Aid and Comfort." 2 J. Elliot, Debates in the Several State Conventions on Adoption of the Constitution 447–51 (1937). See also, Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression 84 Colum.L.Rev. 91, 115–19 (1984).

The inclusion of a restrictive definition of treason in the Constitution reveals a repudiation of part of the English law of treason.[3] The Framers rejected the English treason statute of King Edward, which denominated treason as ". . . the levying of war against the king in his realm, and the adhering to the king's enemies in his realm, giving them aid and comfort in the realm, or elsewhere . . .." [4] The English definition also included, among other things, compassing the death of the chief magistrate, counterfeit of the great seal or coin, and killing a judge when in the exercise of his office.[5] Charges of compassing the king's death, a type of "constructive treason," had been the principal instrument by which treason served in England as drastic suppression of political opposition to those in power.[6]

The record of the constitutional convention, ratifying conventions, and contemporaneous public comment make it clear that the Framers weighted the restrictive definition of treason with historical significance. The Framers chose this language to prevent divisions among society from escalating into charges of treason by the stronger against the weaker, as had often been the case in England.[7] The Framers selected two offenses constituting treason under the English statute, both of which applied to the sovereignty of the Government. The highly pejorative and emotional label of "treason" should only be applied to a limited number of acts.[8] Only the levying of war against the government and adhering to the public enemy, giving him aid and comfort, would tend to subvert the government of the United States.

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[2] The clause does not prevent Congress from specifying other crimes of a subversive nature and prescribing punishment. Congress may not, however, create other crimes merely to evade the constitutional restrictions on treason. Ex parte Bollman, 8 U.S. (4 Cr.) 75, 2 L.Ed. 554 (1807); Wimmer v. United States, 264 F. 11, 12-13 (6th Cir. 1920), certiorari denied 253 U.S. 494, 40 S.Ct. 586, 64 L.Ed. 1030 (1920). See also, Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression 84 Colum.L.Rev. 91, 115–19 (1984).

[3] See J. Madison, The Federalist No. XLIII, 269, 463 (Lodge ed. 1908); 2 J. Elliot, Debates in the General States Conventions on Adoption of the Constitution, 469, 487 (1937) (treason clause praised because it prevented the use of treason trials as an instrument of political suppression). On English treason trials, see Marcus, The Tudor Treason Trials: Some Observations on the Emergence of Forensic Themes, 1984 U.Ill.L.Rev. 675.

[4] 25 Edward III, Stat. 5 chap. 2. See J. Hurst, The Law of Treason in the United States—Selected Essays 14, 15 (1971).

[5] Id.

[6] 8 W. Holdsworth, History of English Law, 309–11 (2d ed. 1937).

[7] M. Farrand, The Records of the Federal Convention of 1787, 345–50 (rev. ed. 1937); 2 J. Elliot, Debates in the General State Conventions on Adoption of the Constitution, 469, 487 (1937).

[8] Cramer v. United States, 325 U.S. 1, 45, 65 S.Ct. 918, 939–40, 89 L.Ed. 1441, 1446 (1945); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 125, 127, 2 L.Ed. 554, 571 (1807).

The other offenses regarded as treason in England had no necessary tendency to subvert the government and thus should not constitute treason.[9]

Thus the purpose of the treason clause in light of its historical underpinnings is twofold. The definition of treason in the Constitution prohibits legislative or judicial creation of new treasons, and safeguards against false testimony through the two-witness principle.

WESTLAW REFERENCES
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§ 6.15 Interpretation

(a) Levying War

In *Ex parte Bollman*,[1] Chief Justice Marshall limited the definition of "levying war" to the actual waging of war. "To conspire to levy war, and actually to levy war, are distinct offenses."[2] In order for a conspiracy to subvert the government to amount to a levying of war, it is necessary that "a body of men be actually assembled for the purpose of effecting by force a treasonable purpose . . . ."[3] Shortly after *Ex parte Bollman*, Chief Justice Marshall presided over the treason trial of Aaron Burr.[4] The Chief Justice's opinion, which acquitted Burr, qualified the holding in *Ex parte Bollman*. This opinion did not dispute the definition of levying war laid down in *Ex parte Bollman* but it set up a procedural barrier to conviction of conspirators in the treason. The Court held that Burr, who had not been present at the alleged assemblage of men, could still be convicted of conspiratorial involvement in the levying of war, but only upon the testimony of two witnesses. Because Burr's involvement was covert, such testimony was not available. After Marshall's opinion, it has become extremely difficult to convict for levying war against the United States without proof of personal participation in actual hostilities.[5]

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[9] See 1 G. Curtis, Constitutional History of the United States, 561–62 (1974).

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[1] 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807) (The government charged two of Aaron Burr's confederates with treason by levying war against the United States. The case appeared before the United States Supreme Court on a writ of habeas corpus).

[2] 8 U.S. (4 Cranch) at 126, 2 L.Ed. at 571.

[3] Id. Chief Justice Marshall was careful to state that the Court did not mean that a person must actually appear bearing arms against the United States to be guilty of treason. Rather, if a body of men assemble to forcefully attack the United States, then "all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy are to be considered as traitors." 8 U.S. (4 Cranch) at 126, 2 L.Ed. at 571.

[4] United States v. Burr, 8 U.S. (4 Cranch) 469, Appendix (1807).

[5] In some cases the Government obtained convictions in lower courts on charges of treason. The Government obtained convictions of treason against participants in the Whiskey Rebellion on the basis of a ruling that forcible resistance to

(b) Giving Aid and Comfort to the Enemy

The few treason cases to reach the Supreme Court since the Aaron Burr incident have charged adherence to the enemies of the United States during World War II, and the giving of aid and comfort. In United States v. Cramer,[6] the Court held that treason has two elements: adherence to the enemy, and rendering the enemy aid and comfort. A citizen may favor the enemy but as long as the citizen engages in no act of aid or comfort to the enemy there is no treason. A citizen may take actions which aid and comfort the enemy—such as making a speech opposing the government—but if there is no adherence to the enemy, no intent to betray, there is no treason.[7] The Court found that the evidence was insufficient to show that Cramer had given aid and comfort to the enemy and thus it reversed his conviction.[8]

(c) The Two-Witness Principle

The two-witness principle repeats in procedural terms the Framer's concern that thoughts and attitudes alone cannot make treason. The crime of treason consists of an intention to do the overt act and further, the intention to betray the government by means of the act. No person may be convicted of treason "unless on the testimony of two witnesses to the same overt act, or on confession in open court." The Court has addressed the question of the relationship of the procedural requirement of two-witness testimony to the definition of treason in two leading cases.

In *Cramer v. United States*,[9] the Government accused one Anthony Cramer of treason because of Cramer's association with two German saboteurs on a mission to disrupt industry in the United States.[10] Two

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enforcement of revenue laws constituted constructive levying of war. United States v. Vigol, 28 F.Cas. 376 (No. 16,621), 2 U.S. (2 Dall.) 346, 1 L.Ed. 409 (C.C. Pa. 1795); United States v. Mitchell, 26 F.Cas. 1277 (No. 15,788) (C.C.D.Pa.1745). See also, United States v. Hanaway, 26 F.Cas. 105 (No. 15,299) (C.C.E.D.Pa.1851) (forcible resistance to Fugitive Slave Law held not constructive levying of war).

President John Adams pardoned the Whiskey Rebellion rioters in 1799. He believed their convictions imported into the law concepts inconsistent with contemporary policy. 9 Works of John Adams 58 (1856). By an Ammesty Proclamation of December 25, 1868, President Johnson pardoned those who participated in the Civil War on the confederate side. See 15 Stat. 711. Cf. Young v. United States, 97 U.S. (7 Otto) 39, 65–66, 24 L.Ed. 992, 999 (1877).

[6] 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441 (1945).

[7] 325 U.S. at 29, 65 S.Ct. at 932, 89 L.Ed. at 1458.

[8] 325 U.S. at 35, 65 S.Ct. at 935, 89 L.Ed. at 1461 The Supreme Court did sustain a conviction of treason in Haupt v. United States, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145 (1947), rehearing denied 331 U.S. 864, 67 S.Ct. 1195, 91 L.Ed. 1869 (1947), discussed below.

[9] 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441 (1945).

For historical background, see Hill, The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law, 12 Am.J.Legal Hist. 95 (1968); Marcus, The Tudor Treason Trials: Some Observations on the Emergence of Forensic Themes, 1984 U.Ill.L.Rev. 675, 697–98, 702.

[10] The Government accused Cramer of violating section 1 of the Criminal Code, 18 U.S.C.A. § 1, derived from Act of April 30, 1790, c. 9, § 1, 1 Stat. 112, which defines

witnesses established that Cramer drank and talked with the two saboteurs but the prosecutor offered no proof by two witnesses as to what Cramer and the saboteurs said, nor evidence that Cramer furnished them any aid, counsel or assistance.

Cramer explained that the Government must prove that the defendant (1) gave aid and comfort to the enemy, and (2) gave adherence to the enemy.

The Government must prove that the defendant gave "aid and comfort" by an overt act. The Framers required that this overt act "must be established by direct evidence, and the direct testimony must be that of two witnesses instead of one."[11] The overt act must be intentional and not merely negligent.[12]

Adherence. To prove "intent," the Government must prove not only that the defendant intended the act but that he intended to betray by means of that act.[13] In contrast to the requirement that proof of overt acts be made by two witnesses, this requirement of an intent to betray by means of the overt act, or what is called "adherence"—a disloyal state of mind—often is not susceptible of proof by direct testimony.[14] Only in the rare case will the overt act in itself—e.g., "accepting pay from an enemy"—also prove adherence.[15] Normally, other evidence must be used to prove the requisite intent, because "[i]t is only overt acts by the accused which the Constitution explicitly requires to be proven by the testimony of two witnesses."[16] Therefore it is not necessary to prove a disloyal state of mind by the use of two witnesses.

> From duly proved overt acts of aid and comfort to the enemy in their setting, it may well be that the natural and reasonable inference of intention to betray will be warranted. The two-witness evidence of the acts accused, together with common-law evidence of acts of others and of facts which are not acts, will help to determine which among possible inferences as to the actor's knowledge, motivation, or intent are the true ones. But the protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given.[17]

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treason in the same language as that in the Constitution, art. III § 3, cl. 1.

[11] 325 U.S. at 30, 65 S.Ct. at 933, 89 L.Ed. at 1458.

[12] 325 U.S. at 31, 65 S.Ct. at 933, 89 L.Ed. at 1459.

[13] 325 U.S. at 31, 65 S.Ct. at 933, 89 L.Ed. at 1459.

[14] 325 U.S. at 31, 65 S.Ct. at 933, 89 L.Ed. at 1450.

[15] 325 U.S. at 32, n.42, 65 S.Ct. at 933, n.42, 89 L.Ed. at 1459, n.42.

[16] 325 U.S. at 32, 65 S.Ct. at 934, 89 L.Ed. at 1460.

[17] 325 U.S. at 33, 65 S.Ct. at 934, 89 L.Ed. at 1460. See also, 325 U.S. at 35, 65 S.Ct. at 935, 89 L.Ed. at 1461.

The Overt Act. The five to four opinion then held that "[e]very act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of *incriminating* acts to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy."[18] Applying this rule to the facts in *Cramer*, the Court then reversed the conviction of treason.

The Supreme Court, however, sustained a conviction for treason two years later in *Haupt v. United States.*[19] Haupt's son was an enemy spy and saboteur whom the Government caught and convicted. The Government charged Haupt with harboring his son in his home and helping him find and obtain a car, all with knowledge of his son's mission for the German Reich.

Justice Jackson, who wrote the majority opinion in *Cramer*, also wrote the majority opinion in *Haupt*. He explained why the overt acts in *Cramer* were not sufficient while the overt acts in *Haupt* were sufficient:

> [T]he minimum function of the overt act in a treason prosecution is that is shows action by the accused which really was aid and comfort to the enemy. This is a separate inquiry from that as to whether the acts were done because of adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.
>
> Cramer's Case held that what must be proved by the testimony of two witnesses is a "sufficient" overt act. There the only proof by two witnesses of two of the three overt acts submitted to the jury was that the defendant had met and talked with enemy agents. We did not set aside Cramer's conviction because two witnesses did not testify to the treasonable character of his meeting with the enemy agents. It was reversed because the Court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not. To make a sufficient overt act, the Court thought it would have been necessary to assume that the meeting or talk was of assistance to the enemy, or to rely on other than two-witness proof. Here, on the contrary, such assumption or reliance is unnecessary—there can be no question that sheltering or helping to buy a car, or helping to get employment is helpful to an enemy agent, that they were of aid and comfort to Herbert Haupt in his

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[18] 325 U.S. at 34–35, 65 S.Ct. at 935, 89 L.Ed. at 1461 (emphasis in original).

[19] 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145 (1947), rehearing denied 331 U.S. 864, 67 S.Ct. 195, 9 L.Ed. 1869 (1947).

> mission of sabotage. They have the unmistakable quality which was found lacking in the *Cramer* Case of forwarding the saboteur in his mission. We pointed out that Cramer furnished no shelter, sustenance or supplies.[20]

In short, the requirement of an "overt act" for treason purposes is very different than the loose requirement of an overt act needed to prove a typical criminal conspiracy.[21] For treason, the overt act must give aid and comfort to the enemy.[22]

The treason clause of the Constitution also requires that the testimony of the two witnesses be to the "same overt act." This requirement is "not satisfied by testimony to some separate act from which it can be inferred that the charged act took place." [23] However, it is not necessary that the two witnesses offer identical testimony. The Court offered an example:

> One witness might hear a report, see a smoking gun in the hand of defendant and see the victim fall. Another might be deaf, but see the defendant raise and point the gun, and see a puff of smoke from it. The testimony of both would certainly be "to the same overt act," although to different aspects. And each would be to the overt act of shooting, although neither saw the movement of a bullet from the gun to the victim. It would still be a remote possibility that the gun contained only a blank cartridge and the victim fell of heart failure. But it is not required that testimony be so minute as to exclude every fantastic hypothesis that can be suggested.[24]

The Government in *Haupt* still had to prove that these overt acts were performed with the requisite intent. The Court then held that it was proper for the jury to find intent because: "Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act." [25]

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[20] 330 U.S. at 634–35, 67 S.Ct. at 876, 91 L.Ed. at 1150 (internal citations omitted).

[21] See W. LaFave & A. Scott, Criminal Law 476–78 (1972).

[22] "[T]he Government's contention that it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent really is a contention that the function of the overt act in a treason prosecution is almost zero. . . . The very minimum function that an overt act must perform in treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy." Cramer v. United States, 325 U.S. 1, 34, 65 S.Ct. 918, 934–35, 89 L.Ed. 1441, 1460–1461 (1945) (footnote omitted).

[23] 330 U.S. at 640, 67 S.Ct. at 878, 91 L.Ed. at 1153. If the Government does rely on different overt acts, each must be proven by two witnesses. Cramer v. United States, 325 U.S. 1, 34, n.43, 65 S.Ct. 918, 934, n.43, 89 L.Ed.2d 1441, 1461, n.43 (1945).

[24] 330 U.S. at 640, 67 S.Ct. at 878, 91 L.Ed. at 1153.

[25] 330 U.S. at 645, 67 S.Ct. at 881, 91 L.Ed. at 1156 (separate opinion of Douglas, J.). Justice Douglas had dissented in *Cramer*. He had contended that Cramer's treasonable intention was demonstrated through the two witnesses who testified to overt acts plus Cramer's statements on the witness stand. See Cramer v. United States, 325 U.S. 1, 48–76, 65 S.Ct. 918, 941–

The Government could properly offer evidence of defendant's conversations to FBI agents and to fellow prisoners. The defendant's out of court statements were admissible because they did not constitute a "confession in open court" within the meaning of the treason clause. In other words, the treason clause requires two witnesses to an overt act or a confession in open court. The defendant's out of court statements or confessions were not used in lieu of proof of a sufficient overt act. Rather, they were to supply evidence of the necessary intent.[26]

In order to avoid the problems of proof required by the treason clause and illustrated by such cases as *Cramer* and *Haupt*, Congress has more typically punished conduct which might be also considered to be treason as another crime, such as theft or espionage.[27]

(d) Dual Nationality and Territorial Limitations

In another war-time treason case, the Court addressed the question of dual nationality, i.e., a citizen of the United States who is also a citizen or subject of another country. In *Kawakita v. United States*,[28] the Supreme Court upheld the lower court findings that a dual national was guilty of treason. It is not a defense to a charge of treason that one is also a national of another country. An American citizen owes allegiance to the United States wherever he may reside. The definition of treason "contains no territorial limitations." [29]

An alien can even be held liable for treason if the alien is domiciled in the United States and therefore owes some type of allegiance to it.[30]

WESTLAW REFERENCES

(a) *Levying War*
treason /p levy! wag*** /4 war warfare

(b) *Giving Aid and Comfort to the Enemy*
aid /3 comfort /p treason

(c) *The Two-Witness Principle*
two-witness /p treason
topic(384) /p intent!
"overt act" /p treason

53, 89 L.Ed.2d 1441, 1468–83 (Douglas, J. joined by Stone, C.J., & Black & Reed, JJ., dissenting).

[26] 330 U.S. at 642–43, 67 S.Ct. at 879–80, 91 L.Ed. at 1154–55.

[27] See, Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126–27, 2 L.Ed. 554, 571 (1807). See also Cramer v. United States, 325 U.S. 1, 45–46 & n.53, 65 S.Ct. 918, 940 & n.53, 89 L.Ed.2d 1441, 1466–67 & n.53 (1945). E.g., United States v. Rosenberg, 195 F.2d 583 (2d Cir.1952), certiorari denied 344 U.S. 839, 73 S.Ct. 20, 21, 97 L.Ed. 652 (1952) (under the Espionage Act neither the requirement as to overt act nor the two-witness principle is applicable).

[28] 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249 (1952), rehearing denied 344 U.S. 850, 73 S.Ct. 5, 97 L.Ed. 660 (1952).

[29] 343 U.S. at 733, 72 S.Ct. at 960, 96 L.Ed. at 1262.

[30] Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154–56, 21 L.Ed. 426, 429–30 (1872). See also, United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 97, 5 L.Ed. 37, 42–43 (1820) (dictum).

(d) *Dual Nationality and Territorial Limitations*
kawakita /p treason

§ 6.16 Corruption of Blood and Forfeiture

Clause two of the section dealing with treason authorizes Congress to declare punishment for treason. That clause also prohibits an attainder of treason from working "corruption of blood," or forfeiture except during the life of the person attainted.[1] In other words, Congress may not pass a law punishing treason which disables any of the heirs of the convicted person from inheriting in fee simple.[2] Congress may, however, deprive a person convicted of treason of property during that person's life.[3]

WESTLAW REFERENCES
corruption /3 blood /p treason

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§ 6.16

[1] U.S.Const., art III, § 3, cl. 2.

[2] Wallach v. Van Riswick, 92 U.S. (2 Otto) 202, 213, 23 L.Ed. 473 (1875).

[3] The Confiscation Act of 1862, 12 Stat. 589, passed to "suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels," illustrates some limits of art. III, § 3, cl. 2. An explanatory joint resolution provided that the Government could only sell a life estate (terminating at the death of the offender) in the offender's confiscated property. At the offender's death, the offender's children could take the fee simple as heirs without deriving title from the United States. The joint resolution accompanied the Act (passed under the war power and not the power to punish treason) apparently to assuage the constitutional concerns of the President. Miller v. United States, 78 U.S. (11 Wall.) 268, 305, 20 L.Ed. 135, 144 (1870).

UNITED STATES MUTUAL SECURITY TREATIES: THE COMMITMENT MYTH

MICHAEL J. GLENNON*

> *The values of democracy are in large part the processes of democracy—the way in which we pass laws, the way in which we administer justice, the way in which government deals with individuals. When the exigencies of foreign policy are thought to necessitate the suspension of these processes, repeatedly and over a long period of time, such a foreign policy is not only inefficient but utterly irrational and self-defeating.*
>
> —J. William Fulbright[1]

In the early days of the Republic, perhaps because of the admonitions of respected Founders,[2] perhaps because the new nation had little military might to offer in exchange, the United States avoided military alliances. As the nation celebrated its bicentennial, however, that practice had changed. Prompted by the advice of experts[3] and armed with the mightiest arsenal ever assembled, the United States found itself enmeshed in a vast, interlocking network of mutual security treaties. Seven such pacts now bind it militarily to twenty-five foreign states.

Considerable misunderstanding has arisen concerning the scope of the treaty obligations undertaken by the United States. They seem widely regarded as iron-clad guarantees that the United States automatically will come to the defense of a treaty partner subject to armed attack. This confusion is exemplified by comments made during the recent debate in the House of Representatives on an amendment

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[1] J.W. FULBRIGHT, THE CRIPPLED GIANT 208 (1972).

[2] George Washington, in his famous "Farewell Address," urged the country to avoid entangling alliances. 1 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 221-23 (1896 ed.). "On the subject of treaties," Thomas Jefferson wrote, "our system is to have none with any nation, as far as can be avoided." 11 T. JEFFERSON, WRITINGS 38-39 (Bergh ed. 1907).

[3] *See, e.g.*, Kennan ("X"), *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 561 (1947).

prohibiting the introduction of U.S. armed forces into combat in Nicaragua. One member, opposing the amendment, opined that "[u]nder the Rio Treaty . . . the United States is under a solemn obligation to the signatory states to come to their assistance in the event of an attack."[4] Another opposed the amendment because it denied "to our allies in Central America any possibility of military assistance . . . under the Rio Treaty of 1947 in the event of an armed attack by Nicaragua against [its] neighbors."[5]

Also misunderstood is the effect of the treaties upon the allocation of war-making power within the federal government. During the Nicaragua debate, the proposed prohibition expressly exempted any action taken "in accordance with" the Rio Treaty.[6] "[O]bviously," the bill's sponsor explained, "an armed attack against any American state would give authority for the President to act."[7] One member echoed the views of many House colleagues when he referred to the United States' "right to act under the full authority vested in the President by the Rio Treaty . . . ."[8] Presidents also on occasion have interpreted the security treaties as sources of authority to introduce U.S. armed forces into hostilities. The Johnson administration, for example, claimed that the SEATO treaty committed the United States to defend South Vietnam and authorized the President to undertake independent military action toward that end.[9] President Nixon, in vetoing the War Powers Resolution,[10] claimed among other things that it contained prohibitions "against fulfilling our obligations under the NATO treaty as ratified by the Senate."[11] President Reagan recently cited the "serious threat of Communist aggression and subversion" to Honduras, and told that country's visiting President that "[t]here should be no doubt that we will fulfill our mutual defense obligation under the Rio Treaty."[12] His implication seemed clear:

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[4] 131 CONG. REC. H5079 (daily ed. June 27, 1985) (statement of Rep. Kemp).

[5] *Id.* at H5076 (statement of Rep. Livingston).

[6] *Id.* at H5063.

[7] *Id.* at H5067 (statement of Rep. Foley).

[8] *Id.* at H5093 (statement of Rep. Hunter).

[9] Memorandum of Leonard C. Meeker, Legal Adviser, Department of State, to the Senate Comm. on Foreign Relations (Mar. 8, 1966), *reprinted in* 54 DEP'T ST. BULL. 474, 480, 485 (1966). *But see U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 75 (1967) (statement of Nicholas deB. Katzenbach, Undersecretary of State, that the treaties "cannot and do not spell out the precise action which the United States would take in a variety of contingencies. That is left for further decision by the President and the Congress . . . . [N]one of [the treaties] incur automatic response.").

[10] Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1976)).

[11] *Veto of the War Powers Resolution*, 9 WEEKLY COMPILATION PRES. DOC. 1285, 1287 (1973).

[12] N.Y. Times, May 22, 1985, at A5, col. 1.

the Treaty empowers the President to decide what steps should be taken, including, possibly, the use of military force, to fulfill the United States' commitment.

These views are seriously mistaken. In mutual security treaties to which the United States is a party, the notion of commitment is a myth. A 1979 report of the Senate Foreign Relations Committee correctly sums up the treaties:

> No mutual security treaty to which the United States currently is a party authorizes the President to introduce the armed forces into hostilities or requires the United States to do so, automatically, if another party to any such treaty is attacked. Each of the treaties provides that it will be carried out by the United States in accordance with its "constitutional processes" or contains other language to make clear that the United States' commitment is a qualified one—that the distribution of power within the United States Government is precisely what it would have been in the absence of the treaty, and that the United States reserves the right to determine for itself what military action, if any, is appropriate.[13]

This article elaborates that conclusion by exploring three key issues raised by those treaties.

First, can such a treaty constitutionally grant the President war-making power in excess of what he would otherwise possess? Part I of the article reviews the Framers' intent, subsequent custom, and recent case law concerning the delegation doctrine in concluding that a treaty that did so probably would be unconstitutional.

Second, do the treaties in fact confer any such authority upon the President? The answer depends upon the scope of the commitment undertaken: if the United States is viewed as having bound itself automatically to intervene militarily in the event one of its treaty partners is attacked, it is reasonable to infer that the treaty in question confers such authority upon the President, for under such circumstances any congressional role would be meaningless. Most frequently the specific presidential authority at issue is the authority to introduce the armed forces into hostilities, but the question also arises in connection with other exercises of presidential war-making power, such as the first use of "tactical" nuclear weapons. Part II of the article concludes that no treaty conferring additional war-making power upon the President is currently in force, a conclusion bolstered by the War Powers Resolution.

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[13] S. REP. No. 7, 96th Cong., 1st Sess. 31 (1979) (Taiwan Enabling Act).

Third, if as a matter of law and fact the treaties cannot and do not represent binding military commitments, what do they represent? Part III of the article explores the treaties' meaning in light of the preceding conclusions.

I. CONSTITUTIONALITY

The text of the Constitution empowers the President "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . . ."[14] Yet it also grants to Congress the power "[t]o declare war,"[15] "[t]o raise and support armies . . . ,"[16] "[t]o provide and maintain a navy,"[17] and "[t]o make rules for the government and regulation of the land and naval forces . . . ."[18] Can these powers be exercised by the President and the Senate in making a treaty? Or are such powers reserved to Congress, to be exercised either through the enactment of implementing legislation to such a treaty or through a congressional-executive agreement?

In oft-cited language the Supreme Court seemed to uphold a treaty power of the broadest scope, extending to "any matter which is properly the subject of negotiation with a foreign country."[19] Frequently overlooked, however, is the Court's observation that the treaty power does *not* extend to "authorize what the Constitution forbids, or a change in the character of the government . . . ."[20] That a treaty must comply with the Constitution was reiterated—if it could ever seriously have been doubted—by Justice Black in *Reid v. Covert*, where a plurality of the Court re-affirmed that the treaty-makers must "act in accordance with all the limitations imposed by the Constitution."[21]

The issue, then, is whether a treaty conferring war-making power on the President would comport with the Constitution.[22] Because the

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[14] U.S. CONST. art. II, § 2, cl. 2.

[15] *Id.* art. I, § 8, cl. 11.

[16] *Id.* cl. 12.

[17] *Id.* cl. 13.

[18] *Id.* cl. 14.

[19] Geofroy v. Riggs, 133 U.S. 258, 267 (1890). *See also* Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872); Asakura v. Seattle, 265 U.S. 332 (1924).

[20] Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

[21] 354 U.S. 1, 6 (1954).

[22] The question occasionally has been said to be whether mutual security treaties can be "self-executing." *See, e.g.*, S. REP. NO. 220, 93d Cong., 1st Sess. 26 (1973) (War Powers Resolution). To frame the issue in terms of self-execution, however, misplaces the emphasis. The question is not whether such a treaty could be enforced by the courts without implementing

President cannot confer such authority upon himself, the question does not arise with respect to executive agreements.[23]

A. Intent of the Framers

"A treaty may not declare war," the Senate Foreign Relations Committee said in its report on the Panama Canal Treaties, "because the unique legislative history of the declaration-of-war clause . . . clearly indicates that that power was intended to reside jointly in the House of Representatives and the Senate."[24] The events to which the Committee referred are recorded in Madison's notes of the Philadelphia convention. Alexander Hamilton submitted a plan that would have empowered the Executive "to make war or peace, with the advice of the Senate."[25] After the Committee of Detail recommended instead that the war power be given to Congress, Hamilton's ally, Charles Pinckney, again proposed that the power should reside in the Senate:

> Mr. Pinckney opposed the vesting [of] this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depositary [sic], being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally rep-

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legislation; nonjusticiability obviously could prove an impediment to judicial enforcement. Rather, the issue is how power is allocated as between Congress and the treaty-makers. *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 141 (1965).

[23] In connection with Secretary of State Henry Kissinger's appearances before the Senate Foreign Relations Committee on November 19, 1975, Senator Dick Clark submitted the following written question to the Department of State: "Does any executive agreement authorize the introduction of U.S. armed forces into hostilities, or into situations wherein imminent involvement in hostilities is clearly indicated by the circumstances?" The Department responded as follows:

> The answer is "no." Under our Constitution, a President may not, by mere executive agreement, confer authority on himself in addition to authority granted by Congress or the Constitution. The existence of an executive agreement with another country does not create additional power. Similarly, no branch of the Government can enlarge its power at the expense of another branch simply by unilaterally asserting enlarged authority. The Supreme Court has limited the powers of the executive just as it has restricted its own authority and that of Congress. The President, for example, could not, solely under his own constitutional authority, validly conclude an executive agreement to extradite a criminal to a foreign nation. *See* Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5 (1936). Also, neither an executive agreement, nor a treaty, may violate the Constitution. *See* Reid v. Covert, 354 U.S. 1, 5-6 (1957).

Letter from Robert J. McCloskey, Assistant Secretary of State for Congressional Relations, to Senator Dick Clark (Mar. 1, 1976) (on file with author).

[24] S. Exec. Rep. No. 12, 95th Cong., 2d Sess. 65 (1978).

[25] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 300 (M. Farrand rev. ed. 1937) [hereinafter cited as M. Farrand].

> resented in the Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, another peace.[26]

Sentiment opposing the Hamilton-Pinckney position was overwhelming. Oliver Elseworth and George Mason argued that the concurrence of both Houses of Congress should be required to declare war because only the Senate's approval was required for peace treaties, and it should be easier to get out of war than into it. Mason further argued that the Senate was "not so constructed as to be entitled to" the war power.[27] Pierce Butler added that Pinckney's concerns about the institutional shortcomings of the House applied equally to the Senate.[28] Apparently Pinckney's proposal died for lack of a second. Speaking nine years later as a member of the House of Representatives, Madison pithily summarized his own objection to the view embodied in the defeated proposal: "Congress, in case the President and Senate should enter into an alliance for war, would be nothing more than the mere heralds for proclaiming it."[29] In sum, then, it appears that the Framers explicitly decided not to confer upon the Senate the power to declare war.

B. Custom

Under certain circumstances the existence of a custom is relevant in determining the allocation of constitutional power. The case law suggests that several conditions must be met.[30] Whether a constitutionally relevant custom exists depends upon how these criteria apply to the "act" in question—here, a mutual security treaty that automatically commits the United States to introduce its armed forces into hostilities upon the happening of a specified event (probably an armed attack against a U.S. ally by a third country). How frequently has this act been repeated?

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[26] II M. Farrand, *supra* note 25, at 318.

[27] *Id.* at 319.

[28] *Id.* at 318-19.

[29] I T. Benton, Abridgment of the Debates of Congress 650-51 (1857). It should be noted, however, that Madison also opposed including within the treaty power any act within the constitutional authority of Congress—a view that would leave virtually nothing on which the treaty power might operate and which has long since been rejected.

[30] The historical events of which the custom consists must be similar. The act constituting the custom must be repeated more than once; the greater the number of times the act has been repeated, the more probative the custom. The period of time over which the act is performed is also relevant: the longer the time period, the more reason to view the time period as having the authority of custom. "Density" is also to be considered, which means the number of times an act has been repeated over the course of its duration. If repetition of the act is irregular, so that comparatively long periods of time occur in which the practice has not been followed, less reason exists for the act to take on the authority of custom. Finally, it must be asked whether the act has been performed during periods of normalcy, meaning that the act was not an aberration attributable to unique historical circumstances. These factors are discussed in Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. Rev. 109, 129-33 (1984).

It is said that the United States has never been a party to such a treaty.[31] This appears to be correct; as indicated below, the United States is not currently a party to any such treaty,[32] and evidently never has been a party.

On the other hand, presidents on occasion have argued that a treaty conferred discretionary authority to introduce the armed forces into hostilities to enforce the terms of that treaty. The position was not that such introduction was required, but that it was permitted. Although not always articulated this way, the claim might have been that the Constitution required that the President "take care that the laws be faithfully executed,"[33] and that treaties constitute law for purposes of the Faithful Execution clause. Thus, in 1818, President Monroe placed some reliance upon a treaty with Spain when sending troops into Florida.[34] President Theodore Roosevelt's Secretary of War relied upon a provision of a 1904 treaty with Cuba (the infamous "Platt Amendment"[35]) when Roosevelt dispatched the armed forces to that island in 1906.[36] And the State Department, in 1966, relied in part upon the SEATO Treaty[37] as support for military involvement in South Vietnam.[38]

As a constitutional matter, it is doubtful that the Faithful Execution clause can serve as support for presidential introduction of the armed forces into hostilities to carry out treaties. Although a variety of interpretations are possible,[39] the Framers apparently intended to limit presidential enforcement power to laws resulting from legislative action.[40] Assuming *arguendo* the existence of a custom of reliance upon the clause for such purposes, such a construction has hardly gone unchallenged in Congress. Following President Wilson's reliance upon the clause in 1917 when ordering the arming of U.S. commercial shipping,[41] the Chairman of the Senate Foreign Relations Committee argued that Wilson's construction would rob the congressional war-making power of all meaning:

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[31] L. Henkin, Foreign Affairs and the Constitution 160 (1972) ("no treaty has ever been designed to put the United States into a state of war without a declaration by Congress").

[32] *See infra* text at notes 106, 123, 149, 178, 185, 195.

[33] U.S. Const., art. II, § 3.

[34] 2 Messages and Papers of the Presidents 1789-1897, at 31-32 (J. Richardson ed. 1897).

[35] *See* Papers Relating to the Foreign Relations of the United States, Doc. 1, 58th Cong., 3d Sess. 244 (1905).

[36] W.H. Taft, Our Chief Magistrate and His Powers 87-88 (1916).

[37] *See infra* text at notes 194-191.

[38] 54 Dep't St. Bull. 474, 485 (1966).

[39] *See* Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U.L. Rev. — (Apr. 1985) (forthcoming).

> I cannot consent that this clause confers, or was ever intended to confer, power upon the President to determine an issue between this Nation and some other sovereignty—an issue involving questions of international law—and to proceed to employ the Army and Navy to enforce his decision. A contrary view would clearly place the war making power in the hands of the President.[42]

Similar objections were voiced in Congress following executive reliance upon the SEATO treaty during the Vietnam War.[43] Because a custom is without constitutional relevance unless, at a minimum, acquiesced to by the other branch, and because acquiescence requires an absence of objection,[44] it is doubtful that any custom of executive branch reliance upon the Faithful Execution clause to justify treaty enforcement has achieved constitutional legitimacy.

Finally, the terms of the treaties themselves belie any intent to provide such authority. As noted below, each treaty qualifies the U.S. commitment with a reference to the parties' constitutional processes;[45] the effect is to leave the allocation of power as it would have been in the absence of the treaty.[46] It therefore seems doubtful that any constitutionally cognizable custom has developed that would permit an inference of presidential war-making power from either "automatic" commitments or from the Faithful Execution clause as applied to treaties.

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[40] *Id.* at note 94 and accompanying text. Madison referred to the President's power to execute "the national laws." 1 Madison, The Constitutional Convention of 1787, at 52-53 (Hunt ed. 1908).

[41] *See* 54 Cong. Rec. 4273 (1917).

[42] 54 Cong. Rec. 4884 (1917) (comments of Sen. Stone).

[43] *See, e.g., U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations,* 90th Cong., 1st Sess. 205 (1967) (comments of Sens. Fulbright and Ervin).

[44] *See, e.g.,* Myers v. United States, 272 U.S. 52, 163 (1926); United States v. Midwest Oil, 236 U.S. 458, 481 (1914). *See generally* Glennon, *The Use of Custom in Resolving Separation of Powers Disputes,* 64 B.U.L. Rev. 109, 137-40 (1984).

[45] *See infra* notes 110, 127, 148, 178, 184, 195, 206 and accompanying text.

[46] *See infra* notes 154, 157, 191, 203 and accompanying text.

C. The Delegation Doctrine

Since the founding of the Republic, prominent members of Congress have believed that the Constitution limits the authority of Congress to transfer its war-making power to the Executive. In 1834, President Andrew Jackson requested statutory authorization for reprisals against France in the event France failed to satisfy claims arising out of attacks on U.S. shipping during the undeclared naval war between the two countries. The Senate Foreign Relations Committee, in a report apparently authored by Senator Henry Clay, recommended against Jackson's request:

> Congress ought to retain to itself the right of judging of the expediency of granting [letters of marque and reprisal] under all the circumstances existing at the time when they are proposed to be actually issued. The committee are not satisfied that Congress can, constitutionally, delegate this right . . . . Congress ought to reserve to itself the constitutional right, which it possesses, of judging of all the circumstances by which such refusal might be attended . . . and of deciding whether, in the actual posture of things as they then exist, and looking to the condition of the United States, of France, and of Europe, the issuing of letters of marque and reprisal ought to be authorized, or any other measure adopted.[47]

In 1859, President James Buchanan asked for congressional approval to use land and naval forces to guarantee the neutrality of Colombia and to protect the lives and property of U.S. citizens in the area. Senator William Seward answered as follows from the Senate floor:

> Could anything be more strange and preposterous than the idea of the President of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared; or the time, or place, or manner, or circumstance of the duration of it, the beginning or the end; and without limiting the number of nations with which war may be waged? No, sir. When we pass this bill we do surrender the power of making war or of preserving peace, in each of the States named, into the hands of the President of the United States.[48]

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[47] 7 J. MOORE, DIGEST OF INTERNATIONAL LAW § 1095, at 127 (1906).

[48] Cong. Globe, 35th Cong., 2d Sess. 1120 (1859).

The Supreme Court, similarly, has long inveighed against the delegation of legislative power to the Executive. "[T]he general rule of law," Justice Story said in 1831, is "that a delegated authority cannot be delegated."[49] Sixty years later, the elder Justice Harlan reaffirmed "[t]hat Congress cannot delegate legislative power to the President . . . ."[50] This precept, he said, is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[51]

Not until the New Deal, however, did the Court actually strike down an act of Congress as violative of the delegation doctrine. In *Panama Refining Co. v. Ryan*,[52] the Court invalidated a provision of the National Industrial Recovery Act. Although the statute spelled out what action the President was permitted to take, it did not delineate the circumstances under which Presidential action was permissible. Several months later the Court struck down a second statutory provision. In *Schecter Poultry Corp. v. United States*,[53] it was the breadth of discretion conferred upon the President that raised problems: the President was given the authority to impose on the poultry industry virtually any regulation he deemed appropriate. "This," Justice Cardozo said in a concurring opinion, was "delegation running riot."[54]

The doctrine deriving from these cases, the "delegation doctrine," has been relied on by a number of authorities who view as unconstitutional any treaty automatically committing U.S. armed forces to hostilities. "[W]hat can't be done," the late Professor Alexander Bickel testified before the Senate Foreign Relations Committee, "is a generalized commitment. You, England or France, are our pals, you are our friends, and any time you are in trouble we will help you. That can't be done."[55] "The attempt of Congress to transfer its power and responsibility to make war to the President," Professor Francis D. Wormuth wrote, "is constitutionally unauthorized and destroys the political system envisaged by the framers."[56]

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[49] Shankland v. Washington, 30 U.S. (5 Pet.) 390, 395 (1831).

[50] Field v. Clark, 143 U.S. 649, 692 (1892).

[51] *Id.*

[52] 293 U.S. 388 (1935).

[53] 295 U.S. 495 (1935).

[54] *Id.* at 553 (Cardozo, J., concurring).

[55] *War Powers Legislation: Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 565 (1979) (statement of Alexander M. Bickel, Professor of Law, Yale University).

[56] Wormuth, *The Vietnam War: The President vs. the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 799 (R. Falk ed. 1969). *See also* Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Berger, *War, Foreign Affairs, and*

1. The Delegation Doctrine in Foreign Relations

In *United States v. Curtiss-Wright*,[57] Congress by law had authorized President Franklin Roosevelt to prohibit the sale of arms and ammunition to countries engaged in armed conflict in the Chaco.[58] The statute required that three conditions be fulfilled before the President may proclaim the embargo: first, the President had to consult with other governments of the region; second, he was required to secure the necessary measure of their cooperation; and third, he was required to find that an embargo would contribute to the reestablishment of peace in the region.[59] President Roosevelt issued such a proclamation[60] and defendant Curtiss-Wright was indicted for violating the statute authorizing the President's proclamation.[61] On appeal, Curtiss-Wright challenged the statute on the ground, inter alia, that it unconstitutionally delegated legislative power to the President. Justice Sutherland, writing for six members of the Court, upheld the law on the notion that Congress may, in the realm of foreign affairs, "accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[62] This conclusion was based on the theory that the President's foreign affairs powers derive not from "affirmative grants of the Constitution,"[63] but from the "law of nations" [64] and from the "investment of the federal government with the powers of external sovereignty."[65] However, this reasoning is entirely dicta and has been widely and justly criticized as bad history, bad logic, and bad law.[66] It is not necessary here to re-plow that ground. What is appropriate is an examination of the case's narrow holding: that the delegation doctrine has a more limited application in the realm of foreign affairs than it does in the realm of internal affairs.

Curtiss-Wright does *not* hold that the delegation doctrine has *no*

Executive Secrecy, 72 NW. U.L. REV. 309 (1978); Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976).

[57] 299 U.S. 304 (1936).

[58] 48 Stat. 811 (1934).

[59] *Id.*

[60] 48 Stat. 1744 (1934).

[61] 299 U.S. at 311.

[62] *Id.* at 320.

[63] *Id.* at 318.

[64] *Id.*

[65] *Id.*

[66] *See, e.g.*, Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Berger, *Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972) *reprinted in* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

application to international relations; rather, the point is that it does not have *equal* application. The distinction is of obvious importance and often has been overlooked.[67] Thus, the case could be restricted to its facts, or at least not extended to "powers to go to war, or to use the armed forces."[68] But it was unnecessary to reach even that question. As Professor Bickel suggested, the Court could have found simply that the standards encompassed in the law met delegation requirements.[69]

More important, the central policy reasons underpinning the delegation doctrine militate in favor of applying it to foreign affairs matters. Justice Rehnquist has said that the delegation doctrine serves three important functions. "First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will."[70] It would be hard to imagine a "choice of social policy" more important than the choice to go to war, or the choice, once the armed forces are involved in hostilities, to raise the ante substantially by the use of nuclear weapons. The responsiveness of Congress (as opposed to that of the Senate and the President) to the popular will apparently represented the precise reason that the Framers placed the decision to go to war in congressional hands.[71] A power allocated to one branch by the Constitution ought not be subject to reassignment to another branch by a vote of Congress—let alone the Senate. This is why the Constitution makes provision for amendments. There is no readily apparent reason why that should be less true of a power relating to foreign affairs.

"Second," Justice Rehnquist wrote, "the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an intelligible principle to guide the exercise of the delegated discretion."[72] In this sense the doctrine is not unlike other provisions of the Constitution directed at curbing the exercise of "naked preferences"—the dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses.[73] The delegation decisions require that Congress "lay down the general policy and standards that animate the law, leaving the agency to refine those standards, [to] fill in the blanks, or [to] apply those standards to particular cases."[74] The exercise of arbitrary power is precluded. This concern seems particularly pertinent in the realm of foreign affairs. Given the broad Presidential powers in that field, additional uncircumscribed discretion—discretion intended by the Framers to reside in the legislature—would write out of the Constitution any meaningful notion of separation of powers in the realm of foreign relations.

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[67] *See, e.g.*, Patterson, *In re The United States v. Curtiss-Wright Corporation* (pts. 1 & 2), 22 TEX. L. REV. 286 (1944); Quarles, *The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?*, 32 GEO. L.J. 375 (1944).

[68] *War Powers Legislation: Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 555 (1972) (statement of Alexander M. Bickel, Professor of Law, Yale University).

[69] "Whether this assumption was valid at the time," Bickel testified before the Senate Foreign Relations Committee, "is thoroughly questionable . . . . The [law] closely defined what the President was to do, and where he was to do it . . . . This was hardly delegation running riot . . . ." *Id.*

[70] Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

[71] *See supra* notes 24-29 and accompanying text.

[72] Industrial Union Dep't, 448 U.S. at 685-86.

"Third, and derivative of the second," Rehnquist wrote, "the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."[75] Because the courts have traditionally played a lesser role in foreign affairs matters, this consideration may be less relevant, although it clearly is not without some application.[76]

The reasons for exempting foreign affairs powers from the operation of the delegation doctrine are thus less than compelling. The Court has backed steadily away from the exception suggested by *Curtiss-Wright*. The first major step was taken in 1952 with *Youngstown Sheet & Tube v. Sawyer*,[77] the famous "Steel Seizure Case." President Truman justified the seizure on the ground that the continued operation of the steel mills was necessary for the successful continuation of the war effort in Korea and was therefore permitted under his sole powers as commander-in-chief. The Court rejected the argument and held instead that President Truman's action represented, in effect, an exercise of *legislative* authority. No examination was made of congressional enactments (such as defense authorization or appropriation acts) from which delegation might conceivably have been inferred. Nor was any reference made to powers that President Truman might have derived from the nation's "sovereignty" or from the "law of nations." Indeed, no reference whatever was made to *Curtiss-Wright*.

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[73] *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

[74] Industrial Union Dep't, 448 U.S. at 675.

[75] *Id.* at 686.

[76] The "foreign affairs" cases decided by the Supreme Court are not so few as some might think. *See, e.g.*, M. GLENNON & T. FRANCK, V UNITED STATES FOREIGN RELATIONS LAW (1980) (setting forth cases).

[77] 343 U.S. 579 (1952).

Six years later the Court moved further from Justice Sutherland's constitutional exegesis. In *Kent v. Dulles*,[78] the Court invalidated a passport revocation as lying beyond the statutory authority of the Secretary of State. If the "power is [to be] delegated," the Court said, "the standards must be adequate to pass scrutiny by the accepted tests."[79] In that case, as in the *Steel Seizure* case, the Court indicated its willingness to invalidate acts of the Executive in the foreign affairs field.

2. Current Viability of the Delegation Doctrine

The invalidation of Executive acts notwithstanding, no federal statute has been struck down through application of the delegation doctrine in fifty years.[80] Although rumors of the doctrine's death have been frequently reported,[81] they are probably exaggerated. In the 1980 *Benzene Case*,[82] the plurality opinion relied upon the delegation doctrine in construing narrowly a federal statute conferring rule-making authority on the Secretary of Labor.[83] Justice Rehnquist, concurring, argued that the statute should have been invalidated through use of the doctrine.[84] He repeated the opinion the following term in the *Cotton Dust Case* and was joined by the Chief Justice.[85] On at least two occasions Justice Brennan expressed a measure of approval for continued application of the doctrine.[86] It is one thing to use the doctrine as a canon of statutory construction and quite another to employ it as a criterion of validity; some justices willing to do the latter would doubtless disagree on the doctrine's applicability in a given case. Nonetheless, it is not farfetched to believe that in the right case, for the right purpose, the doctrine could indeed command a majority of the current Supreme Court.[87]

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[78] 357 U.S. 116 (1958).

[79] *Id.* at 129.

[80] The reasons are not hard to guess. The doctrine smacks of substantive due process, admitting of limited possibility for principled application and permitting statutory invalidation for reasons having less to do with the Constitution than with gastronomically-derived notions of public policy. It is guilty by association: like substantive due process, it is remembered largely as a tool of juridical reactionaries who sought to write Herbert Spencer's *Social Statics* into the U.S. Constitution. (That it has also received the approbation of judicial progressives has often escaped notice. *See, e.g.*, W. DOUGLAS, GO EAST YOUNG MAN 217 (1974); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972)).

[81] *See, e.g.*, Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675 (1978) (Marshall, J., concurring). *See generally* Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U.L. REV. 443 (1978).

[82] Industrial Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980).

[83] *Id.*

[84] *Id.* at 687 (Rehnquist, J., concurring).

[85] American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

[86] California Bankers Ass'n v. Schultz, 416 U.S. 21, 91 (1974) (Brennan, J., dissenting); United States v. Robel, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring).

However, in three recent passport cases—*Zemel v. Rusk*,[88] *Haig v. Agee*,[89] and *Wald v. Regan*[90]—the Court once again relied upon the *Curtiss-Wright* notion of generalized deference to the President. Chief Justice Warren noted in *Zemel* that "Congress—in giving the President authority over matters of foreign affairs—must of necessity paint with a brush broader than customarily it wields in domestic areas."[91] The Chief Justice reiterated, however, that *Curtiss-Wright* did "not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice."[92]

The great deference shown by the Court to the independent Constitutional powers of the President in foreign affairs heightens the doubts as to the continued viability of the delegation doctrine in the field of foreign affairs. Nevertheless, delegating authority to the Executive to limit the international travel of private citizens is fundamentally different from conferring congressional war-making power on the President. If the magnitude of relevant social choices represents one criterion, then the policy considerations are manifestly incomparable: that an aspect of the foreign commerce power happens to be delegable says little or nothing about the delegability of central elements of the war-power.

Whether there exists a war powers exception from the delegation doctrine is unclear. In *Dames & Moore v. Regan*,[93] the Iran claims settlement agreement was upheld through the application of the analytical framework developed in the *Steel Seizure* case.[94] The majority opinion made no reference to *Curtiss-Wright* or to any notion of presidential power deriving from sovereignty or the law of nations.

More important, perhaps, is the Court's 1983 opinion in *INS v. Chadha*.[95] In invalidating use of the "legislative veto," the Court mandated that Congress must adhere strictly to constitutionally required procedures for the enactment of legislation. "Convenience and efficiency"—apparently considerations foremost on Justice Sutherland's mind in upholding the broad delegation in *Curtiss-Wright*—were insufficient to save a statute "contrary to the Constitution." "Convenience and efficiency . . . are not the primary objectives—or the hallmarks—of democratic government."[96]

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[87] *See* Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. Rev. 257, 311-20 (1982) (suggesting that recent Supreme Court decisions indicate the doctrine's resurrection).

[88] 381 U.S. 1 (1964).

[89] 453 U.S. 280 (1981).

[90] 104 S. Ct. 3026 (1984).

[91] 381 U.S. at 17.

[92] *Id.* Justice Black, dissenting, would have overturned the statute as an invalid delegation. *Id.* at 20-22.

[93] 453 U.S. 654 (1981).

[94] 343 U.S. 579 (1952).

[95] 462 U.S. 919 (1983).

On the other hand, *Chadha* may be seen as reflecting the Supreme Court's indifference to the delegation doctrine. In some cases the legislative veto was the only check on the unbridled exercise of presidential power; its absence might be viewed in those instances as a standardless delegation of legislative power. Justice White's dissent noted that the majority opinion invalidated a number of "foreign affairs" vetos,[97] including those present in legislation concerning war powers[98] and arms exports.[99] A Court concerned about rejuvenating the delegation doctrine might go about the task differently.[100]

If the state of the delegation doctrine is confused as it applies to domestic affairs, it is thus thoroughly confused as it applies to foreign affairs. Yet one thing is clear: to whatever extent the doctrine has continued vitality, no persuasive reasons have been advanced to exempt from its application questions of war-making authority. And alive or not, the Framers' intent to include the House of Representatives in any decision to go to war would raise the most serious doubts about the validity of any treaty purporting to impose an "automatic" commitment on the United States to use armed force.

II. CURRENT U.S. MUTUAL SECURITY TREATIES: TEXT AND LEGISLATIVE HISTORY

Owing perhaps to the vexing constitutional questions raised by the delegation doctrine, the mutual security treaties entered into by the United States at the conclusion of World War II made clear that no party was committed automatically to come to the defense of any other party. With regard to the United States, the legislative history on this point underscored the treaties' text, and also made clear that none of the treaties was intended to confer upon the President any war-making power that he would not have had in the treaties' absence. Legislative intent is always problematic;[101] nonetheless, an examination of the text and legislative history of those treaties is illuminating. Initially, however, it is worth looking briefly at the treaty that raised the issue for the first time during the post-war period—the United Nations Charter.[102]

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[96] *Id.* at 944.

[97] *Id.* at 967-68 (White, J., dissenting).

[98] *Id.* at 971 (White, J., dissenting). *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541 (1976)).

[99] *Chadha*, 462 U.S. at 971 (White, J., dissenting). *See* International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified at 22 U.S.C. § 2776(b)). *See* Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 577-78 (1984).

[100] It might also be pointed out that the most recent passport case, Wald v. Regan, 104 S. Ct. 3026 (1984), was decided after *Chadha*. Had the Court in *Chadha* intended to resurrect the delegation doctrine, one might have expected it to evidence that intent in a case such as *Wald*, which could, one presumes, have fallen into line with Kent v. Dulles, 357 U.S. 116 (1958), rather than Zemel v. Rusk, 381 U.S. 1 (1964), and Haig v. Agee, 453 U.S. 280 (1981).

The concerns took several forms.[103] One general concern was that the United States constitutionally could not place its armed forces at the disposal of an international organization, such as the United Nations, which might cause those forces to be introduced into hostilities without presidential or congressional consent. A variation on that theme, which would recur in the upcoming debates on mutual security treaties, was that a treaty could not automatically commit the U.S. armed forces to hostilities—as the United Nations Charter arguably did when it required member states to make available their forces for use by the Security Council. This, it was said, could be done only with congressional concurrence.

At least with respect to the United Nations Charter, none of these concerns was justified. Members of the United Nations do agree to accept and carry out the decisions of the Security Council,[104] and measures involving the use of armed force may be undertaken by the Security Council.[105] But absent express agreement with a given member, the Security Council is authorized only to decide upon measures "not involving the use of armed force."[106] Moreover, the only forces available are forces of those member states that have entered into an agreement with the Security Council governing the use of those forces.[107] The Charter requires that members enter into agreements with the Security Council to make their forces available to it,[108] but "on the initiative of the Security Council."[109] It also provides that such agreements "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."[110]

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[101] *See* Note, *Statutory Interpretation,* 43 HARV. L. REV. 863 (1930), for the argument that it is unrealistic to talk about the collective intent of a legislative body, which is normally undiscoverable. For a response see Dickerson, *Statutory Interpretation: A Peek in the Mind and Will of a Legislature,* 60 IND. L.J. 206 (1975).

[102] U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

[103] *See* 91 CONG. REC. 7118 (1945) (address by President Harry S. Truman).

[104] U.N. CHARTER art. 25.

[105] *Id.* art. 42.

[106] *Id.* art. 41.

[107] *Id.* art. 43, para. 2.

[108] *Id.* art. 43, para. 1.

[109] *Id.* art. 43, para. 3.

[110] *Id.*

It was this last provision on which Senate debate centered. In testimony before the Senate Foreign Relations Committee, John Foster Dulles, who had been a member of the U.S. delegation at San Francisco, said that this provision was understood to contemplate the use of treaties.[111] On the Senate floor, several Senators suggested that he misspoke; a treaty, they contended, would not necessarily be required.[112] Others disagreed.[113] The Chairman of the Senate Foreign Relations Committee, Senator Tom Connally, answered that it was premature to debate the question because the issue would be decided when such an agreement was actually concluded.[114] A message from President Truman, indicating that he would "ask the Congress for appropriate legislation to approve" any such agreement, caused some Senators to voice concern.[115] A statute governing U.S. involvement in the United Nations—the United Nations Participation Act[116]—was ultimately enacted; it requires congressional approval of any such agreement.[117]

Finally, of course, the United States may exercise a veto against any such action.[118] This was presented by administration spokesmen as a constitutional safeguard,[119] and was so perceived by various Senators.[120] It has been argued that the veto is inadequate in this regard insofar as the U.S. representative might not be present when such a measure is voted on. This is true but irrelevant: the President might be unavailable to exercise his veto over certain legislation, but his absence could hardly imply a *constitutional* defect. Procedure can provide only opportunity; it cannot guarantee that an opportunity will be used.

These constitutional objections leveled against the Charter thus appear without merit. They are usefully borne in mind, however, in assessing the arguments made in connection with the United States' various mutual security treaties, which are examined below in the order into which they were entered.

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[111] *The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess. 653 (1945).

[112] *See, e.g.*, 91 CONG. REC. 8021 (remarks of Sen. Lucas) (1945); *id.* at 8022 (remarks of Sen. Fulbright).

[113] *See, e.g.*, *id.* at 8025 (remarks of Sen. Taft).

[114] *Id.* at 8029.

[115] *See, e.g.*, *id.* at 8185 (remarks of Sen. Donnell).

[116] 22 U.S.C. § 287 (1945).

[117] 22 U.S.C. § 287(a) (1945).

[118] U.N. CHARTER art. 27, para. 3.

[119] *The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess. 298 (1945) (statement by Leo Pasvolsky, Special Assistant to the Secretary of State for International Organization and Security Affairs).

[120] *See, e.g.*, 91 CONG. REC. 6876 (1945) (remarks of Sen. Connally).

A. The Rio Treaty

The first mutual security treaty entered into by the United States after the conclusion of World War II was the Inter-American Treaty of Reciprocal Assistance,[121] commonly called the "Rio Treaty." Twenty-three Western Hemisphere nations are today parties.[122]

At the time the treaty was being negotiated, classified communications within the Department of State indicated an intent to "[s]pecify satisfactory procedures for reaching majority decisions in the consultations called for under the treaty that will not bind the United States without its consent."[123] It was recognized that "[a]greement in principle to the inclusion in the treaty of a provision for concrete action in event of armed attack does not make the difficult problem of wording such a provision much easier."[124] It was suggested that such a treaty would be "essentially political rather than military."[125]

The treaty that emerged met these specifications. It provides that the parties "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack . . . ."[126] Unlike subsequent mutual security treaties to which the United States became a party, this commitment is not qualified by language suggesting that it would be carried out in accordance with the "constitutional processes" of each party; the only reference in the treaty to constitutional processes occurs in connection with the ratification provision.[127] The commitment is qualified by a provision stating that "each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation" referred to above.[128]

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[121] Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 [hereinafter cited as Rio Treaty].

[122] Current parties are Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela. U.S. DEP'T OF STATE, TREATIES IN FORCE 229 (1985).

[123] Cable from the Assistant Secretary of State for American Republic Affairs (Braden) to the Under Secretary of State (Acheson), May 29, 1947 (Secret), *reprinted in* 8 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1 (1947).

[124] Memorandum by the Chief of the Division of Special Inter-American Affairs (Dreier), June 25, 1947 (Confidential), *reprinted in id.* at 5.

[125] Telegram from the Chargé in Ecuador (Shaw) to the Secretary of State, July 7, 1947 (Restricted), *reprinted in id.* at 12.

[126] Rio Treaty, *supra* note 121, art. 3, § 1.

[127] "This Treaty . . . shall be ratified by the Signatory States as soon as possible in accordance with their respective constitutional processes." *Id.* art. 23.

[128] *Id.* art. 3, § 2.

Yet this applies only until the "Organ of Consultation" meets and "agree[s] upon the measures of a collective character that should be taken."[129] Such decisions are taken by a vote of two-thirds of the parties to the treaty.[130] All parties to the treaty are bound to apply measures comprising the recalling of chiefs of diplomatic missions; breaking of diplomatic or consular relations; and the interruption of economic relations or of rail, air, sea, postal, telegraphic, telephonic, or radio communications.[131] However, "no State shall be required to use armed force without its consent."[132]

This final provision set the tone for discussion of the constitutional ramifications that took place in the U.S. Senate, although the "escape clause" was downplayed in initial communications to the Senate Foreign Relations Committee. The report of Acting Secretary of State Robert A. Lovett to President Truman, which was in turn transmitted to the Senate, stressed that each party to the treaty would incur an *obligation*.[133]

In response to questions from the Senate Foreign Relations Committee, however, the State Department took a somewhat softer line. Assistant Secretary of State Norman Armour testified in executive session that, "[i]n the event of . . . attack, the parties to the treaty are bound to extend such immediate individual assistance to the attacked state as each party considers necessary . . . ."[134] He reiterated that the United States could not be required to use force without its consent.[135] The Senate Foreign Relations Committee concluded that in the event of an armed attack, "we would be called upon to extend immediate assistance to the state attacked."[136] But it added: "The character and amount of this assistance would be determined by our Government."[137] "In no case, however, would we be required to use our armed forces without our consent."[138]

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[129] *Id.*

[130] *Id.* art. 17.

[131] *Id.* art. 20; art. 8.

[132] *Id.* art. 20.

[133]

> [E]ach of the parties obligates itself to take affirmative action to assist in meeting an armed attack. This important provision converts the *right* of individual and collective self-defense, as recognized in the United Nations Charter, into an *obligation* under this treaty. The provision for immediate assistance is applicable to all cases of armed attack taking place within the territory of an American state . . . .

Letter of Acting Secretary of State to President Transmitting Rio Treaty, 17 DEP'T ST. BULL. 1189-90 (1947) (emphasis in original). This was transmitted to the Senate by President Truman. President's Message to Senate Transmitting Rio Treaty, *id.* at 1188.

[134] *Inter-American Treaty of Reciprocal Assistance: Hearings Before the Senate Comm. on Foreign Relations (Historical Series)*, 80th Cong., 1st Sess. 126, 127 (1947) (statement of Norman Armour, Assistant Secretary of State).

[135] *Id.* at 129. Senator Connally asked General Matthew B. Ridgway, also representing the administration, about the scope of that discretion:

> Senator CONNALLY: [I]n the case of an attack by one American State against another . . . [w]hile the obligation to us is to immediately come to the assistance of the attackee, we have to choose our own measures for that purpose, is that right?
>
> General RIDGWAY: Yes, sir.
>
> Senator CONNALLY: In the case of an attack from without into the zone, we are obligated, are we not, to come to the assistance of the attacked State, and use arms?

On the Senate floor, the scope of the treaty's obligation was further discussed. Senator Connally explained that "it is left to the discretion and wish of each of the nations to adopt such measures as it may approve in carrying out the obligation to assist the victim of the attack."[139] Senator Donnell was concerned with ambiguities in the treaty's text and wondered whether a reservation might be appropriate to make clear that the United States would be under no obligation to use armed force.[140] Senators Vandenberg and Connally assured Senator Donnell that the treaty was clear enough. "The total option remains with each individual signatory, without any limitation or instruction," Senator Vandenberg said.[141] "[A]ll through the treaty," Senator Connally said, "it is specific that even in the first instance each nation shall determine its own measures of meeting attack, which would mean that it would not have to adopt military action unless it so desired."[142] Senator Donnell then indicated that he was content to accept the Senators' views, and no reservation was offered.[143] Senator Millikin, who later cast the sole vote against the treaty,[144] chided Senator Vandenberg for the apparent inconsistency in his position,[145] but the Senate appeared satisfied with the explanation given by him and Senator Connally. The Senate consented to

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> General RIDGWAY: No, the same obligation attaches, sir. We can choose the method by which we implement the obligation to assist in meeting that attack. We are not obligated to employ armed force there, either.

Id. at 131.

[136] S. EXEC. REP. NO. 11, 80th Cong., 1st Sess. 11 (1947), *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS.

[137] *Id.*

[138] *Id.*

[139] 93 CONG. REC. 11,124 (1947).

[140] *Id.* at 11,128.

[141] *Id.*

[142] *Id.* at 11,129.

[143] *Id.*

[144] *Id.* at 11,137.

[145] The colloquy was as follows:

> Mr. MILLIKIN. I suggest to the Senator that there is no point in having a cake if you do not eat it.
>
> Mr. VANDENBERG. After you have eaten it, as I understand it, it has disappeared.
>
> Mr. MILLIKIN. It has disappeared, but if you do not eat it what is the use of having it?

Id. at 11,131.

ratification of the treaty by a vote of seventy-two to one.[146]

B. The NATO Treaty

The concern expressed in the Senate during consideration of the Rio Treaty that the United States might be swept into war without deliberation was reflected in the drafting of the NATO Treaty.[147] Unlike the Rio Treaty, the reference to "constitutional processes" in the NATO Treaty is linked directly to the central commitment undertaken. The treaty provides that "its provisions [shall be] carried out by the Parties in accordance with their respective constitutional processes."[148] The principal provision referred to is undoubtedly that of article 5:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an attack occurs, each of them, in exercise of the right of individual or collective self-defense . . . , will assist the Party or Parties so attacked by taking forthwith . . . such action *as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area.[149]

The terms of the treaty make it clear that no nation is committed to introduce its armed forces into hostilities; it may do so if it deems such action necessary, but such introduction is not required. That this is the intended interpretation emerges from every level of consideration of the treaty in the United States.

The day the text of the proposed NATO Treaty was made public, Secretary of State Dean Acheson addressed the nation. The treaty, he said, "does not mean that the United States would be automatically at war if one of the nations covered by the pact is subjected to armed attack. Under our Constitution, the Congress alone has the power to declare war."[150]

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[146] *Id.* at 11,137.

[147] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 [hereinafter cited as NATO]. Current parties to the treaty are Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States. U.S. DEP'T OF STATE, TREATIES IN FORCE 274 (1985).

[148] NATO, *supra* note 147, art. 11.

[149] *Id.* art. 5 (emphasis added).

[150] Address by Secretary of State Acheson delivered on Mar. 18, 1949, over the combined networks of the Columbia and Mutual Broadcasting Systems, 20 DEP'T ST. BULL. 384-88 (1949).

In his letter transmitting the treaty to President Truman, Secretary Acheson again emphasized that the United States would reserve for itself the right to determine what action the treaty required:

> The obligation upon each Party is to use its honest judgment as to the action it deems necessary to restore and maintain . . . security and accordingly to take such action as it deems necessary. Such action might or might not include the use of armed force depending upon the circumstances and gravity of the attack. . . . Each Party retains for itself the right of determination as to whether an armed attack has in fact occurred and what action it deems necessary to take. . . .
>
> This does not mean that the United States would automatically be at war if we or one of the other Parties to the Treaty were attacked. Under our Constitution, only the Congress can declare war. The United States would be obligated by the Treaty to take promptly the action which it deemed necessary to restore and maintain the security of the North Atlantic area. That decision as to what action was necessary would naturally be taken in accordance with our constitutional processes.[151]

This analysis was transmitted to the Senate by President Truman on April 12, 1949.[152]

Secretary Acheson re-emphasized the limited scope of the NATO commitment on the first day of hearings before the Senate Foreign Relations Committee.[153] Senator Donnell, who had opposed the Rio Treaty, pressed Secretary Acheson on the scope of the U.S. obligation and the role of the President and Congress. In response, Secretary Acheson commented that the "constitutional processes" mentioned in the treaty "obviously mean that Congress is the body in charge of that constitutional procedure."[154] In a response that would go directly to the power conferred by the treaty upon the President to use nuclear weapons, Secretary Acheson said: "Article 5 . . . does not enlarge, nor does it decrease, nor does it change in any way, the relative constitutional position of the President and the Congress."[155]

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[151] 20 DEP'T ST. BULL. 532, 534 (1949).

[152] President's Message to Senate Transmitting North Atlantic Treaty, 20 DEP'T ST. BULL. 599 (1949).

[153] *North Atlantic Treaty: Hearings on Exec. L Before the Senate Comm. on Foreign Relations*, 81st Cong., 1st Sess. 11 (1949) (statement of Dean Acheson, Secretary of State). Senator Connally questioned him about it:

> THE CHAIRMAN. Is there or is there not anything in the treaty that pledges us to an automatic declaration of war in any event?
> Secretary ACHESON. There is nothing in the treaty which has that effect, Senator.
> THE CHAIRMAN. Those matters still residing in the discretion and judgment of the Government and the Senate?
> Secretary ACHESON. That is true.
> THE CHAIRMAN. Even after the occurrence of events, we would still have that freedom, would we not?
> Secretary ACHESON. That is true.

Id. at 18. Senator Vandenberg asked the same questions and got the same answers:

> Senator VANDENBERG. Is there anything in the treaty which will lead automatically to a declaration of war on our part?
> Secretary ACHESON. No, sir.

These critically important qualifications were elaborated at some length in the Senate Foreign Relations Committee's report on the treaty.[156] One passage is particularly pertinent:

> [T]he Committee calls particular attention to the phrase "such action as it deems appropriate." These words were included in article 5 to make absolutely clear that each party remains free to exercise its honest judgment in deciding upon the measures it will take to help restore and maintain the security of the North Atlantic area. . . . [W]hat we may do to carry out [the] commitment [of article 5] will depend upon our own independent decision in each particular instance reached in accordance with our own constitutional processes. . . .
>
> During the hearings substantially the following questions were repeatedly asked: In view of the provision in article 5 that an attack against one shall be considered an attack against all, would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such an event does the treaty give the President the power to take any action, without specific congressional authorization, which he could not take in the absence of the treaty?
>
> The answer to both these questions is "No." . . . In the event any party to the treaty were attacked the obligation of the United States Government would be to decide upon and take forthwith the measures it deemed appropriate to restore and maintain the security of the North Atlantic area. . . .

Senator VANDENBERG. The answer, of course is unequivocally "No."

Secretary ACHESON. Unequivocally "No."

Id. at 25.

[154] *Id.* at 80.

[155] *Id.*

[156] S. EXEC. REP. No. 8, 81st Cong., 1st Sess. (1949).

> Nothing in the treaty . . . increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them.[157]

These important limitations on the United States' commitment were re-affirmed on the Senate floor by Senator Connally, the Chairman of the Foreign Relations Committee, in explaining the treaty to the Senate.[158] Senator Connally also addressed specifically the charge that the treaty was an "automatic" commitment:

> While the treaty was being drafted rumors circulated about Washington that article 5 carried with it a commitment which would bind the United States automatically to go to war in the event of an armed attack. I challenge anyone to find such a commitment. . . . Not only must we ratify the treaty by constitutional processes, but it will be carried out under the provisions of the Constitution of the United States. The full authority of the Congress to declare war, with all the discretion that power implies, remains unimpaired.[159]

Senator Connally noted that this was understood by all the signatories to the treaty, and included in the record a portion of a British white paper setting forth the understanding of the United Kingdom.[160] Senator Vandenberg affirmed the correctness of Senator Connally's interpretation of the treaty, at some length.[161]

Yet opposition arose, centering around the alleged vagueness of the treaty's commitments and the possibility that it might draw the United States into foreign wars. Senator Jenner referred to the "garbled diplomatic gibberish"[162] and charged that even supporters of the treaty were divided over the "wisdom of clarifying beyond question of doubt the real nature of the military commitments contained in the weasel-worded clauses of this treaty."[163] He and Senator Donnell then engaged in an extended colloquy concerning what they saw as a "military alliance" that would "sabotage the United Nations" (and, conceivably, tie the United States to communist governments that might become members of NATO).[164] European signatories to the treaty, Senator Donnell argued, had proceeded under the belief that the United States would be pledged to go to war if one of them were attacked; he entered in the record a statement to that effect by the Danish foreign minister.[165] Senator Watkins later complained that the treaty "creates an obligation to defend our allies' territory in the event of an armed attack upon them,"[166] an obligation that he opposed.[167] He therefore proposed a reservation, worded as follows:

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[157] *Id.* at 13-15. The Committee's report proceeded to address specifically what the term "constitutional processes" was meant to encompass:

> The Committee wishes to emphasize the fact that the protective clause . . . was placed in article 11 in order to leave no doubt that it applies not only to article 5, for example, but to every provision of the treaty . . . .
>
> The treaty in no way affects the basis devision [sic] of authority between the President and the Congress as defined in the Constitution . . . . In particular, it does not increase, decrease, or change the power of the President as Commander in Chief of the armed forces or impair the full authority of Congress to declare war.

Id. at 18-19.

[158] "The treaty does not involve any commitment to go to war," he said, "nor does it change the relative authority of the President and the Congress with respect to the use of the armed forces." 95 CONG. REC. 8812, 8814 (1949).

[159] *Id.* at 8815

[160] *Id.*

[161] *Id.* at 8894-95.

[162] *Id.* at 9553.

> The United States further understands and construes article 5 to the effect that in any particular case or event of armed attack on any other party or parties to the treaty, the Congress of the United States is not expressly, impliedly, or morally obligated or committed to declare war or authorize the employment of the military, air, or naval forces of the United States against the nation or nations making said attack, or to assist with its armed forces the nation or nations attacked, but shall have complete freedom in considering the circumstances of each case to act or refuse to act as the Congress in its discretion shall determine.[168]

Senator Connally described the reservation as a "complete repudiation of the treaty," under which the United States would have "no obligations."[169] Senator Watkins responded by reading from a letter by Charles Evans Hughes to Senator Hale, wherein the late Justice wrote that article 10 of the treaty represented an "illusory engagement."[170] The argument had little effect, however; one Senator proceeded to hail the treaty as "the logical next step in the development of the conception of the Monroe doctrine . . . ."[171] Senator Connally entered in the *Record* a letter from Secretary of State Dean Acheson opposing the reservation, which, the Secretary of State said, would "not only raise doubts as to our determination in the minds of those who might be considering aggression, but would certainly raise the gravest doubts in the minds of our partners in the pact . . . ."[172] The reservation was defeated, eighty-seven to eight.[173] The Senate then consented to ratification of the treaty by a vote of eighty-two to thirteen.[174]

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[163] *Id.* at 9554. A Senator could be inconsistent or kid himself, Senator Jenner said, but "let him not delude the American people." *Id.*

[164] *Id.* at 9564.

[165] *Id.* at 9640.

[166] *Id.* at 9900.

[167] The historic and generally accepted American view is that only Congress sitting at the time the armed attack occurs has the power, when the attack is made in other than United States territory, to declare war and authorize the employment of the armed forces of the United States to repel such an attack.

Id. at 9899.

[168] *Id.* at 9904.

[169] *Id.*

[170] *Id.* at 9907. The United States, Hughes' letter said, "should not enter into a guaran-

Defeat of the reservation might be argued to represent a contrary will on the part of the Senate, i.e., a belief that the treaty did and should contain an "automatic" commitment to use armed force.[175] A better reading of the Senate's will, however, and more consistently in keeping with the context in which the Watkins reservation was rejected, is that the reservation articulated a delicate but purposefully unexpressed element of the unanimous understanding of the signatories, and that a spelling-out of that element would have undermined the political force of the treaty—thereby risking the possibility of renegotiation and throwing the solidarity of the alliance into jeopardy. Most Senators seemed to believe, in short, that the element of noncommitment in the commitment was clear enough. And a consensus appeared to have been reached between the executive branch and the Senate concerning the measure of specificity required to satisfy the demands of the Constitution as well as those of our putative allies.

C. ANZUS and the Philippines Treaty

The Mutual Defense Treaty Between the United States and the Republic of the Philippines[176] and the Security Treaty Between Australia, New Zealand, and the United States (ANZUS)[177] were next negotiated by the executive branch and considered by the Senate on

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tee which would expose us to the charge of bad faith or having defaulted in our obligation. . . . Democracies cannot promise war after the manner of monarchs." *Id.*

[171] *Id.* at 9911 (remarks of Sen. Smith).

[172] *Id.* at 9915.

[173] *Id.* at 9916.

[174] *Id.*

[175] Justice Jackson argued in the *Steel Seizure* case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), that rejection of an amendment by the Senate that would have authorized the seizure of the steel mills effectively represented legislative *disapproval* of such an act. *Id.* at 634 (Jackson, J., concurring).

[176] Mutual Defense Treaty, Aug. 30, 1951, United States-Philippines, 3 U.S.T. 3947, T.I.A.S. No. 2529 [hereinafter cited as Philippines Treaty].

[177] Multilateral Security Treaty, Sept. 1, 1951, United States-Australia-New Zealand, 3 U.S.T. 3420, T.I.A.S. No. 2493 [hereinafter cited as ANZUS].

roughly the same schedule. The Senate concerns confronted during consideration of the Rio and NATO Treaties apparently were taken as a given during the negotiation of these later treaties, with a consequence that Senate debate was far less protracted.

Nonetheless, U.S. negotiators occasionally tried to soft-pedal the significance of the "constitutional processes" language in explaining it to their foreign counterparts—in terms that would surely have raised alarm had they been used before the U.S. Senate. In a meeting with the Foreign Ministers of Australia and New Zealand, Ambassador Dulles was asked what was meant by "constitutional processes." In reply, he concluded that the phrase "did not . . . impose any serious limitation" on U.S. assistance to its allies.[178]

In intra-governmental communications, Dulles's emphasis shifted. In a "Top Secret" dispatch to General Douglas MacArthur, he candidly described the unfettered discretion the United States reserved for itself:

> While [the draft treaty] commits each party to take action (presumably go to war) it does not commit any nation to action in any particular part of the world. In other words, the United States can discharge its obligations by action against the common enemy in any way and in any area that it sees fit.[179]

Each party to the treaties, Dulles testified before the Senate Foreign Relations Committee, would have to decide what action was appropriate "in the light of the fact that there is recognition that it is a common danger, and that each will act in accordance with its constitutional processes to meet that danger."[180] The subject was not pursued, at least not nearly to the extent it had been during hearings on the NATO and Rio Treaties. Perhaps Committee members knew the administration's likely answers and expected to be satisfied with them. In any event, Dulles' statement was repeated in the committee report[181] with the simple observation that "a whole range of defensive measures . . . might be appropriate depending upon the circumstances" and "any action in which the United States joined would have to be taken in accordance with our constitutional processes."[182]

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[178] 6 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 166 (1977). Ambassador Dulles' complete reply to the question, as recorded by a State Department official, was that:

> the phrase was to be found in the United Nations Charter in article 43. It had been inserted there primarily to meet the sensibilities of Congress, which alone under our Constitution has the power to declare war. The phrase, which also appears in the North Atlantic Treaty, makes clear that the President does not have this power. [W]hile it is quite true that under our Constitution only Congress can *declare* war, the question of *making* war is a different matter. War can be made by others, leaving us little choice. Congress has declared war in only one of the wars in which the U.S. has been engaged. In every other case Congress has found that a state of war already existed. Only in the unlikely event that the U.S. started a war would the phrase have any relevance. It did not in fact therefore impose any serious limitation. *Id.*

[179] *Id.* at 177.

[180] *Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the Senate Comm. on Foreign Relations,* 82d Cong., 2d Sess. 62 (1952).

Discussion of the issue on the Senate floor was equally cursory; a number of other issues had now captured the attention of opponents of the treaties. Each treaty was approved overwhelmingly. The issue of "automatic commitments" apparently had had its day. Yet three more security treaties currently in force remained to be approved by the Senate.

D. *The South Korea Treaty*

Like the Philippines and ANZUS Treaties (and unlike the NATO and Rio pacts), the Mutual Defense Treaty Between the United States and the Republic of Korea[183] is without language indicating that an attack on one party will be regarded as an attack on the other. Otherwise, although somewhat more succinct—the entire text of the treaty is less than two pages— material obligations of the treaty parallel those of other U.S. mutual security treaties. Each party recognizes that an attack on the other in the Pacific area "would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."[184] This means, Secretary of State John Foster Dulles said in his letter of transmittal to the President, that "[a]n armed attack by [*sic? "on"?*] either party does not obligate the other to come to its assistance."[185] President Eisenhower transmitted this report to the Senate on January 11, 1954.[186]

This was not the commitment that the Koreans sought. President Singman Rhee of South Korea had asked President Eisenhower for a security pact under which "[t]he United States will agree to come to our military aid and assistance immediately without any consultation or conference with any nation or nations, if and when an enemy nation or nations resume aggressive activities against the Korean Peninsula."[187] The commitment they got, as Secretary of State Dulles explained to the Senate Foreign Relations Committee, was a bit different. Asked by Senator George about what assistance the United States would be obligated to give if South Korea were attacked, the Secretary of State said:

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[181] S. EXEC. REP. NO. 2, 82d Cong., 2d Sess. (1952).

[182] *Id.*

[183] Mutual Defense Treaty, Oct. 1, 1953, United States-Republic of Korea, 5 U.S.T. 2368, T.I.A.S. No. 3097.

[184] *Id.* art. III.

[185] Secretary of State's Letter to President Transmitting Mutual Defense Treaty with Korea, 30 DEP'T ST. BULL. 132 (1954).

[186] *Id.* at 131.

> It would be wholly within the determination of the United States. The other party to the treaty would have no right to make any specific demand upon us and say that we were obligated by the treaty to do any particular thing. The choice of means is entirely ours.[188]

In fact, Dulles went further and explained that the textual difference between operative provisions of the Korean and NATO Treaties derived from his personal effort to avoid the constitutional controversy that had occurred during the debate on ratification of the NATO Treaty by making abundantly clear that no "automatic commitment" was implied.[189] In the Senate Foreign Relations Committee's report this was described as the "Monroe Doctrine" formula, because, the Committee said, its origins traced to the Monroe Doctrine. "It has the additional advantage of never having been challenged throughout our history, from the constitutional standpoint, as altering the balance of power between the President and Congress."[190]

On the Senate floor, a thoroughly confused discussion occurred. Several Senators addressed the issue whether the term "constitutional processes" required congressional participation under all circumstances.[191] No agreement existed. All apparently did agree, however,

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[187] Letter from President Singman Rhee to President Dwight D. Eisenhower (May 30, 1953), *reprinted in A Mutual Defense Treaty Between the United States of America and the Republic of Korea: Hearings on Exec. A Before the Senate Comm. on Foreign Relations*, 83d Cong., 2d Sess. 57 (1954).

[188] *Id.* at 17 (statement of John Foster Dulles, Secretary of State).

[189] "I, myself, invented this new formula," he testified, "at the time when I was negotiating the security treaties with Australia, New Zealand, and the Philippines . . . ." *Id.* at 7. The purpose there, he said, had been the same—although from a standpoint of actual practice, the difference is "perhaps more academic than it is practical." *Id.* at 29.

[190] S. Exec. Rep. No. 1, 83d Cong., 2d Sess. (1954).

[191] Senator Wiley, Chairman of the Foreign Relations Committee, was asked by Senator Stennis about the extent of the commitment and the role of Congress in its implementation:

> Mr. STENNIS. [A]re we committing ourselves now, in agreeing to this treaty, to go to war if Korea is attacked, without any declaration by the Congress?
>
> Mr. WILEY. In my opinion, very definitely the answer is no. . . . [W]e will do that which we think is advisable.
>
> Mr. STENNIS. Who is "we"? Is that the President, or is it the Congress?
>
> Mr. WILEY. It is the Congress and the President who have to determine that question . . . . [I]f an overt act is committed by an aggressor upon an ally, it then rests

that the United States would not be required to come to the defense of South Korea if it were attacked, and that in this sense the treaty, in the words of Senator Smith of New Jersey, did "not go beyond the general type of commitment which we have made in our other Pacific-area security treaties."[192] The treaty was approved eighty-one to six.[193]

E. The SEATO Treaty

The Southeast Asia Collective Defense Treaty,[194] like other Pacific-area treaties ratified over the previous thirty years, omits any indication that an attack on one party is to be regarded as an attack on all. Its operative commitment provides that "[e]ach party recognizes that aggression by means of armed attack in the treaty area against any of the Parties . . . would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes."[195] This, Secretary of State Acheson reported to President Eisenhower, "leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs. There is, of course, a wide range of defensive measures which might be appropriate depending upon the circumstances."[196] The report was transmitted by President Eisenhower to the Senate.[197]

In executive session hearings before the Senate Foreign Relations Committee, Secretary Dulles explained why the Pacific-area treaties did not contain the provision present in the NATO and Rio Treaties to the effect that an attack on one was to be regarded as an attack on all. That language, Secretary Dulles said, had created "doubts and uncertainties" concerning the treaties' "constitutional effect." Those uncertainties had been resolved in the case of both the NATO and

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> with the constituted authority, to wit, the Congress, to decide whether or not we shall regard such aggression as a basis for going to war . . . .
>
> [T]here is nothing in the treaty which would change, delimit or add to the powers of the President of the United States.

100 Cong. Rec. 785 (1954).

[192] *Id.* at 794.

[193] *Id.* at 819.

[194] Southeast Asia Collective Defense Treaty and Protocol, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28 [hereinafter cited as SEATO Treaty]. Current parties are Australia, France, New Zealand, the Philippines, Thailand, the United Kingdom, and the United States. U.S. Dep't of State, Treaties in Force 229 (1985).

[195] SEATO Treaty, *supra* note 194, art. IV.

[196] Secretary of State's Letter to President Transmitting Southeast Asia Collective Defense Treaty and Protocol, 31 Dep't St. Bull. 820, 821 (1954).

[197] President's Message to Senate Transmitting Southeast Asia Collective Defense Treaty and Protocol, *id.* at 819.

Rio Treaties, he said, but in negotiating the treaties with Australia, New Zealand, and the Philippines, "it seemed to me more prudent to use the language which had been used by President Monroe . . . ." That language, he testified, "commends itself perhaps to a general acceptance by the Senate."[198] Secretary Dulles went on to describe the effect of the treaty's obligatory provisions:

> Well, Article IV, paragraph 2, contemplates that if that situation arises or threatens, that we should consult together immediately in order to agree on measures which should be taken. That is an obligation for consultation. It is not an obligation for action.[199]

Secretary Dulles described the linguistic evolution of the treaties again in open session. The NATO Treaty, he said, raised the question whether it gave the President the same power in the event of an attack on Norway that he would have had in the event of an attack on New York City. Dulles recalled that he had been a member of the Senate at the time and had participated in the debate. The new formula was devised for the ANZUS, Philippine and Korean Treaties, to avoid reopening the constitutional debate.[200] He reiterated, however, that the "difference practically is not that great . . . ."[201] He was thus careful to avoid intimating that the NATO Treaty contained an "automatic" commitment.

Testifying after Dulles, former Representative Hamilton Fish recommended to the Committee that it modify the treaty so as to make clear that the term "constitutional processes" was understood to require a declaration of war before the armed forces could be used to carry out U.S. obligations under the treaty.[202] The Committee discussed the question in executive session and concluded that presidential powers were—or could be—broader than Mr. Fish had suggested; the consensus was that the treaty should simply make clear that it neither contracted nor expanded the President's powers.

Senator George, the Committee Chairman, acted as floor manager of the treaty in the Senate. He explained that the NATO-Rio Pact reference had been dropped because of the "constitutional controversy" it provoked. Instead, the treaty used the formula of the Monroe Doctrine, which, he said, left "no doubt that the constitutional powers of the Congress and the President are exactly where they stood before. [The treaty] has no effect whatsoever on the thorny question of whether, how, and under what circumstances the President might involve the United States in warfare without the approval of Congress."[203] No significant discussion of the issue occurred, and on February 1, 1955 the SEATO Treaty was approved by a vote of eighty-two to one.[204]

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[198] *Southeast Asia Collective Defense Treaty: Hearings Before Executive Session of Senate Comm. on Foreign Relations,* 83d Cong., 1st Sess. 1, 4 (1955) (statement of John Foster Dulles, Secretary of State).

[199] *Id.* at 25.

[200] *Id.* at 27.

[201] *Id.* at 29.

[202] *Southeast Asia Collective Defense Treaty: Hearings Before Senate Comm. on Foreign Relations,* 84th Cong., 1st Sess. 50 (1955) (statement of Hamilton Fish, President, American Political Action Committee).

F. The Japan Treaty

The Treaty of Mutual Cooperation and Security Between the United States and Japan[205] sets forth an obligation virtually identical to the other Pacific-area mutual security treaties. The treaty provides that "[e]ach party recognizes that an armed attack against either Party . . . would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."[206] By the year this treaty was signed, 1960, the Senate apparently had come to have so firm an understanding of the meaning of such language that the issue was virtually ignored.[207]

G. The War Powers Resolution

The War Power's Resolution[208] addresses the issue in section 8(a)(2). That section provides that

> [a]uthority to introduce United States Armed Forces into

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[203] 101 CONG. REC. 1049, 1051 (1955).

[204] *Id.* at 1060.

[205] Treaty of Mutual Cooperation and Security Between the United States and Japan, Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509.

[206] *Id.* art. V.

[207] Compare the questioning of Secretary of State Christian Herter by the Senate Foreign Relations Committee with that of other Secretaries of State testifying on previous treaties. *Treaty of Mutual Cooperation and Security with Japan: Hearings Before the Senate Comm. on Foreign Relations*, 86th Cong., 2nd Sess. 1 (1960) (statement of Christian Herter, Secretary of State). Also, this was a "replacement" treaty with Japan; at Japan's request, the treaty was revised, although the commitment provisions remained the same. Testifying on the scope of those provisions in 1952, Senator Brewster asked John Foster Dulles what U.S. obligations would be "if Russian troops did move down from the islands into Japan?" He replied, "We have no obligation." *The Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. 117-27 (1952) (statement of John Foster Dulles, personal representative of President on Japanese Treaty).

[208] Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548) (1976) [hereinafter cited as War Powers Resolution].

> hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . . from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.[209]

The proscription against inferring such authority from a treaty "heretofore" ratified seems clear enough. Because none of those treaties is implemented by legislation meeting the two conditions specified in section 8(a)(2)—specific authorization and express reference to the War Powers Resolution—the Resolution seems to say that no authority to introduce the armed forces into hostilities may be inferred from any treaty.

Yet a subsequent provision appears contradictory. Section 8(d)(1) provides that "[n]othing in this joint resolution . . . is intended to alter the . . . provisions of existing treaties."[210] If an "existing treaty"—presumably one in force at the time of the enactment of the Resolution—*did* permit such an inference of authority, how is that authority affected by the War Powers Resolution? Does the Resolution, as one commentator put it, talk "out of both sides of its mouth"?[211]

The provision originated in the Senate version of the Resolution,[212] which provided that "[n]o treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States into hostilities . . . ."[213]

In its report, the Senate Foreign Relations Committee explained its understanding of "existing" treaty commitments:

> Treaties are not self-executing. They do not contain authority . . . to go to war. Thus, by requiring statutory action, . . . the War Powers Resolution would perform the important function of defining that elusive and controversial phrase—"constitutional processes"—which is contained in

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[209] *Id.* § 8(a)(2).

[210] *Id.* § 8(d)(1).

[211] *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 76 (1977) (statement of Monroe Leigh, Steptoe and Johnson, Washington, D.C.).

[212] S. 440, 93d Cong., 1st Sess., 119 CONG. REC. 25, 119-20 (1973).

[213] *Id.* § 3(4).

our security treaties.[214]

The conference report[215] set forth section 8 as it reads in the Resolution; the joint statement of the managers (appended thereto and explaining the meaning of the conference report) says merely that the conference committee "agreed to [the] adoption of modified Senate language defining specific statutory authorization, and defining the phrase 'introduction of United States Armed Forces' as used in the joint resolution."[216] No explanation is given as to the meaning of the cryptic indication of an intent not to alter the provisions of existing treaties.

Given this background, what is to be made of section 8? Conflicting interpretations are doubtless possible, but the most reasonable would appear to be that the section was intended to make clear that no treaty may serve as a source of authority for the introduction of the armed forces into hostilities. This limitation should be construed as applying to all treaties, ratified both before and after enactment of the War Powers Resolution. To construe the provision as exempting "existing" mutual security treaties would be to create a confused, two-tier system of security treaties. Such a result would be without support in the legislative history and completely at odds with the oft-repeated belief that no treaty in force at the time of the debate on the Resolution did or could commit the United States automatically to introduce its armed forces into hostilities. The apparently inconsistent reference of section 8(d)(1) to the "provisions" of "existing" treaties can in fact be read as a straightforward (if infelicitous) attempt to state the congressional understanding that no existing treaty *is* altered by the War Powers Resolution because no existing treaty *does* provide authority of the sort that the Resolution rules out. This is, in fact, how the treaties were construed by both the Ford[217] and

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[214] S. REP. No. 220, 93d Cong., 1st Sess. 26 (1973). The Committee said further that:

> the war powers of Congress are vested in both Houses of Congress and not in the Senate (and President) alone. A decision to make war must be a national decision. Consequently, to be a truly national decision, and, most importantly, to be consonant with the Constitution, it must be a decision involving the President and both Houses of Congress. *Id.*

[215] H. REP. No. 547, 93d Cong., 1st Sess. (1973).

[216] *Id.*

[217] In connection with Secretary of State Henry Kissinger's appearances before the Senate Foreign Relations Committee on November 19, 1975, Senator Dick Clark submitted a question asking whether "any *treaty* authorize[s] the introduction of U.S. armed forces into hostilities . . . ?" The administration replied:

> [T]he answer is "no." Treaties of the United States which express defense commitments to other nations commit the United States to act only in accordance with its constitutional processes. Such treaties do not confer authority which would not otherwise be available through the constitutional processes of the United States.

Carter[218] administrations.

III. CONCLUSION

As Senator Stennis reminded the Senate during the confused debate on the treaty with South Korea, it is important to "keep our eye on the ball."[219] The issue is *not* what procedures are implied or required by the term "constitutional processes;" whether congressional approval is required before the President can introduce the armed forces into hostilities is a vast and complex question, far beyond the scope of this article.[220] Rather, the issue here is whether U.S. mutual security treaties can and do serve as a supplementary source of authority on which the President can rely to introduce the U.S. armed forces into hostilities.

Part of the confusion has derived from a focus on the word *constitutional* to the virtual exclusion of the word *processes*. *Process* suggests deliberation; it implies *procedure* leading to *choice*.[221] In one sense, of course, the question of whether Congress should *choose* to

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Letter from Robert J. McCloskey, Assistant Secretary of State, to Sen. Dick Clark (Mar. 1, 1976) (on file with author).

[218] In response to a letter from Senator George McGovern to Secretary of State Cyrus Vance, the administration replied:

> [A]lthough our mutual security agreements entail a legal obligation to respond to an armed attack on another party, the nature and scope of that response is left to the discretion of the responding party . . . . Accordingly, such treaties do not confer "Authority to introduce United States Armed Forces into hostilities" within the meaning of Section 8(a)(1) of the War Powers Resolution.

Letter from Douglas J. Bennet, Jr., Assistant Secretary for Congressional Relations, to Sen. George McGovern (June 2, 1977) (on file with author).

[219] 100 CONG. REC. 779, 789 (1954).

[220] The proverbial "short answer" is that the President's independent constitutional authority depends on a number of factors, including the purpose for which the forces are used and whether a bona fide emergency exists. *See generally* Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); War Powers Resolution, *supra* note 208, § 2(c) (expressing the understanding of Congress that the President's independent powers to introduce the armed forces into hostilities extend only to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces").

[221] This is illustrated by the Senate Foreign Relations Committee's use of the term in another, similar context. As submitted to the Senate, the Panama Canal Treaty, Treaty on the Panama Canal, Sept. 7, 1977, United States-Panama, — U.S.T. —, T.I.A.S. No. 10,030, originally provided that "[t]he Parties *shall conclude* an agreement" concerning the exchange of prisoners. *Id.* art. IX(11). The Committee recommended (and the Senate later accepted, 124 CONG. REC. 10,541 (1978)) an understanding which provided that any such agreement "shall be concluded in accordance with the constitutional processes of both parties." S. EXEC. REP. No. 12, 95th Cong., 1st Sess. 6 (1978). The Committee indicated its intent to require that the agreement take the form of a treaty. One additional purpose of the understanding, the Committee said, was to clarify the substance of the international commitment undertaken by the United States:

act is academic, or at least in certain situations it can be. Those are circumstances in which the President clearly possesses independent constitutional authority to introduce the armed forces into hostilities. There, the extent to which a given mutual security treaty does or does not provide such authority need not be reached. Where units of the U.S. armed forces are stationed where they have a legal right to be and are subject to an armed attack, for example, it is irrelevant that an applicable treaty also might provide support for the use of armed force. The President could of course find it useful for domestic political purposes to cite the attack upon a treaty ally as further justification for using armed force in response. But as a constitutional matter it is simply clear that, under such circumstances, the U.S. Constitution provides all the authority the President requires.

On the other hand, the issue is far from academic in circumstances where no colorable source of authority exists other than a mutual security treaty. One respected commentator has suggested that the question is not a serious one because the United States can simply "refuse to honor"[222] such a commitment, which is "no different from other treaty undertakings . . . ."[223] The meaning of this observation is not altogether clear. If the suggestion is merely that Congress and the President have it within their power, acting together, to disregard international obligations of the United States, then the point is a useful reminder that there is, when the political

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> As paragraph 11 has been drafted, it could be construed as requiring the United States to enter into a prisoner exchange agreement, and would thereby place the United States in violation of this treaty should the United States elect not to do so. Obviously, the authority of the Senate to advise and consent to a treaty is meaningless if it is required to be given; the authority to disapprove is implied if our "constitutional processes" are to be upheld.

Id. at 11. The Committee also recommended use of the term "constitutional processes" in an amendment to a companion treaty, the so-called "Neutrality Treaty." Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, — U.S.T. —, T.I.A.S. No. 10,029. In language illuminating the meaning of the phrase in the mutual security treaties, the Committee explained its intent:

> The effect of this language is to make clear that the treaty does not obligate the United States to introduce its armed forces into hostilities or authorize the President to do so. It thus places the Neutrality Treaty, in terms of the "automaticity" of the United States' international commitment, in the same category as mutual security treaties to which the United States is a party. All such treaties implicitly reserve to the United States a right of choice in each individual situation to act, militarily, as it deems appropriate under the circumstances. Any treaty which did not do so would, in the Committee's opinion, unconstitutionally divest the House of Representatives of its share of the warmaking power and would, unconstitutionally, delegate to the President the power to place the United States at war.

S. EXEC. REP. NO. 12, 95th Cong., 1st Sess. 74 (1978).

[222] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 192-93 (1972).

[223] *Id.* at 192.

branches join in the breach, no corresponding domestic rule.[224] If on the other hand the implication is that the United States need not worry about international law niceties because inconvenient international undertakings can always be disregarded, then the argument seems to disregard the damage done to world order—and to U.S. credibility—by the violation of international obligations.

But that, of course, assumes the very point at issue: are the United States' mutual security treaties really *obligations*? On this question domestic contract law may have some wisdom to offer. No one would argue that the parallels are exact; the Vienna Convention on the Law of Treaties[225] is not Article II of the Uniform Commercial Code.[226] It contains, indeed, no provision dealing with such concepts as "illusory obligation," "moral obligation," or the requirements of a "meeting of the minds" and "mutuality of obligation." Yet these are subjects that have long occupied the attention of respected English and U.S. jurists, and international law does derive, at least in part, from "the general principles of law recognized by civilized nations . . . ."[227] If domestic contract rules do not actually apply, the policy considerations underpinning those rules may at least provide a useful perspective.

An illusory promise is an expression cloaked in promissory terms, but which, upon closer examination, reveals that the promisor has committed himself to nothing.[228] Illusory promises make for illusory contracts, and illusory contracts are void. The illusion lies in a retained option of non-performance: if performance of an apparent promise is entirely within the discretion of the promisor, the promise is illusory.[229]

Closely related are requirements of certainty. A contract does not exist unless its terms are reasonably certain.[230] Uncertainty as to incidental or collateral matters is seldom fatal to the existence of a contract. But if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract, and no legal obligation.[231]

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[224] Where the President acts alone, however, his action does raise constitutional problems. *See* Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U.L. Rev. __ (Apr. 1985) (forthcoming).

[225] Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/11/Add. 2, 8 I.L.M. 697.

[226] *Compare* article 19(c) precluding reservations incompatible with the object and purpose of a treaty.

[227] Statute of the International Court of Justice, art. 38, para. 1(c), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153.

[228] J. CALAMARI & J. PERILLO, CONTRACTS § 4-17 (2d ed. 1977).

[229] *Id.* In fact, the "promise" is merely a statement of intention to pursue whatever course of conduct the "promisor" may choose to pursue. RESTATEMENT (SECOND) CONTRACTS § 2 comment e (1982). The classic example is a promise to buy as much as the promisor may choose; there is no promise, and no contract. *Id.* § 77 illustration 1.

[230] RESTATEMENT (SECOND) CONTRACTS (1982) § 33.

The courts enforce legal obligations, not moral ones. In rare instances a moral obligation may be transformed into a legal obligation, but these are almost exclusively situations involving past consideration or pre-existing benefit.[232] A moral obligation, it has been said, is not worth the paper on which it is not written.

The reasons for these rules are familiar. Specificity is necessary to determine whether the parties truly intended to form a contract. It is essential, too, for determining the existence of a breach. An appropriate remedy cannot be forged unless the court can know what promise was violated.[233]

Under domestic contract rules, the United States' mutual security treaties would be fatally defective. Members of the Senate repeated over and over, in debates on the treaties' ratification, that the United States was committing itself only to do what it deemed appropriate. The United States, in its sole discretion, retained the option to do nothing. The terms of the treaties say nothing about what the United States must do if another party is attacked. They say nothing about when the United States must do it. They say nothing about how long the United States must do it. They say nothing about what the United States will *take into account* in determining what it will do. The treaties say nothing, in short, about any of the myriad factors essential to deciding whether the United States has honored or abandoned its treaty commitment.

But so what? No domestic tribunal will ever sit in judgment of the United States' action in responding—or failing to respond—to an armed attack on a treaty partner. No court will ever be confronted with the problem of "fashioning relief" for an aggrieved party. And the formality, the solemnity, with which these commitments were entered into leaves little ground for doubting the intent of any state to become a party.

Why, then, should any one care that the "obligations" are vague to the point of meaninglessness? The reason is clear: *Because no one will know, in circumstances that leave room for reasonable dispute, whether this nation has lived up to its commitments.* The treaties leave the war-making powers of each branch precisely where those powers would have been in the treaties' absence—and because of that, no one can know what the treaties bind those branches to do.

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[231] *Id.* comment a.

[232] J. CALAMARI & J. PERILLO, CONTRACTS § 5-2 (2d ed. 1977).

[233] RESTATEMENT (SECOND) CONTRACTS, § 33 comment b (1982).

The cost, or potential cost, of the treaties' indeterminate language is manifest. Credibility is the currency of diplomacy. Vaguely worded undertakings may generate initial good will; the peoples of those nations bound to the United States in mutual security pacts may have felt a measure of consanguinity with this country as a consequence of our seeming public-spiritedness. It was not, after all, every nation that sent its representatives flying about the post-war globe signing up treaty partners.

Yet what will happen to U.S. credibility if it exercises the choice *not* to go to war that it has so clearly reserved for itself under the mutual security treaties? What price will be paid by this country in the long-term if it appears to act in bad faith—even though its act is one that is legally sanctioned? Are not the expectations of our treaty partners, in short, drastically different from those who would take comfort in—to use Senator Jenner's term[234]—the "weasel words" of the treaties?

One response is of course that their actual expectations are irrelevant. All that they might reasonably have based their expectations upon, the argument might go, is the text of the treaty they have ratified. That is, after all, the purpose of having reduced the understanding to writing—to evidence what the parties *actually* agreed upon—as well as what they did not.

But four-cornered, sharp-penciled U.S. legalism is likely to win little in the battle for the hearts of foreign government officials of a country under siege. Actual expectations of relevant foreign diplomats, not the expectations of the reasonably prudent U.S. law professor, are the touchstone of whether the United States, through inaction or too little action, would suffer an unacceptable loss of credibility.

On that, our knowledge is scant. No country-by-country study has been conducted of the understanding of the meaning of the treaties in the foreign ministries of our treaty partners. Nor has any systematic review been undertaken to determine what those views may be today. What is known is largely anecdotal, consisting primarily of foreign newspaper accounts entered in the *Congressional Record* at the time of the ratification debates[235] and occasional foreign reaction to official discussion of the scope of the U.S. commitments.[236]

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[234] *See supra* text accompanying note 163.

[235] 95 CONG. REC. 9443, 9640 (1949).

[236] Murata, *Japan's Defense Delusion*, Japan Times, Dec. 30, 1977, at 14 (describing Japan's "assumption" that "the U.S. WILL come to Japan's aid AUTOMATICALLY when

In the absence of hard evidence, it is reasonable to view most diplomatic personnel in the foreign ministries of most of our treaty partners as moderately sophisticated realists who would share the conclusion of a study conducted ten years ago at the Hebrew University of Jerusalem. The study was directed at assessing the permissible scope of a U.S. security guarantee that might emerge from a Middle East peace settlement. It reviewed the form required by the U.S. Constitution; the breadth of authority that such a guarantee might confer upon the President to "redeem" the U.S. pledge; and who constitutionally could "renege on, or terminate," such a commitment. The conclusion:

> [E]ven treaties must be viewed as mere policy statements. They reflect valid—indeed solemnly accepted—policy of the moment of their adoption, but their future implementation will be dependent on the shape of *future* policy . . . . No American treaty incorporating a defense commitment has failed—if only by its very vagueness and by its specific allusion to "constitutional processes"—to leave all future U.S. options entirely open . . . . The formality of the guarantee will most certainly not be the decisive factor in the crunch; as in the past, the execution or non-execution of the guarantee will be determined primarily by the perceived real interests of the guaranteeing power at the "moment of truth."[237]

The "perceived real interests" of the United States at the "moment of truth" are—and probably are seen to be—extensions of the reasons that motivate the United States to conclude security arrangements at the outset. Like other world powers, we doubtless explain our purposes differently to ourselves than those purposes would be explained by an "outside observer." Under-secretary of State Nicholas deB. Katzenbach, for example, told the Senate Foreign Relations Committee that the "basic objective of our foreign policy is the security of the United States and the preservation of our freedoms,"[238] which probably explains as well the perceived interest in entering into the various mutual security treaties. Others, less involved in policy-making than in its analysis, are perhaps more detached. Robert Osgood has suggested, for example, that alliances

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Japan is attacked" and discussing the "blind spot" in Japanese thinking about the security arrangement).

[237] M. POMERANCE, AMERICAN GUARANTEES TO ISRAEL AND THE LAW OF AMERICAN FOREIGN RELATIONS 30-31 (No. 9, Dec. 1974) (emphasis in original) (footnotes omitted).

[238] *U.S. Commitments to Foreign Powers: Hearings on S.Res. 151 Before the Senate Comm. on Foreign Relations,* 90th Cong., 1st Sess. (1967).

are made because they "are the most binding obligations [states] can make to stabilize the configurations of power that affect their vital interests."[239] It is likely that the reasons why the United States (or any nation, for that matter) introduces its armed forces into hostilities proceed from the same general rationale under which a given alliance is formed. And it is possible that the means that might be employed to carry out that objective are so multifarious as to elude the efforts of even the most skillful diplomat to reduce them to writing in a mutual security treaty.

It should not be surprising, therefore, that a country such as Israel should view with skepticism the value of a mutual security relationship with the United States. For the same reasons it should not be unexpected that existing treaty partners might view mutual security pacts as providing little security for themselves—apart from a generalized confluence of interests that may encourage armed U.S. intervention at the "moment of truth."

All of this suggests that the hole does not subsume the donut—that notwithstanding their gaping escape clauses, such treaties have important benefits for both sides that should not be overlooked. If their commitments are not absolute, they at least provide a measure of reassurance that the parties do not stand alone in facing what could otherwise be an overwhelming aggregate of opposing forces. It may be a fair question whether congealed opposition is a cause or effect of our mutual security treaties; the Warsaw Pact may see itself as having the same defensive purposes as NATO, and may also derive some measure of cohesion from NATO's existence.

But be that as it may, NATO's symbolic value has tangible consequences, military and non-military. It provides a congenial framework within which important planning can take place in the event its parties should ever elect to employ armed force collectively. The appearance and reality of military unity may deter Warsaw Pact aggression. It may also deter foreign policy gyrations by NATO members; when a party begins to act in ways inconsistent with the objectives of the alliance, the alliance's cooperative framework and diplomatic channels can provide useful leverage for the application of diplomatic pressure by other parties. (This is probably more true in the case of an alliance comprised of parties of vastly disparate power, such as the Rio alliance.) A military alliance seems, in short, to provide the international analog to a "neighborhood": bonds develop that conduce generally to the protection of multiple interests of the parties.

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[239] R. OSGOOD, ALLIANCES AND AMERICAN FOREIGN POLICY 19-20 (1968).

However great those benefits may be, they cannot mask the ultimate juridical unreality of the notion of commitment. If it means anything in this context, the term "commitment" means that under *some* circumstances, armed force will be required to be employed. Yet the treaties—all of them—are clear in their express terms and equally clear in their legislative history that under *no* circumstances is any party required to take any military action. With regard to the United States this qualification carries an important corollary: none of the treaties confers any war-making power on the President that he would not have had in its absence. This means that he is given no additional power to introduce the armed forces into hostilities by any treaty, and it also means that, once the forces are involved in hostilities, he is given no additional power to carry out any otherwise unauthorized military operation.

The dilemma confronting U.S. treaty negotiators was a real one. The prime purpose of the mutual security pacts was to deter aggression. Deterrence is effective, in international relations as in domestic criminal justice, only to the extent that it is swift and sure. Yet the negotiators were also compelled to ensure the pacts' consistency with the deliberative decision-making processes of the democracies they sought to preserve. Speed and certainty are not the hallmarks of democratic procedure—particularly of the decision to use armed force. The evolution of Anglo-American constitutionalism is in no small part a history of the decline of the war-making power as a "prerogative" power, a history of its transfer to legislative authorities. To have disregarded that evolution would have been—at least in the United States—to have ensured the rejection of the pacts. An initial flirtation with "automatic" commitments, reflected in the ambiguous language of the Rio and NATO Treaties, was thus quickly ended when those treaties were taken up by the Senate.

So the negotiators wrote into the treaties the fullest measure of commitment that their domestic legal and political systems would allow—which was zero. They rejected swift and sure deterrence in favor of the right to decide—to weigh the facts of each incident, to judge whether an armed attack actually had occurred, to assess whether the attack had been provoked, to determine whether a military response was the most propitious, to consider all the factors that go into an evaluation of what action is most appropriate. The United States promised that it would, in good faith, consider such assistance as it deemed appropriate if another party is attacked. But that is all it promised.

In mutual security treaties to which the United States is a party, the notion of commitment is a myth. To pretend otherwise is to undermine the very constitutional processes that the treaties were intended to preserve.

PREPARED STATEMENT OF WILLIAM TAYLOR REVELEY III

I.

A.

In my judgment, the country needs war powers legislation. We need it to help solve the severe, debilitating war powers problem that afflicts us.

The problem is not that the President is deliberately, wickedly usurping ancient congressional prerogatives over war and peace. Nor is the problem that Congress is deliberately, wickedly invading hereditary powers of the President over the use of force.

The problem is that the country lacks a constitutional consensus about the process by which the President and Congress are to share authority over American decisions to use force. We continue to bicker over which branch gets to decide what, when. This bickering occurs at profound cost to the country. Four sorts of harm come quickly to mind:

(1) The bickering poisons relations between the President and Congress. To be accused of constitutional usurpation is no fun. It engenders anger, fear, defensiveness, countercharges. Constitutional theologians from both sides — the President's and Congress' — insist with passion of truly religious intensity that their view of the Constitution is the Only True View, that all others are heresy. The fate of heretics in the hands of the righteous is well known.

(2) The bickering undermines public confidence in the rule of law and in the legitimacy of both the President and Congress. The political branches of government cannot go on year after year accusing one another of illegality in one of the most sensitive areas of American life — war and peace — without seriously eroding the faith of the people in both of these branches of government.

(3) The bickering prevents focused attention to policy, that is, focused inquiry into what the United States

ought to do about particular foreign and military situations, what our realistic alternatives are for dealing with them, what the costs and benefits of these alternatives are, and which alternatives we ought to pursue to maximize our national interest. Rather than focusing on these policy issues, the debate all too often focuses on process issues, on which branch is constitutionally entitled to decide what, when. Focused attention on whether the United States ought in the national interest to commit troops abroad is sacrificed to bickering over the precise way in which the President and Congress are to make whatever decision is ultimately to be made.

(4) The bickering denies American war and peace decisions, first, the wisdom and, second, the staying power that can come only from having both the President and Congress meaningfully involved in our decisions to use force. It is unavoidable that the Constitution divides the war powers between the two branches; thus it is inescapable that for American foreign and military policy to work, the two branches must cooperate in the exercise of their overlapping prerogatives.

But wait, some say, these sorts of harm occur not because we lack a constitutional consensus on process but simply because the country lacks a current consensus on policy. We had a policy consensus from the end of World War II to sometime in the 1960's, they say, but now we've lost it and that's the problem. Well, of course, when people can agree easily on what policy to adopt (whether these people are spouses dealing with one another, parents and children, university faculties and administrators, corporate officers and directors, litigants, voters, or Presidents and Congresses) — when consensus on policy does exist, then little attention is paid to the nature of the decision-making process. But how often do people agree easily about difficult and important issues? History suggests not all that often. And the more difficult it is to get agreement on policy the more important it becomes to have agreement on process. Why? Two reasons:

(1) When people agree on how decisions should be made, that is, when they accept that a particular person or group is entitled to make a particular sort of decision, then they are far more likely to accept the decision that is ultimately made, even if they disagree with it as a matter a policy, than they are likely to accept such a decision if they believe it was made by people not authorized to decide. Every day in countless contexts people accept and support decisions whether they like them or not because the decisions have been made by a process that people thought was legitimate. In other words, agreement on process helps produce agreement on policy.

(2) When we disagree over both process and policy — over who gets to decide as well as over what the decision ought to be — a two-front struggle results, with dismal effect for focused inquiry into what we ought to do in our best interest. Sound policy suffers.

In short, process matters. We badly need a constitutional consensus on how the President and Congress are to go about making war and peace decisions.

B.

To reach at least minimal agreement on process, all the crucial constitutional threads must be drawn together. The President's constitutional theologians must stop ignoring the fact that the language of the Constitution and its Framers' and Ratifiers' purposes create an enduring role for Congress in American decisions to use force. At the same time, Congress' constitutional theologians must stop ignoring 200 years of practice under the Constitution. From George Washington's administration to date, practice also has been central to this country's constitutional journey. War powers practice indicates that, when Congress has provided the necessary tools to the President — men, money and materiel — and when Congress has not previously banned a particular use of force, then the President may begin it on his own initiative. Two hundred years of practice make that clear.

It is essential that we weave these threads together in war powers legislation.

We might just as well howl into the wind as try to put in place a process that ignores either the country's deep-rooted constitutional expectation of congressional involvement, on the one hand, or the country's equally deep-rooted constitutional expectation of presidential initiative, on the other. Both expectations must be met if we are to develop a war powers process that actually works.

For now, we should focus on the irreducible constitutional minimum: on the "nothing less" bedrock that must exist if Congress is to be involved consistently in decisions about the use of force and if the President is to retain the initiative that practice has given him and that he will exercise in light of the hazard, pace and complexity of foreign and military affairs and his greater capability than Congress to deal quickly and quietly with these affairs.

What is the irreducible minimum? In my view, it is:

(1) Means to encourage the President and Congress to consult meaningfully together before and during moments of truth;

(2) Recognition that, informed by this consultation, the President may act alone if he thinks it in the national interest, for instance, because he believes speed or secrecy is crucial to U.S. success; and

(3) Recognition that, when the President alone initiates the use of force, it thereafter is for Congress to approve, disapprove or limit the use if Congress chooses to act.

The irreducible minimum does not include time limits within which Congress must either act to approve, or be deemed to have disapproved, presidential initiatives. It is far from clear that disapproval by inaction is constitutional; it is quite clear that Presidents will resist such a concept relentlessly and that Congress will rarely try to enforce it. Time limits won't work in the real world.

Is disapproval by concurrent resolution part of the irreducible minimum? It can go either way. After Chadha, Presidents will also resist relentlessly the concept that concurrent resolutions can constitutionally curb their initiatives. But as a practical matter, if the President commits troops who remain in the field a week, two weeks, three weeks, two months after the initial commitment, and Congress by majority vote in both Houses acts to limit or end the use of force, it is most unlikely that the President will simply disregard such an expression of congressional will. If he did, Congress has remedies, for instance, the power of the purse.

In sum, the War Powers Resolution as passed in 1973 has not succeeded. It needs to be reduced to its most basic and workable elements. These elements, together, can lead the way to the constitutional consensus we so desperately lack. The consensus would involve less than either presidential or congressional theologians insist is their branch's constitutional due. But the consensus would work.

One final note: Some people say, if war powers legislation is to be so reduced, why bother to have it? Better to kill the 1973 Resolution outright and thereby vindicate the presidential view of the Constitution, or better to beef up the Resolution to require Congress' prior approval for any use of force, except for a few specified sorts, and thereby enshrine the congressional view of the Constitution. And, anyway, the irreducible minimum just described already exists. The President and Congress don't need a War Powers Resolution in order to consult one another. The President has been acting alone and reporting to Congress from time to time without such legislation, and Congress can already act before or during presidential initiatives to block, limit or end them in a variety of ways, such as cutting their funds.

True, but simply because most of us could exercise daily, eat sparingly and otherwise see to our bodies doesn't mean that most of us do. We are more likely to do it when pushed by an action-forcing regimen. The War Powers Resolution is an action-forcing regimen. It hasn't worked well so far because it carries too much baggage, such as §§ 2(c) and 5(b). Stripped to its irreducible minimum, however, the

Resolution just might bring the President and Congress to engage one another constructively on questions of war and peace — to consult, let the President act first if he feels so compelled, but then report and let Congress go second, to approve or disapprove his initiative if it feels so compelled.

To repeal the War Powers Resolution, leave it as it is, or amend it to impose more restraints on the President would do nothing for constitutional consensus. Repealed, the Resolution would greatly disappoint expectations that Congress must play a sustained, meaningful role in use of force decisions. Left as it is, the Resolution would continue to work so fecklessly as to suggest that consistent collaboration between the two branches on the use of force is hopeless. Amended to try to restrain further the President, the Resolution would surely be ignored by just about everyone. Cut to its irreducible minimum, however, the Resolution could lead us to constitutional consensus.

C.

The rest of my testimony is in two parts. The first puts flesh on the conclusions above about what the text of the Constitution, the Framers and Ratifiers' purposes and two centuries of practice have to tell us. Part III is a detailed analysis of the War Powers Resolution that first appeared in my book War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? Though completed in 1981, the analysis remains telling in most respects today.

II.

OLD CONTROVERSIES OF NEW IMPORTANCE

For nearly two centuries the war powers have bedeviled a host of Presidents, Congressmen, and those few judges willing to deal with them in court. Through all, the nature of these powers has remained more unsettled perhaps than any other mainstream of American constitutional law.

The respective constitutional prerogatives of the President and Congress over war and peace were of consuming concern to Americans while Washington, John Adams and Madison held office. Nor have there been any administrations since in which the nature of these prerogatives has not been debated with some heat. Controversy has persisted in part because Americans have frequently had to decide whether to fight. Decisions to use armed force have been made well over a hundred times since 1789, and decisions against its use at least as often. Persistence also reflects the weighty nature of the subject. Profound consequences may accompany the use or non-use of armed force. Disputes of corresponding intensity have arisen over the extent to which each branch is entitled to set policy.

Passion and dogged adherence to positions aroused on this account have been given new edge precisely because the disputes have concerned separation of powers. Presidential and congressional zeal in defense of real or imagined prerogatives is traditionally acute. And argument over the allocation of war powers conjures up two of our most cherished political bugbears: the fear that American democracy will perish, choked by presidential tyranny, and the obverse dread that it will smother amid congressional indecision and parochialism. With stakes so high, partisans have been loath to leave the constitutional fray.

Persistence has resulted, too, from the accumulation of unresolved controversies. Constitutional uncertainties about the division of the war powers between the President and Congress have not been cured by formal amendment, and, unlike most other areas of constitutional confusion, there has been very little light shed here by judicial decisions. Moreover, post-1789 practice regarding the division is often inconsistent. Most plausible and many quaint allocations of the war powers between the two branches are supported by one bit of precedent or another. Contrary divisions of control have existed in fact, and contradictory statements have been made by different people about what sorts of allocations are required. With unsettling frequency the same luminaries (Madison, Hamilton and Fulbright, for example) have varied their constitutional conclusions with changing times.

Such flux has been encouraged by our general tendency to collapse the constitutional question of where decision-making control lies into the policy question of what we would like the President or Congress to do about a pending situation. This emphasis on immediate result rather than on long-term constitutional structure has been with us since 1789, but never so emphatically as when the Cold War went sour in Indochina, curdling the prevailing taste for presidential prerogative. Inevitably, then, recurrent disputes over the war powers of the two branches have fueled future controversy almost as often as they have resulted in case-by-case definition of how authority is to be split between them.

While the war powers present no novel constitutional issues, since the Second World War they have presented issues of wholly new dimensions. True, foreign relations were central to survival during the first generation under the Constitution. European intervention in American affairs was an armed reality through the War of 1812. At times during the balance of the nineteenth century, the United States was internationally threatened, acutely during the Civil War. But through most of the 1800s, security was an easy outgrowth of rising American strength, geographical isolation, modest military technology, and European balance of power. Security problems abroad centered on the protection of Americans from pirates, primitives, or weak states and on the consequences of manifest destiny in North America.

Times changed with the Spanish-American War. Militarily, politically, ideologically, economically, and legally the country has found itself increasingly threatened since 1900, and increasingly forced to react to developments more numerous, rapidly evolving, and complicated than before. The changed international environment has placed a new premium on informed, expert decisions made in accord with overall American objectives. It has valued rapid, flexible action and a willingness to make hard choices.

Especially during the last three decades, we have had a threefold change in circumstances: in our capacity and in our will to use force abroad and in the consequences of that use. The purely physical ability of postwar America to commit its military abroad in large or small numbers, swiftly or slowly, for days or years, vastly exceeds the country's conflict capacity before 1941. America's willingness to intervene abroad also stands in revolutionary contrast to a previous tradition of non-involvement except to trade, defend American citizens and property beset abroad, expand our boundaries, and police the Caribbean.

Ironically coupled with this new capacity and will to use force abroad are consequences of intervention that defy prediction and risk catastrophe more relentlessly than ever before. Since 1945 the pace, complexity, and hazard of foreign affairs have grown exponentially. A misstep invites troubles unimagined when the United States was safe behind its ocean moats. Even the time when weak states might be "policed" with little risk of violating international law and political sensibilities has passed. No more with relative impunity may the American military punish backward peoples who have attacked our citizens and property, or pursue criminals across the borders of weak states, or occupy and administer dissolute Caribbean countries. The war powers do indeed pose old controversies of new importance. More than at any time since 1789, we need to understand and order the process by which this country decides when and how to use its military abroad.

CONSTITUTIONAL DETERMINANTS

There have been four main influences on the division of authority over war and peace between the President and Congress: (1) the text of the Constitution's war-power provisions, (2) the purposes of those who wrote and ratified the text in 1787-88, (3) evolving beliefs since 1789 about what the Constitution requires, and — irrespective of text, purposes, and evolving beliefs — (4) the various allocations of control over the war powers that have existed in fact between the President and Congress during the past two centuries.

Determinants (1) and (2) are reasonably straightforward guides for constitutional interpretation. Determinants (3) and (4) are more convoluted. Together they make up what is generally termed "practice," or "usage." Practice has been shaped not only by the constitutional text and debates but also by factors of three other sorts: the hazard, pace, and complexity of America's international circumstances at any particular time; the respective institutional capabilities of the President and Congress to cope with these changing circumstances; and the shifting balance of political strength between the two branches, which has helped the President at times and Congress at others to greater control over war and peace. It is historical fact that all of these factors have contributed to the allocation of the war powers between the President and Congress. More important, they will all continue to contribute, barring a radical change in American habits.

The Text of the Constitution

If we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution and then look at war-power practice since 1789, he would marvel at how much Presidents have spun out so little. On its face, the text tilts decisively toward Congress. Comparison of Articles I and IV with Article II shows that most of the specific grants of authority run to Congress. Reading them straight through provides an insight that nothing else can into how the Constitution itself divides the war powers. The sequence in which the text assigns authority to each branch, the location of certain provisions relative to others, and the simple weight of the words devoted to Congress as opposed to the President are as telling as is the precise language of the grants.

In addition, provision for suspending habeas corpus during military emergency is set out in the legislative, not the executive, article of the Constitution. And state war powers are placed with the congressional grants, rather than in Article IV with other state concerns.

Moreover, of the few specific grants of power given to the President, two of the most important (over treaties and major federal appointments) he shares with the Senate. Thus the text supports argument that, in those areas of foreign affairs where making policy and providing tools to implement it are not committed to the legislative process, they are held jointly by the President and the Senate (the executive element of Congress), except for certain ministerial functions most efficiently left to one person, for instance, military command and law enforcement, and, except for powers of limited war or peace importance, such as granting pardons and commissions.

Provisions giving Congress and the President weapons with which to coerce one another again run heavily toward the legislators. Under Articles I and II the Executive can try to mold Congress through information and recommendations, by the veto, and through calling or not calling special sessions. He can attack the legislators in his public statements but lacks authority to remove them from office. The text, on the other hand, allows Congress to negate all of these executive spurs, and the President with them. Under its Article I legislative authority, Congress may supply its own information and recommendations and override presidential vetoes. It may also refuse to pass legislation dear to the Executive, and it can investigate other branches of government preparatory to lawmaking or while overseeing the execution of existing acts. Either or both houses may pass resolutions censuring the President, and together they can dispose of him "and all Civil Officers of the United States" through impeachment.

But more important in the real world than the congressional dominance suggested by the text has been the fact that the language does not unavoidably preclude broad presidential prerogative. Congressional control is not established beyond a reasonable doubt. There are three grounds for uncertainty about the text's meaning.

First, many words and phrases in the Constitution's provisions on war and peace are generality itself — for instance "declare war" and "commander in chief." They are neither self-defining nor susceptible to one meaning applicable in all circumstances. Each generality, accordingly, can be made concrete in many ways. And whether expansively or narrowly construted, each has a number of different meanings, reflecting the factual differences in the war-power contexts that it governs. Thus, whether an ample reading of the declaration-of-war clause is linked with a spare interpretation of the commander-in-chief proviso, or vice-versa, the meaning given both provisions will vary with the type of action in question, its purpose and costs, whether there is a need for speed or secrecy, the tools required to implement it, and so on. "A word is not a crystal, transparent and unchanged," Mr. Justice Holmes suggested. Rather, he said, "it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." While this cannot fairly be said of all words, it certainly fits many of the crucial provisions in the war-power text.

Second, doubt also exists because the text gives certain powers to the President and others to Congress that can be read to cover the same areas in mutually exclusive fashions. These competing grants permit each branch to claim authority over many common aspects of the war powers. Edward S. Corwin spoke of "logical incompatibles" and said that the "Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."

In fairness to the text, illogic and struggle do not have to characterize its affirmative grants. Struggle rises to fever pitch only when expansive readings are given to ill-defined Article II powers of the President, that is, when the clauses dealing with executive power, law enforcement, and military command are construed to involve the President in areas over which Article I has given Congress more explicit grants of authority. Competition is greatly lessened when congressional authority is read generously and presidential sparingly, for the Constitution provides the Executive with far fewer clearly defined responsibilities than it does Congress.

Third, in addition to ill-defined, frequently competitive provisions, there are also numerous gaps in the war-power provisions. Though the text deals directly with some of the issues, it conspicuously fails to speak to others. It says nothing, for instance, about which branch controls deploying ships on the high seas, stationing troops on foreign soil or declaring neutrality in other nations' struggles.

The Constitution does impose one iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed. Even if congressional authority is most broadly construed, Congress must work its will through the legislative process, and the President is very much part of that process. Under

Article II, Section 3, he determines when to call Congress into special session, should it not be sitting, on "extraordinary Occasions." Also under Section 3 he may provide Congress with information on the state of the Union and recommend such "Measures as he shall judge necessary and expedient." And under Article I, Section 7, he may veto any measure that the legislators wish to have become law of the land. Accordingly, the text limits congressional control by the President's discretion over special sessions, his right to importune the legislators, and his capacity to force them to raise a two-thirds vote in both houses to overcome his opposition. The constitutional role of the Executive in the legislative process has been sparingly construed at times, but its presence is textually assured. Too, he has at least an equal voice with the Senate over appointments and treaties. And even were the bulk of his remaining constitutional powers seen as those of a congressional agent, the indispensability of an agent grows with the ponderousness of his master and the scope of his assignments.

On the other hand, if executive authority is read to take maximum advantage of generality, competition among grants, and gaps, it still cannot give the President total control over American war and peace. There are many important matters — trade controls and money, to cite an important area of policy and a crucial tool — that require congressional consent under the unavoidable terms of the text. With less extreme readings of the Constitution, of course, the mutual dependence of the two branches becomes more pronounced.

Purposes Revealed by Debates of the Framers and Ratifiers

The Constitutional Fathers spent precious little time on what authority the President should have over foreign affairs, war and peace included. At issue in 1787-88 were far more basic questions about what sort of executive to carve out of existing congressional government — would it be single or plural, act with or without a council, have veto power, how would it be chosen, for what term and with what possibility of reelection? These issues were rarely considered with an eye to the respective roles of the President and Congress in determining American foreign policy. To a large extent they were merely another manifestation of the conflict over the power of the central government, the federalists favoring a stronger Executive than the states righters.

That conflict was the transcendent problem for the Framers and Ratifiers. In 1787 it took eighteen days to move from Boston to Georgia. Economic and governmental divisions further separated the American people. Their constitutional necessities were, first, an allocation of authority between the national government and states that would create a viable union, and, second, a division of national authority between the representatives of the large and small states that would ensure ratification of the new plan of government.

Not surprisingly, when the Framers and Ratifiers felt they had to grapple with questions of war and peace, the emphasis was on the states, not on congressional and executive powers. Danger to the nation from state excesses in foreign affairs had provided important impetus to the Constitutional Convention. Since colonial days the states had been loath to subordinate their immediate individual interests to the common good. They were reluctant to bear their fair share of military burdens unless actually attacked, but prone themselves to incite Indians, European powers, and their sister states. Separate diplomatic activity by them and their violations of national treaties were frequent. Jefferson wrote Washington early in the Philadelphia Convention about the need "to make our states as one to all foreign concerns," and Madison concluded that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."

By the same token the Constitutional Fathers found the supremacy of national treaties over state law far more troublesome than the manner in which the federal government itself would make treaties. They were also vastly more concerned to define national authority over war and peace, already great in theory under the Confederation, than to split the war powers between the President and Congress. And they felt it necessary to grant emergency military powers explicitly to the states rather than to the President, probably on the assumption that state militia would bear the first brunt of repelling sudden attack.

The skimpy attention given congressional and executive war powers in 1787-88 was a byproduct as well of the relatively short shrift given foreign affairs as a whole. They were rarely mentioned in direct terms in either the Philadelphia or state debates. The only aspects that received real debate were war and treaty making. Emphasis went to treaties, though the two merged whenever the Constitutional Fathers turned to the termination of hostilities.

Predominant attention could go to treaties, because peace was expected to be the customary state of the new nation. America would avoid aggressive war abroad and enjoy in turn "an insulated situation" from the great powers of Europe. In Alexander Hamilton's words: "Europe is at great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot in this position be necessary to our security." This placid view of foreign relations precluded any explicit consideration of the use of American force abroad, except for defensive naval action to protect the Atlantic coast and American commerce. Only Hamilton suggested that it might be well to intervene in the Caribbean struggles of the Old World powers. Commercial relations were to characterize American relations abroad. Contacts of other sorts, not much desired, would be discouraged by hobbling treaty making. Gouverneur Morris opined that "[i]n general he was not solicitous to multiply & facilitate Treaties." The isolationist mood was perhaps a reaction to the trials of the Revolution.

It clearly fed on fear of great-power interference in the domestic politics of the fledgling state, especially through bribery of federal politicians. Whatever the cause, a notion of peaceful retreat did grip Americans in the late 1780s — John Adams going so far as to suggest disbanding the foreign service or reducing it from its already meager proportions.

Again, not suprisingly, it was the needs of domestic order, not foreign intervention, that provided the incentive for an executive who could lead the national army and navy. The demons arising out of that command for the Framers and Ratifiers were those of 1787-88, not ours. Their abiding fear was that the Executive would use the military for tyrannical purposes at home, possibly to make himself a hereditary prince, not that he would use it for ill-advised foreign adventures. Controversy centered on whether it was safe to allow executive command in the field, whether standing armies might be used by the President for domestic subversion, and whether he should be allowed to pardon traitors, since their crimes could stem from efforts to help him usurp power. For some of the Constitutional Fathers, the demons lurking in military matters were not executive but congressional: the legislators were said to hold both the purse and the sword, and thus feared as incipient military despots. For these Framers and Ratifiers the remedy would have been a national military thoroughly dependent on state militia, state officers, and state military appropriations.

In short, American problems and assumptions in 1787-88 did not anticipate all of ours. They were those of a small, divided people eager for national unity but fearful of federal tyranny. Domestic rebellion and foreign invasion were their "war" concerns. More important for them were safeguards against military usurpation at home than military preparedness during peace. Greatly more than we, they valued state authority over national, legislative power over executive. They preferred peace and political isolation to a world made safe for America. The institutional arrangements developed in 1787-88 reflected these values and needs. A small, elite branch of Congress was planned as a plenary participant with the President in whatever American diplomacy might arise. State militia were to be the backbone of national defense; Congress the arbiter of military policy, by governing the existence of American armed forces and their commitment to conflict. The states and President would serve as interim defenders against sudden attack, pending opportunity for congressional decision; and the Executive would act as first general and admiral should the legislators choose to fight.

The Framers and Ratifiers did intend a more effective national executive than had previously existed in the Confederation Congress, influenced by their understanding of European practice and political theory, by prior legislative excesses in America, and by the dismal executive record of Revolutionary and Confederation legislatures. They wanted presidential aid in conducting negotiations, gathering intelligence, and in framing recommendations essential to policymaking. They hoped to obtain an executive check on foolish or venal legislators, and they sought presidential execution of national policy. But with rare exception the Framers and Ratifiers did not mean to surrender congressional control over setting American policy and providing tools for its implementation. Thus, they rejected executive hegemony over foreign and military affairs, as seen in European practice and political theory. Their model was Parliament's seventeenth-century steps to curb the British king, and throughout their debates ran a persistent fear of executive despotism.

Several caveats are overdue. A constant of human experience is that our conclusions about desirable allocations of power change with shifts in the basic facts on which those allocations are premised. The Framers and Ratifiers acted on the basis of many assumptions about reality that no longer hold, and they often seemed obsessed with ephemeral economic and security concerns. What the Constitutional Fathers would have thought given late twentieth-century realities often cannot be confidently assumed from what they said amid the circumstances of the late 1780's. What if they had realized that peace and noninvolvement with the rest of the world would not be America's customary state; that the hazards, pace, and complexity of international affairs would burgeon, along with the country's capacity and need to work its will abroad; that treaties would hardly prove to be the guts of American foreign relations; that from the outset the Senate could not keep step with the President in diplomacy, and the militia could not replace federal forces; that the regular military would grow huge and stand during peace, little restrained by the need for Congress to raise and support it; and that the loyalty of naturalized citizens, the navigation of the Mississippi, and other compelling issues of the late eighteenth century would quickly fade?

There are, of course, aspects of the 1787-88 purposes not tainted by the passing assumptions and problems of those years. But any attempt to move from the specifics of the Framers' and Ratifiers' debates to resolve contemporary war-power issues must have its adequacy measured by reference to questions such as those above, and it must convincingly rebut the possibility that the extrapolation is too speculative to be meaningful.

Three other factors contribute to the hazards of extrapolating from 1787-88. First, records of the drafting and ratifying conventions come in fragments. The Framers did have an official secretary, William Jackson, but he restricted himself largely to recording motions and votes. Even these spotty notes were "carelessly kept." The Framers debated in secret, and Jackson's Journal remained undisclosed, first in the hands of George Washington and then in the Department of State, until it was published by an order of Congress in 1819, following the deaths of most of the Convention delegates. At that point, it was largely beyond verification or correction.

In subsequent years other accounts of the Framers' Philadelphia proceedings were published, most importantly the notes of James Madison in 1840. But Madison as an old man had dubiously revised his account after the appearance of the Journal. His attempt to reconstruct events of more than thirty years before was necessarily clouded by the passage of time. Similarly, Charles Pinckney, attempting in 1819 to produce a copy of the plan that he had presented the Convention, could not remember which of four or five papers in his hands was the correct version.

Even when the available if checkered accounts of the Philadelphia proceedings are mustered, their overlapping discussion comes to very little for a convention that met steadily for almost four months. The standard compilation of the debates runs to less than 1,300 pages; the verbatim transcript of a proceeding of similar length could easily reach twenty times that volume. Records of most of the state ratifying conventions are even more modest than those of Philadelphia. When executive and congressional prerogatives clashed in the Steel Seizure Case, Mr. Justice Jackson lamented the "poverty of really useful and unambiguous authority applicable to concrete problems of executive power . . . . Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions," he said, "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." The situation is not that grim, but available records are poor.

Second, though attendance varied, a total of fifty-five men participated in the four months of deliberation in Philadelphia, and many more took part in the state ratifying conventions. Divergent positions had to be compromised during the drafting of the Constitution. Compromise on one provision did not prevent efforts to reassert more extreme positions in later provisions. Interpretation of specific language varied among delegates. Because the Philadelphia Convention met in secret and its participants said little about its deliberations during ratification, delegates to the state conventions were largely unaware of the previously expressed views of the Framers. Even those Framers who were also Ratifiers and chose to tell their colleagues of the

Philadelphia debates did not always recall them with precision. Under the circumstances it is not likely that a majority, much less all, of those who voted in the federal and state conventions for the Constitution's war-power provisions held a finely drawn, common "intent" about their meaning.

Third, evidence of several sorts suggests that the Framers may have drafted with a measure of deliberate ambiguity. Any constitutional scheme that depends on separation of powers and on checks and balances necessarily allocates among the branches of government competing powers with vaguely defined frontiers of authority. Also apparent on the face of the Constitution is a drafting technique that eschewed detail for terse statement, leaving much to be assumed.

The Constitutional Fathers were practical men, and their laconic drafting technique may well have reflected awareness of the difficulty of laying down rules to govern situations whose dimensions are at best dimly grasped. James Madison in remarks to the Virginia ratifying convention was quite explicit about the need for experience, stating that "the organization of the general government of the United States was, in all its parts, very difficult. There was a peculiar difficulty in that of the executive. Everything incident to it must have participated in that difficulty. That mode which was judged most expedient was adopted, till experience should point out one more eligible." As Washington noted, "Time and habit are necessary to fix the true character of governments." And though not a Framer, Thomas Jefferson suggested in 1816 what they "would say themselves" about the need for experience, "were they to rise from the dead."

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in

> government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead . . . . Let us . . . avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils.

Deliberate ambiguity may also have been a means of producing agreement among fractious delegates. Gouverneur Morris, very influential in drafting the final version of the document, explained that "it became necessary to select phrases which, expressing my own notions, would not alarm others . . . ." For men whose overriding objective was ratification of a Constitution promising a more viable union, the precise meaning to be given ambiguous but generally acceptable language could await resolution in practice.

It follows that all judgments about the Constitutional Fathers' purposes must be viewed with a cold and suspicious eye. Fragmentary evidence of the debates, the limited extent to which there is ever common purpose in any process as long, contentious, and complex as the drafting and ratifying of the Constitution, the chance that the text includes deliberately ambiguous language to be shaped by experience, the presence of gaps in intent caused by assumptions and problems peculiar to the late 1780's, and the dangers of extending what was said then about the war powers, in respect to concrete problems of that era, to unforeseen issues in unforeseen times — all these call for restraint about what the Framers and Ratifiers really had in mind.

With trepidation it can be said that there do seem to be certain long-term ends that the Constitutional Fathers sought by the way in which they divided authority over war and peace between the President and Congress. They were:

1. To ensure national defense
2. To hinder the use of the military for domestic tyranny
3. To hinder its use for aggression abroad
4. To create and maintain consensus behind American action for war and peace
5. To ensure democratic control over policy about these matters

6. To encourage rational war and peace decisions
7. To permit continuity in American policy when desirable and its revision as necessary
8. To permit emergency action for war or peace that has not yet been blessed by national consensus or democratic control
9. To ensure American capacity to move toward war and peace rapidly or secretly when necessary, and flexibly and proportionately always
10. To permit the efficient setting and executing of war and peace policy.

Practice since 1789

Ronald Reagan enjoys far more sweeping control over American war and peace than George Washington did, and Washington came to wield strikingly greater authority than had been expected for the President during the constitutional convention of 1787-88. The dominant trend in war-power practice has been presidential aggrandizement. True, the process has not been linear between administrations or even within them — compare Lincoln's war powers with those of Andrew Johnson or the prerogatives of the early Nixon presidency with those of his last year in the White House. But over the course of nearly two hundred years, presidential war powers have grown radically.

The growth of presidential authority over war and peace has stemmed largely from three factors: the evolving nature of those institutional characteristics of the presidency and Congress pertinent to the war powers; certain historical developments that have favored the Executive's characteristics over those of Congress; and, finally, the willingness of many Presidents, greater than that of Congress, to exercise their constitutional authority to the fullest and beyond.

During American retreat from Indochina, however, congressional influence over war and peace came into flood tide after a period of unprecedented ebb. The legislators challenged the President's control over a range of action that seemed about to become permanently his by virtue of repeated congressional acquiescence. At the core of these matters was the commitment of American forces to undeclared combat on a large or small scale, openly or covertly. The constitutional text and debates account for much of this congressional resilience. They establish certain hard-core legislative powers and give rise to procongressional expectations which, in concert, create an enduring base from which the legislators can reassert their hold over war and peace from time to time.

In areas of hard-core congressional authority, Presidents have usually felt themselves able only to recommend action, sign or veto resulting legislation, and receive any delegation of authority that Congress offered. While these areas do not include most types of military action, they do cover most types of nonmilitary action with consequences for war or peace and most of the tools vital to implement policy of any sort.

Beyond these hard-core powers there has also been persistent popular feeling that the Constitution requires legislative approval of American use of force. Twentieth-century Presidents (unlike their predecessors) have rarely said that explicit congressional approval is needed for most military action, but the view has been pressed with vigor by others during this century. Even during the 1950s a remnant in Congress kept the faith, Senator Taft being their leading apostle.

The legislators' resilience also reflects the fact that congressional influence can be kept alive even though Congress as a whole declines to vote on the merits of a particular policy. The power of congressional committees to investigate and oversee provides a means of sparking national debate, molding opinion, and thereby influencing presidential action. Activity by individual Senators and Representatives can focus political pressure already existing outside Congress and bring it to bear on the Executive.

Legislators can work privately too, communicating quietly with the President to persuade him that his plans are ill-advised or subject to great potential opposition. Legislators can also work in tandem with rebellious elements in the bureaucracy to thwart presidential policy.

Finally, the door is kept further ajar for Congress by the restraints imposed on an Executive by his own capacity to persuade others to take steps he wishes taken. Other centers of power within the country — the bureaucracy, courts, and media in particular — lessen his freedom of maneuver. And the electorate stands ready to turn against him if his policies are perceived to be unresponsive to popular needs or, worse, illegitimate. Intensifying these restraints is fear of the President as a potential despot, a fear with us since 1787-88. In Arthur Schesinger's terms: "The theory . . . of the President as the great moloch generating its own divinity and about to swallow all power can be reproduced at every stage in our history, beginning with those who . . . complained against the presidency of General Washington. Anti-Moloch pressures have as their by-product an opportunity for Congress to reassert its influence when in the mood."

To date, however, the legislators have proved unable to reassert themselves once and for all by establishing enduring channels for a congressional voice in decisions about war and peace. Like most of the rest of us, legislators tend to be result-oriented. Their concern with the particulars of policy often overshadows their concern with the institutional process by which it is made. Principal interest goes to what we should do (whether to intervene in Nicaragua) rather than to how we should go about deciding what to do (whether by executive fiat announced to congressional leaders shortly before the fact, by prior congressional approval, or by some intermediate method). Accordingly, most legislators become seriously solicitous of their prerogatives only when they disagree with executive policy. Then no oar is spared to set to rights presidential "usurpation." But once the tempest over policy has passed, concern with the institutional aspects of decision making fades also, to await the next tempest. The War Powers Resolution of 1973 may have signaled a change in congressional habits.

War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?

(By William Taylor Reveley)

IN THE spring of 1965 the United States sent troops a short distance into the Dominican Republic. Although desiring to protect Americans threatened there by civil strife, President Johnson also feared that the Dominicans might be about to go the way of Castro's Cubans. His prophylactic intervention in Dominican affairs provided the catalyst for recent struggles between the Executive and Congress over the war powers—Chairman J. William Fulbright of the Senate Foreign Relations Committee ended 1965 actively disillusioned with presidential direction of American foreign policy. The Indochina War massively spread his disillusionment. Spurred especially by the Fulbright Committee, many legislators began to reconsider Cold War assumptions about the proper roles of the President and Congress in controlling American use of force abroad. That reconsideration peaked only when President Nixon resigned.

Although attention focused on military action in Vietnam, Laos, and Cambodia, Congress was busy on related fronts as well. Legislators demanded that the President disclose all existing executive agreements with other states, and they moved to enlarge congressional control over future American commitments abroad, especially those with war and peace consequences. Efforts were made to cut foreign aid radically, including grants for military purposes, and to reduce spending by the Defense Department for weapons and overseas bases. Steps were taken to winnow the huge emergency authority delegated to the Executive by statutes passed and left standing over the prior forty years (for instance, authority over the economy and the size of the armed forces). Legislators also tried to prevent the President from either impounding congressional appropriations, on the one hand, or spending monies not appropriated (particularly for military ends), on the other. Congress sought to pry information from the Executive branch on a timely and comprehensive basis, vigorously rejecting claims of executive privilege even as to matters said to involve national defense. There were attempts to ensure congressional oversight of covert actions, whether intelligence and military operations abroad or security measures at home. Senate confirmation was demanded for appointees to a number of newly crucial executive posts, and Senate review of nominees was taken as an opportunity to scrutinize and limit executive policy. Then, too, the legislators moved to lessen presidential influence by improving their own decision-making procedures, especially committee and budgetary practices.

All of this ferment was important to the division of the war powers between the two branches. Most telling were two of its aspects. First, Congress ended American involvement in the Indochina War by refusing to fund it any longer. The final in a series of fiscal restraints came in the Church-Case Amendment to the Continuing Appropriations Resolution of 1974, which banned outright the use of federal funds for any "military or paramilitary operations" "in," "over" or "off the shores of" the whole of Vietnam, Laos, and Cambodia.[1] Never before had Congress used its appropriations power to withdraw the United States from a major conflict. Equally novel was the War Powers Resolution of 1973. Again, never before had Congress set out procedures for how the President and legislators are to go about deciding whether to fight. Together, these unprecedented developments offer Congress the best chance it has had since 1789 for an assured voice in war and peace decisions. Of the two, the appropriations ban suggests that the legislators will command the Executive's attention whenever they become restless, but the War Powers Resolution has the greater potential for long-term legislative influence. Cutting off funds is a drastic remedy not easily adopted even in extreme circumstances and one rarely conducive to thorough debate about policy. Systematic legislative influence is more likely to flow from procedures which cover mild as well as severe cases, which direct debate to the policy merits without fiscal distractions, and which provide unavoidable channels for communication between the Executive and Congress.

The Constitution's necessary-and-proper clause permits Congress to adopt measures such as the War Powers Resolution, which reiterate constitutional requirements and define procedures for their implementation.[2] Section 2(b) of the Resolution duly recites: "Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer hereof."[3]

Congress's authority to reiterate constitutional requirements, however, is far narrower than its power to define how they are to be implemented. No congressional discretion exists concerning the *nature* of the constitutional requirements (for example, under what circumstances the President may commit troops without prior legislative approval). So far as the necessary-and-proper clause is concerned, Congress's only option is to reiterate the Constitution, elaborating perhaps but not changing it. Wide legislative discretion exists, on the other hand, over the choice of means: The President can be ordered to give up old methods of implementation (for instance, episodic, often untimely reporting of troop commitments) and adopt new ones (complete, prompt reporting).

As a practical matter, of course, the legislators do have some leeway with respect to the nature of the constitutional requirements. It comes from the same source as the President's—uncertainty as to what the Constitution means. The greater the ambiguity, the greater the difficulty in separating a definition of constitutional requirements from the adoption of means to implement the Constitution. War-power legislation simply requiring the President to report his commitment of troops to combat seems to involve "means" alone. But such legislation moves toward constitutional "definition" if it requires prior congressional approval for American use of force except on certain occasions defined in the statute; or if it puts a deadline on any use of force begun by the President alone unless Congress subsequently approves the venture; or if it permits Congress to end an executive use of force by concurrent resolution, that is, by a measure not subject to veto.

Once war-power legislation moves beyond means to definition, it has no more right to automatic acceptance by the President than his constitutional claims have to automatic acceptance by Congress. If the President signs the act, he concedes its claims, opening the way to consensus. If he vetoes it and is upheld, then no law formally exists, but prudence may lead the Executive to accept many of the measure's would-be requirements, and the legislators will have a concrete notion of the war powers that they think are constitutionally theirs. If the President's veto is overridden, he may still refuse to acknowledge the legislation, unless the courts tell him to do so. Prudence, however, will dictate even more strongly his acquiescence in the act's requirements, and Congress will be even more confident of its war-power role. Still, if the legislation strongly offends the President's understanding of his constitutional powers or of the national good, he may defy it. And he almost surely will obey only the narrow letter of the law. In other words, a war-power statute is most likely to foster a clear, enforceable division of authority between the two branches if it is signed by the President. Thus, if there are a few basics on which the two branches can agree, the legislation ought to stick to them, leaving other aspects of the division of authority to evolve from these basics.

It comes as no surprise, then, that the War Powers Resolution of 1973 and its proponents took care to stress that they were *not* engaged in constitutional definition. As Section 2(a) of the measure chastely states: "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution . . . ." Or in the words of Senator Muskie:

> The bill does not undertake to impose on the President a modification of his constitutional powers. It does not undertake to assert a restate-

> ment of Congress' view as to the President's role with respect to the warmaking power.
>
> What it undertakes to do is to establish a procedure for comity as to different views in the future, so that Congress can be brought in from the periphery of the warmaking power to its center in order to exercise its proper role.[4]

The Executive disagreed. President Nixon felt that "the restrictions which this resolution would impose upon the authority of the President are . . . unconstitutional," adding that "[t]he only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force."[5] While it grates to hear a President say that constitutional change may come only by formal amendment in light of our Executives' historic taste for amendment by practice, it was seemly for Mr. Nixon to point out that the War Powers Resolution does attempt a bit of constitutional definition in Congress's image. That fact has lessened the generosity with which the White House has implemented the measure.

The steps leading to its enactment were complex and contentious.[6] They began with efforts by Senator Fulbright in the late 1960s to reduce presidential freedom in foreign affairs. On June 25, 1969, the Senate by vote of 70 to 16 adopted the following proviso, a modified version of one that the Senator had introduced almost two years earlier:

> *Resolved*, That (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such a commitment.[7]

On November 16, 1970, by a vote of 289 to 39, the House of Representatives took its initial step, passing a measure requiring the President to report quickly to Congress, in writing, concerning the legal basis, circumstances, and anticipated scope of any commitment of American troops abroad, whether to enlarge forces already there, make new deployments, or fight. Later House resolutions leading to ultimate agreement with the Senate in the fall of 1973 became progressively more severe in their limits on presidential freedom, but the Representatives continued to hinge their scheme on after-the-fact reporting by the Executive.

The Senate, to the contrary, was more interested in preventing the President from acting in the first place without prior congressional approval, except in a few carefully defined circumstances. Thus Section 3 of the Senators' 1973 bill provided that

> [i]n the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—
>
> (1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;
>
> (2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;
>
> (3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or
>
> (4) pursuant to specific statutory authorization . . . .[8]

As majorities in the House and Senate struggled toward compromise, the dominant issue remained whether to try to define the occasions on which the President might use force without prior congressional approval, and if he might, whether the President had independent constitutional authority to act under those circumstances or merely delegated authority from Congress. Crucial also was the issue whether to impose time limits on any presidential action, and if so, what deadlines (30 days? 120?), measured from which tripwire (from the time of an executive order committing the troops? from the moment Congress receives the President's report? and if that, how long to submit the report after the order?). Also hotly debated was whether Congress should be able to end an executive initiative by inaction—by simply failing to vote one way or another on it, as opposed to explicitly voting no.[9] Similarly contested was whether Congress might stop executive action by concurrent resolution or whether it should do so only by a vote subject to presidential veto. Finally, the nature of presidential consultation with Congress was the subject of much concern. While the House would not touch the Senate's definitional approach, it did warm to the notions of a deadline on presidential initiatives and their termination either by congressional inaction or concurrent resolution. The growing militancy of the House is epitomized by evolution in the consultation language included in the various House resolutions. The first urged the President to consult with Congress "when feasible." The fourth and last demanded that "the President in every possible instance shall consult with the leadership and appropriate committees of the Congress . . . .[10]

On October 10, 1973, the Senate agreed by a vote of 75 to 20 to a compromise based on the House version. The Representatives concurred two days later, 238 to 123. On October 24 President Nixon vetoed the legislation, finding it "both unconstitutional and dangerous to the best interest of our Nation." On November 7 Congress overrode the veto. The text of the Resolution and veto appear in Appendix C. They are prime examples of conflicting congressional and executive claims regarding the war powers.

Congressional opinion was not monolithic. Though the War Powers Resolution as adopted did not include the constitutional definition that Senator Jacob Javits had championed, he nonetheless liked it: "The fact is that never in the history of this country has an effort been made to restrain the war powers in the hands of the President . . . . [I]t will make history in this country as has never been made before."[11] But some other supporters of the Senate's definitional approach viewed the Resolution "as a historic surrender," not "a historic recapture."[12] Thomas F. Eagleton and Gaylord Nelson, cosponsors of the Senate bill, bitterly opposed the final act. In Eagleton's terms:

> If we are reluctant to deal with the constitutional issue of prior authority, then we will continue to be confronted in years to come with the prospect of desperately trying to stop misbegotten wars.
>
> War powers legislation that is meaningful has to deal with the fundamental causes of the constitutional impasse that plagued the Nation for the past decade. It must . . . in the most precise legal language, carefully spell out those powers which adhere to the Executive by reason of his status as Commander in Chief and his obligation to act in emergencies to repel attacks upon the Nation, its forces, and its citizens abroad. For the rest, such legislation must make clear that all remaining decisions involved in taking the Nation to war are reserved to the elected representatives of the people—as the Constitution so says, the Congress.[13]

But others equally devoted to congressional prerogative feared precisely such a spelling out of presidential authority. Senator Fulbright had cautioned:

> I am apprehensive that the very comprehensiveness and precision of the contingencies listed . . . may be drawn upon by future Presidents to explain or justify military initiatives which would otherwise be difficult to explain or justify. A future President might, for instance, cite "secret" or "classified" data to justify almost any conceivable foreign military initiative as essential to "forestall the direct and imminent threat" of an attack on the United States or its armed forces abroad.[14]

And, of course, a significant number of legislators saw even the House approach, embodied in the adopted Resolution, as an unconstitutional or unwise restriction on presidential power. These people made up most of the 18 Senators and 135 Representatives who voted to sustain the President's veto.

Why after almost two hundred years did Congress bring itself to institutional legislation on the war powers? A variety of factors were at work, some rooted in the Constitution and others in passing political exigencies—as is usually the case with great constitutional issues. Majorities in Congress felt a need to reassert themselves in decisions about war and peace. President Nixon's 1970 Cambodian incursion, sprung as suddenly on Congress as on the North Vietnamese, his Christmas bombing of North Vietnam in 1972, carried out in the teeth of profound congressional disquiet, and his continued bombing of Cambodia in the summer of 1973, after Congress had forced an end to American fighting in Vietnam, all against a background of presidential sway during the Cold War, had created serious constitutional imbalance, so far as most Senators and Representatives were concerned.

Further, it was presidential prerogative's bad luck that the gestation of the War Powers Resolution coincided with Watergate. The latter led most Congressmen to see constitutional imbalance in many aspects of executive power, not just those involving foreign affairs. Final action on the Resolution coalesced with the dismissal of Special Prosecutor Archibald Cox and the ensuing resignation of Attorney General Elliot Richardson, as well as with the mushrooming White House tapes controversy.

More mundane factors were also at work. Before the vote on Nixon's veto of the Resolution, the House in 1973 had sustained five successive executive vetoes. Its Democratic majority was eager to override for the sake of the party. Similarly, the 1972 election had produced numerous new members of Congress, most of them Democrats eager to vote against anything Nixonian. There was also a successful lobbying effort to win for the override a number of Representatives who had voted against the Resolution on the ground that it was too weak. Five such votes were turned around; the override margin in the House was four votes. Finally, majority sentiment in both Congress and the country had decisively rejected continued American involvement in Indochina, thereby removing the inhibitions on votes against a President and his policy that exist when the country is at war. Conditions were prime for Congress to stake an unparalleled claim to the war powers.

Constitutional Definition

In the War Powers Resolution, two-thirds of the Senate and House defined the Constitution as subjecting to legislative control all American involvement in imminent or actual combat, except perhaps for hostilities on American territory. Thus under Section 5(b) of the measure, the absence of congressional approval for such involvement compels its end after sixty days, unless Congress extends the deadline, is unable to meet in the wake of armed attack on America, or the President obtains an extra thirty days of grace by certifying in writing that our troops' safety requires their continued use during the withdrawal process. And under Section 5(c), "at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." In short, Congress claims that the President may not constitutionally commit our forces to foreign hostilities unless the legislators either explicitly authorize combat in advance or ratify it within a set time after its beginning. Further, Congress asserts that no veto is constitutionally permissible when the legislative process runs in reverse, that is, when the President commits troops without prior congressional authorization. In that event, Section 5(b) permits either the House or Senate to terminate the executive initiative simply by failing to ratify it before the statutory deadline, and Section 5(c) permits majorities in both houses to abrogate it at any time by concurrent resolution.

The principal parent of the Resolution, Representative Clement J. Zablocki, described its potential in these terms:

> Our purpose . . . was to provide Congress with a two-barrel approach . . . to ending a commitment of troops ordered by the Presi-

> dent. The first of that so-called two-barrel approach involves the 60-day period at the end of which the President would have to end the commitment of troops unless Congress, in effect, exercises its exclusive warmaking powers by endorsing or approving the action through a declaration of war or a specific authorization. . . .
>
> The second barrel . . . involves the concurrent resolution which we regard as a statutorily legal method of ending the commitment of troops. The thought behind the desirability of the concurrent resolution route is obvious: since the Constitution gives Congress—and only Congress—the power to declare war, Congress had to have a nonvetoable method of demonstrating, if it so chose, that it did not wish to declare war, even before the expiration of the 60-day period. We recognized that the Constitution clearly states that the President is Commander in Chief but it also states with even greater clarity that only Congress can declare war.
>
> Granted, Congress may have abdicated that power over the last few decades through inaction; as a result, Presidents began to assume the power. In time, this assumption of power by Presidents led to the erroneous idea that it was an inherent or implied Presidential power.[15]

Having claimed legislative control over American involvement in combat, Congress went on in the Resolution to read the Constitution as requiring *prior* legislative approval for such involvement except on two occasions. Thus Section 2(c): "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." In the legislators' view, the President on his own authority may *constitutionally* commit us to combat simply to repel an attack on American territory or on our troops abroad.[16] Ironically, this reading of executive prerogative is narrower even than the definition in the Senate bill, quoted previously.

Congress nailed Section 2(c)'s constitutional position tighter in Section 8(d) (2): "Nothing in this joint resolution . . . shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein an involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution." And the legislators apparently hoped to force the President either to accept their reading of the Constitution in Section 2(c), openly defy it, or to plead mea culpa, because Section 4(a) (B) demands that he explain to Congress "the constitutional . . . authority" for any commitment of troops to combat, should he do so without prior legislative approval.

How do the constitutional conclusions of the War Powers Resolution stand in relation to those reached in Chapters VIII and IX? The judgment that American involvement in combat is ultimately subject to congressional control seems sound for reasons developed there. Equally sound is the act's provision that Congress may end presidential initiatives by concurrent resolution, again for reasons already noted.[17]

But the legislation's apparent distinction between combat on American territory and abroad lacks merit. In both instances, as suggested previously, Congress should have authority to curb executive war making.[18] Nor does the Resolution indicate with sufficient clarity that Congress may *condition*, as well as terminate, executive policy. The distinction between an absolute congressional ban on American involvement in combat and the imposition of congressional conditions on it has already been noted. Explicit recognition of the distinction is important to avoid presidential pretense that such conditions are the same as strategy or tactics and therefore wholly within executive control.

The act's assumption that Congress must explicitly approve executive use of force, if the use is to be constitutional, does not seem ultimately sound. Defects in such a notion, especially one buttressed by a deadline for ratification, have already been detailed. Similarly, Section 2(c)'s severe limits on presidential discretion to commit troops have scant merit. Under this section's constitutional definition, Presidents could never on their own authority direct American troops to confront those of another state in order to protect American civilians or property attacked abroad, to assist international peace keeping or humanitarian rescue, to defend the territorial integrity of Mexico against foreign attack, and the like.

While the union of Sections 2(c), 4(a) (B), and 8(d) (2), described earlier, suggests that the legislators meant their niggardly reading of presidential war powers to govern American practice,[19] other evidence exists that this was not really congressional intent. The October 4, 1973, "Joint Explanatory Statement of the Committee of Conference" hedged: "Section 2(c) is a statement of the authority of the Commander-in-Chief respecting the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. Subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill . . . ."[20] Senator Eagleton dismissed the section as "the pious pronouncement of nothing."[21] Senator Muskie attempted an explanation that seems as cogent as any, other than that the provision was included to placate backers of the Senate bill:[22]

> It is true . . . that this language is not operative language.
>
> Why was it put into the bill?
>
> It was put into the bill as an indication that, in enacting a bill, Congress did not intend to surrender any of its constitutional powers with respect to the making of war.
>
> The remainder of the bill is a procedural bill, undertaken to insure consultation by the President with Congress and undertaking to put in the hands of Congress the procedure for terminating any hostilities into which the President may have plunged us, whether or not his action in so doing conformed with our view as to what his constitutional powers might be.[23]

Presidents Ford and Carter ignored the limits of Section 2(c),[24] and their successors are likely to ignore them. The State Department has concluded that the proviso "does not constitute a legally binding definition of the President's Constitutional power as Commander-in-Chief."[25] And while modest as such definitions go, the June 1975 formulation of that power by the Department's Legal Adviser offered no comfort to the provision:

> Besides the three situations listed in subsection 2(c) . . . , it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised.[26]

To the extent that Section 2(c) does lack binding effect, its unduly restrictive view of presidential authority is softened. But, to precisely that same extent, the legislation takes on a quixotic air, detrimental to the rule of law. Clear, enforceable constitutional rules, as well as the war-power ends discussed earlier, would have been better served had Congress foregone the section.

Implementing Procedures

How does the War Powers Resolution implement the legislators' definition of the constitutional requirements? As just noted, it provides very few means to enforce Section 2(c). The legislation is far more thorough about obtaining information from, and consultation with, the President and about focused, expedited congressional action on the particulars of any use of force. President Nixon's veto message did not attack these aspects of the act. As the State and Defense Departments pointed out in June 1975, the message "indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4," concerning presidential reports to Congress.[27] In fact, one of the few provisions of the Resolution singled out for praise in the veto message was the third, or consultation, section:

> The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the Executive and

the prudent fulfillment by each branch of its constitutional responsibilities. [The Resolution] includes certain constructive measures which would foster this process by enhancing the flow of information from the executive branch to the Congress. Section 3, for example, calls for consultations with the Congress before and during the involvement of United States forces in hostilities abroad. This provision is consistent with the desire of this Administration for regularized consultations with the Congress in an even wider range of circumstances.

Ironically, after the act went into effect, the most bitter congressional charges that "the executive branch proclivity is toward evasive and selective interpretation" of the Resolution have concerned consultation.[28]

Information

Legislative decisions about the use of force depend on the timely receipt by Congress of pertinent information, much of it from the President. Matters relevant to his reporting include what sorts of circumstances require a report, how rapidly it must be made, its content, whether it is to be periodically updated, and the mechanics for laying it before the various legislators. Sections 4 and 5(a) of the Resolution deal with these questions:

> Sec. 4(a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation:
>
> the President shall submit within 48 hours to the Speaker of the House . . . and to the President pro tempore of the Senate a report, in writing, setting forth—
>
> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and

> (C) the estimated scope and duration of the hostilities or involvement.
>
> (b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.
>
> (c) . . . [T]he President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.
>
> Sec. 5(a) Each report submitted pursuant to section 4(a) (1) shall be transmitted to the Speaker . . . and to the President pro tempore . . . on the same calendar day. Each report so transmitted shall be referred to the Committee on [International Relations] of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker . . . and the President pro tempore . . . if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action . . . .

Sections 4 and 5(a) are basically sound, with several reservations. There is no reason for Section 4(a) to dispense with a presidential report if Congress has declared war, while requiring one if Congress has *previously* authorized the use of force by legislation other than a formal declaration.[29] Since Section 8(a) of the Resolution indicates that the President is to assume authority to use force only from the most explicit congressional statements to that effect, all prior legislative approvals should be regarded as the same, whether they are clothed in a declaration of war or some other form.

There is some ambiguity in the terms used by Section 4(a) (1) to (3) to describe what sorts of circumstances require a report. The first answer to this ambiguity must come in the Executive's appraisal of the facts of each case. In October 1974 Secretary of State Kissinger explained that

> several months ago the Office of the Secretary of Defense instituted an arrangement whereby the Legal Adviser to the Chairman of the Joint Chiefs of Staff informs the Department of Defense General Counsel of all troop deployment actions routed through the Chairman's office which could raise a question as to whether a report to the Congress is required. In implementation of that arrangement a written instruction was promulgated establishing a War Powers Reporting System within the Operations Directorate of the JCS. Arrangements have been made for this Department's Legal Adviser to receive the same information as is supplied to the DOD General Counsel. Consultations between the two departments' legal counsels will be arranged as needed.[30]

Especially open to disagreement are the meaning of "hostilities" and "imminent involvement." Legislative history of the Resolution indicates that Congress meant for these words to cast a broad net: "In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. '*Imminent hostilities*' denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict."[31] The State and Defense Departments adopted more restrictive "working definitions" of these terms:

> "[H]ostilities" . . . mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" . . . mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.
>
> . . . .
>
> . . . Whether or not . . . rifle fire constitute[s] hostilities would seem to us to depend upon the nature of the source of this rifle fire—i.e., whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat.[32]

These interpretative issues matter, of course, because they determine whether the President should report at all and, if so, whether under Section 4(a) (1), rather than under Section 4(a) (2) or (3). Recall that under Section 5 of the act, *only* Section 4(a) (1) circumstances give Congress the power to end an executive initiative by inaction or concurrent resolution.

This does not mean that a President can count on avoiding the Resolution by flatly refusing to report or by declining to report under Section 4(a) (1) even though hostilities are at hand. Senator Javits has felt "it . . . timely to remind the Executive Branch—as was made clear during the floor debate on the Conference Report—failure properly to label a report required . . . under Section 4, or even a failure to submit a required report, will in no way delay or frustrate the triggering of the 60-day clock and the provisions of Sections 4 through 7 of the law."[33] In 1975 the Legal Adviser to the State Department did not quarrel with this view, though he noted that the Executive is just as entitled as Congress to interpret what the Resolution requires: "[I]t is perfectly within the power of Congress to decide even if we reported under 4(a) (2) that it was really 4(a) (1) and treat that as the beginning of the 60-day or 90-day period trigger. I don't agree that the competency is absolute. . . . [T]he Executive can have an interpretation just as the Congress can have an interpretation and in the last analysis it would arise on some sort of lawsuit which the courts would probably decide."[34]

Section 4(a) directs that the President report to Congress "within 48 hours" after "any case [listed in Sections 4(a) (1) to (3)] in which United States Armed Forces are introduced."[35] It is not likely that the Executive can both manage a crisis and prepare a report in much less time. The *Mayaguez* report anticipated the deadline by four hours. It reached the offices of the Speaker and President pro tempore in the middle of the night, after the President "had to be awakened at 2 o'clock in the morning in order to read and sign his report . . . ."[36] But it is also true that many American uses of forces will be over before a 48-hour report makes its way to the legislators. Thus, to the extent that the Resolution depends on congressional reaction to formal executive reports, it concedes control over short-term military crises to the President.

As regards Section 4(a) (A&C), a more particularized statement of content would be desirable (since Presidents will be prone to say as little as possible):[37] for instance, requirements that the Executive set forth (1) the precise objectives of his action, (2) the American personnel, money, and other resources committed to it, (3) the geographical areas affected by the action, (4) the length of time that particular resources have been committed to particular areas, and (5) his projection of future developments regarding each of the above. If any of this information might aid the enemy, procedures could be developed to make reasonably likely its submission and receipt in confidence. Section 4(a) (B) poses other problems. As already suggested, its requirement that the President state "the constitutional . . . authority" under which he acted seems designed either to force him to accept the stingy reading of his authority in Section 2(c), to defy it openly, or to admit guilt for having transgressed it. The Section 4(a) (B) requirement that he state "the legislative authority" under which he acted, if any, presumably refers to statutory approval other than declarations of war, since no report is required under the latter. This proviso renews the needless dichotomy between the two just mentioned. There would be merit, however, in requesting the President to justify his action under international law, including treaties. The degree to which the action is or is not legal under that law is an element Congress must weigh in determining whether the action's costs to the country outweigh its benefits.

Section 4(b) is little more than hortatory, since it fails to deal with the extent to which the President in the exercise of *his* constitutional war powers is entitled to withhold information from the legislators. If the act means to suggest that the President has no such right, even as to strategic and tactical data, it strays. Section 4(c) has greater merit. Periodic reporting by the President during any ongoing use of force is essential to ensure that Congress remains capable of informed decision making and that it is presented with recurrent, unavoidable occasions to take a position. Whatever the content requirements for the initial presidential report, supplemental reports should update all pertinent categories. Section 5(a) provides apt means for laying the facts of American involvement in combat before those congressional committees most competent to deal with them, as well as apt means for bringing the legislators as a whole together if they are out of session when crisis develops and the circumstances warrant their immediate consideration of the President's action.

The Resolution does not deal with secret reporting, but its terms implicitly accommodate it. Nothing is said, for instance, about automatic disclosure of the President's report in whole to all members of Congress, and certainly nothing is said about its automatic disclosure to the public. If the President is, in fact, to report meaningfully in all the circumstances covered by Section 4(a), he must have reasonable confidence that secrets told Congress will remain secret. On the other hand, the legislators must be assured that vital information is not withheld from them simply because it undercuts executive desires; and Congress cannot be bound to keep presidential secrets when it believes public awareness of them is crucial to the national interest. Most of these difficulties could be met by a constructive relationship between the Executive, on the one hand, and the Speaker, President pro tempore, and the Senate and House foreign affairs committees, on the other. It ought to be possible for these legislators to receive and keep information in confidence until the President agrees to its disclosure to the rest of Congress or until a majority of both committees so vote.[38]

Consultation

In addition to calling for formal presidential reports, the Resolution seeks to obtain a legislative voice in war and peace decisions by demanding that the President exchange views with the legislators and seek their advice about *all* American moves into or toward hostilities, except when circumstances utterly preclude consultation. Section 3 states: "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations." According to the

Resolution's legislative history, this "consultation" is to be a meaty process:

> The use of the word "every" reflects the committee's belief that such consultation *prior* to the commitment of armed forces should be inclusive. In other words, it should apply in extraordinary and emergency circumstances--even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.
>
> At the same time, through use of the word "possible" it recognizes that a situation may be so dire, e.g. hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible. It is therefore simultaneously *firm* in its expression of Congressional authority yet *flexible* in recognizing the possible need for swift action by the President which would not allow him time to consult first with Congress.
>
> The second element of section [3] relates to situations *after* a commitment of forces has been made (with or without prior consultation). In that instance, it imposes upon the President, through use of the word "shall," the obligation to "*consult regularly with such Members and committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent.*"
>
> A considerable amount of attention was given to the definition of *consultation*. Rejected was the notion that the consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.[39]

Two defects in Section 3 are somewhat troublesome. First, it does not require consultation in Section 4(a) (2) and (3) circumstances, only 4(a) (1). The Executive has carefully noted this distinction, disclaiming any statutory duty to consult about new deployments or substantial increases in old ones. But as the State Department told a House subcommittee, "The President has not made anything of that; he intends to consult irrespective of which of these paragraphs an action may fall under."[40] From a "policy viewpoint" influential legislators have urged the

Executive to continue to make nothing of the distinction.[41] Nonetheless, it is alive and well as a matter of law.

Second, Section 3 leaves the President significant discretion to choose which Senators and Representatives he will consult and when to talk with them. Obviously, the less often they meet during a crisis, and the less the chosen legislators know about foreign affairs, the more trivial the consultation is likely to be. Triviality is probable when the President inserts into a continuous process of executive decision making a few episodic gatherings with congressional leaders, chosen without regard to their foreign affairs expertise and responsibilities.

By way of remedy, one Representative has suggested that

> [t]o have a really meaningful advise and counsel procedure involving legislative action, I would think that it would be almost essential that [the congressional consultees] drop everything else they are doing and stay with the NSC during this 2½-day period in this instance or any other unfolding crisis to be there to consider and evaluate the facts as they are perceived and as they may change during this period of time.
>
> Otherwise, if they are brought in for advi[c]e and consultation at the time of the first meeting of the NSC with the President, all of that might be totally outdated by what happens a few hours later. It might really be well for the President in the future to do his best to insist that the Speaker of the House and the minority leader as well as the majority and minority leaders in the Senate come and stay there with him and consider this crisis as it unfolds.[42]

And one Senator has argued that consultation should draw on "the expertise of the members of the committee that are pertinent to the issue":

> If you call in the leadership, they don't know what they are being called in for—some general subject dealing with the war in Southeast Asia or the seizure of the *Mayaguez*. Then you consult with them and then they have to go back and find out what their particular constituent body thinks, whereas if he consults the substantive legislative standing committees he is getting the view of that body which is charged with making recommendations on that subject to its own House.
>
> So I respectfully submit first and foremost that that should be the established method of consultation, that is with the Senate Foreign

Relations Committee and the House International Relations Committee. If the President would also like to consult with the leadership—that is fine and that is icing on the cake.[43]

Recall the remedy proposed in Chapter X: more delegation of foreign-affairs authority by Congress to a few members who would be expected to work with the Executive throughout the course of a crisis.

Meaningful collaboration between the President and Congress, from the first through the eleventh hours, constitutes the war-power millennium. Section 3 of the Resolution seeks it. The section by itself, however, does little more than exhort, unless it is backed by a growing congressional capacity for coordinated, informed, timely decision making, by greater congressional will to take and assume responsibility for decisions about war and peace, and by heightened congressional zeal to cajole and coerce the President into consultation. As Senator Javits said, "If Congress sits back passively and merely awaits Executive fulfillment of the reporting requirements of the law, the key policy decisions will continue to be monopolized by the Executive Branch, as they were in the decades leading up to enactment of the War Powers Resolution."[44]

Improved Procedures for Congressional Action

We have already seen how Section 5 ends a presidential initiative when (1) the House or Senate fails to ratify it within 60 days, subject to certain exceptions, or (2) Congress at any point votes it down by concurrent resolution. As is true of much of the other implementing detail in the act, there is nothing magic about the 60 days. They were born of the House's preference for 120 and the Senate's for 30, and many have disagreed about the likely effect of any particular time period. Devotees of congressional prerogative differ, for example, some finding 30 days essential lest the President have time to lock Congress into his policy by fait accompli, others fearing 30 days would allow the President to win rally-round-the-flag support. But whatever the time period, it does encourage focused, expedited congressional attention to the policy at hand.

The 60-day deadline, however, does more harm than good, for reasons already discussed. Indeed, the purpose of a series of complex procedures in Section 6 of the Resolution seems to be to lessen the possibility that the deadline will arrive without the legislators' having voted yea or nay. The provisions of Section 6 do not guarantee a definitive vote, nonetheless, because it can be blocked if either house "shall otherwise determine by the yeas and nays." It is also well to be clear that the 60-day proviso is not the only means to focused, expedited congressional action. Section 5(c), coupled with the presidential reporting requirements just considered, unavoidably focuses the legislators on the pertinent executive action. And Section 7 deals with expediting procedures not tied to the 60-day deadline but related rather to congressional decision by concurrent resolution at any time.

The Section 7 provisions "against filibuster, or committees pigeon-holing,"[45] are a significant step toward rationalizing Congress's handling of war and peace issues. These provisions ensure prompt but not precipitate action in the respective foreign affairs committees, on the floor of each house, and in congressional conference deliberations, so long as majorities in each house believe that rapid action is desirable. When a majority in either house does not find it necessary, the pace slows. Thus, Section 7 is likely to achieve an element essential to a responsible role for Congress in war-peace decisions: an end to obstruction of legislative judgment on presidential initiatives.

Early Life

The War Powers Resolution did not get off to a brisk start. More than 17 months passed before the first presidential report was filed under it. During the interim there was at least one executive initiative that might well have been reported under Section 4(a) (2), if not 4(a) (1). While Greece and Turkey were struggling over Cyprus in 1974, the American Ambassador to that island requested on July 21 the evacuation of local Americans. President Nixon responded the next day by sending five naval vessels to the area and by permitting 22 helicopter sorties from the U.S.S. *Inchon* to a British base in Cyprus in order to remove roughly 400 Americans and 80 foreign nationals. On July 23 a joint British-American effort rescued another 135 Americans and foreign nationals. In Senator Eagleton's view, the Executive's failure to report any of this activity violated the Resolution. The Senator was unable, however, to bring others in Congress to take a similar view of the matter—perhaps because no hostilities resulted, American armed forces did not land on any part of Cyprus where they were unwelcome, and the President traditionally has had a prerogative to rescue Americans threatened abroad. The fact remains that the Resolution could have been read to require a report on the operation. The President's refusal to do so, and Congress's disinclination to remonstrate with him, did nothing for a generous view of the legislation.

Content of sorts for it came during the last spasms of American military involvement in Indochina. President Ford sent three reports to Congress regarding the evacuation of Americans and foreign nationals. The first report on April 4, 1975, concerned the removal of thousands of refugees from Danang, Vietnam, to safer points south. The second on April 12 reported rescuing Americans and foreign nationals trapped in Phnom Penh, Cambodia. The third followed on April 30, about the evacuation from Saigon. No hostilities were involved in the Danang operation; limited enemy fire seems to have been received during the Cambodian venture, with no American response or casualties; some combat was involved at Saigon and there were American losses. The Saigon operation was the most taxing of the three. A naval task force participated offshore, 70 helicopters and assorted fighters flew numerous sorties, and 865 marines landed in an undertaking that lasted 19 hours. Approximately 1,400 Americans, 5,600 Vietnamese and 85 others were removed by helicopter while 30,000 Vietnamese were picked up at sea. There was a palpable possibility of heavy fighting with either communist forces or South Vietnamese troops desperate for rescue.

The reports submitted by President Ford to Congress concerning these operations were striking in several respects. First, none was expressly submitted pursuant to Section 4(a) (1). The Danang and Phnom Penh reports cited 4(a) (2), and the Saigon report simply "section 4."[46] Thus the President did not come to Congress under the only provision in Section 4 that activates the deadline on executive action and creates the possibility that Congress may end the venture at any time by concurrent resolution.

Second, the President was careful to claim independent power to act. The first report was the most cautious, mixing constitutional prerogative with statutory authority: "This effort is being undertaken pursuant to the President's constitutional authority as Commander-in-Chief and Chief Executive in the conduct of foreign relations and pursuant to the Foreign Assistance Act of 1961 . . . which authorizes humanitarian assistance to refugees, civilian war casualties and other persons disadvantaged by hostilities . . . in South Vietnam." The next two reports were more aggressive: "The operation was ordered and conducted pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of U.S. Armed Forces." Third, the reports were exceptionally terse, involving little of the detail contemplated by the reporting provisions of the Resolution. Their texts appear in Appendix C. Fourth, by the time the President reported, each of the operations was over. The Resolution did receive its first substance in the April 1975 reports, but not much.

It is significant, however, that President Ford reported, despite the Nixon precedent on Cyprus and despite a long tradition of Executives' rescuing Americans threatened abroad. Ford was encouraged to report because Congress had previously banned the use of federal funds for any military activities in Indochina. While it was not clear that the ban covered the evacuation of Americans and foreigners inextricably mixed with them, it could be read to do so (particularly if hostilities resulted), and the ban did seem clearly to cover foreigners not entwined with Americans.[47] Certainly the evacuation operations involved decisions with "hostilities" implications—for instance, what nationalities were to be rescued, how many people should be brought out, by what means, over what period of time, to what extent reliance should be placed on diplomacy rather than military operations, and to what degree combat would be accepted to achieve the predetermined objectives. With these considerations in mind, the President addressed the Senate and House in joint session on April 10, 1975: "And now I ask the Congress to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation if this should be necessary, and I also ask prompt revision of the law to cover those Vietnamese to whom we have a very special obligation, and whose lives may be in danger, should the worst come to pass."[48]

In response to the President's request, both houses passed bills, each referring to the War Powers Resolution. On April 25 a conference committee reconciled the two bills as the Vietnam Humanitarian Assistance and Evacuation Act of 1975. The Senate promptly agreed to the conference report and sent it to the House, where it was to be considered on April 29. But before it reached the floor, the evacuation of Saigon was well underway. Calling from the White House,[49] Speaker Carl Albert requested that the measure be withdrawn. It was considered by the House on May 1 and rejected. In short, the President sought explicit authority to use the military—authority which Congress might have provided and tied to the War Powers Resolution. When he had not received prior congressional approval nineteen days after asking for it, he acted nonetheless. And he acted despite a legislative ban on military operations in Indochina, which covered at least part of his initiative. The House then declined to take a position on the matter, forfeiting the opportunity at least to ratify what the President had done and to explicitly involve Congress in its authorization.

Some in the House had feared that the measure might authorize American reentry into Indochina. By May 1 others viewed the matter as moot or wished to avoid too close association with South Vietnamese refugees. There was strong sentiment among the foreign affairs leadership of the House and Senate, however, that the measure be adopted, whether before or after the fact, to associate Congress with the President in the use of military force under the War Powers Resolution. Senator

Eagleton's postmortem was characteristically dismal, but more realistic than not:

> Congress fumbled the ball. When the President was forced by events to order the evacuation from South Vietnam on April 29, the House of Representatives had not yet completed the final stage in enacting the necessary legislation. Two days later, when the House finally had the opportunity to express Congressional will and intent, the House voted overwhelmingly not to act.
>
> This unfortunate decision raises grave questions about the willingness of Congress to fulfill its constitutional responsibilities. The President obviously had no authority to use the United States forces to rescue foreign nationals in Vietnam. Yet our forces evacuated thousands of Vietnamese. Asked to explain, President Ford tried to justify his action on "moral" rather than legal grounds. Yet Congress let the precedent stand. Future Presidents might now conclude that the Commander in Chief had an inherent right to do what Mr. Ford did.[50]

And as the *Milwaukee Journal* said in a May 23 editorial:

> In the spirit of partnership, Ford asked Congress to provide both money and clear authority to evacuate endangered Vietnamese along with Americans. While South Vietnam crumbled, Congress wrangled. Dozens of amendments filled the air. Many a lawmaker played general, trying to link certain kinds of aid to certain military maneuvers under certain conditions. Finally, Ford was forced to rely on inherent presidential power and order evacuation without companion action by Congress.
>
> From all this, a pointed lesson emerges. On urgent foreign policy issues, the presidency is still the government's decision making center —if only because it can move with a crisp singularity that a congressional multitude cannot hope to match.[51]

There was some congressional feeling that the President failed to consult with the legislators during the April crises.[52] The emergencies began while Congress was in Easter recess. Nonetheless, the Executive tried to notify the congressional leadership about the Danang operation. The President spoke to Congress about the crisis that evolved into the Saigon evacuation. Four days after Mr. Ford's message to the House and Senate, he, along with the Secretaries of State and Defense and the Army Chief of Staff, met with the Senate Foreign Relations Committee to discuss the situation in Southeast Asia. Other high administration officials testified before several other congressional committees regarding the impending evacuation.[53] While the full objectives of Section 3 of the Resolution may not have been met in April 1975, neither were they wholly ignored.

Hardly had the Indochina evacuations ended when the new Cambodian regime seized an American merchant ship, the *Mayaguez*, on May 12, 1975. To recover the ship and its crew, protect the rescuers, and retaliate against the aggressors, President Ford sent American troops into Thailand, used that country as a staging area, and fought the Cambodians. Eight ships, 11 helicopters, 25 planes, and 300 marines were involved in the Cambodian hostilities, with the loss of 15 Americans dead, 3 missing, and 50 wounded. During the hostilities the United States dropped the largest bomb in its nonnuclear arsenal on the island of Koh Tang, to support marines in battle there. American forces bombed a military airfield and an oil storage depot in Cambodia, shortly after the crew of the *Mayaguez* had been released.[54]

Since hostilities were clearly involved, the President reported to Congress on May 15 under Section 4(a) (1) of the Resolution. But the President chose not to report also under 4(a) (3), although his operations in Thailand were protested by its government.[55] And as in April, he claimed an independent prerogative to use force. Like the Indochina reports, the *Mayaguez* account was terse, including, for instance, no explanation of the basis in international law for the operation. Its text is in Appendix C. And like the Indochina report, the *Mayaguez* account came after the fact. Finally, the President was not slowed by the statutory ban on military ventures in Indochina, apparently because he did not read it to preclude his armed rescue of Americans attacked abroad.

According to the State Department, "[A]lthough the *Mayaguez* incident was a rapidly unfolding emergency situation, four separate sets of communications took place between the executive branch and the congressional leadership."[56] These "communications" did not amount to much. Senator Javits accurately complained that "[t]he consultation of the Congress prior to the *Mayaguez* incident resembled to me the old and discredited practice of informing selected Members of Congress a few hours in advance of the implementation of the decision already taken within the executive branch."[57] Still, on May 14 the Senate Foreign Relations Committee announced: "[W]e support the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men."[58] Congress as a whole acquiesced in the level of consultation offered it. So ended an eight-week period that has been by far the most important in the Resolution's implementation to date.

Post *Mayaguez*

Several months after leaving the White House, former President Ford frontally attacked the Resolution on both legal and practical grounds. In an April 1977 speech he said that there had been six military crises during his presidency: the four discussed already and two June 1976 evacuations of American citizens from Lebanon's civil war. No reports under the War Powers Resolution were submitted on the Lebanese ventures. Mr. Ford concluded that no reports were legally required either for them or for his initiatives in Indochina, although reports were in fact filed on the Indochina and *Mayaguez* rescues: "In none of those instances did I believe the War Powers Resolution applied, and many members of Congress also questioned its applicability in cases of protection and evacuation of American citizens. Furthermore, I did not concede that the resolution itself was legally binding on the President on constitutional grounds."[59]

Mr. Ford assessed the act even more grimly from "a practical standpoint." He focused first on the difficulties of consultation during the early stages of a crisis:

> When the evacuation of DaNang was forced upon us during the Congress's Easter recess, not one of the key bipartisan leaders of the Congress was in Washington.
>
> . . . [H]ere is where we found the leaders of Congress: two were in Mexico, three were in Greece, one was in the Middle East, one was

> in Europe, and two were in the People's Republic of China. The rest we found in twelve widely scattered states of the Union.
>
> This, one might say, is an unfair example, since the Congress was in recess. But it must be remembered that critical world events, especially military operations, seldom wait for the Congress to meet. In fact, most of what goes on in the world happens in the middle of the night, Washington time.
>
> On June 18, 1976, we began the first evacuation of American citizens from the civil war in Lebanon. The Congress was not in recess, but it had adjourned for the day.
>
> As telephone calls were made, we discovered, among other things, that one member of Congress had an unlisted number which his press secretary refused to divulge. After trying and failing to reach another member of Congress, we were told by his assistant that the congressman did not need to be reached.
>
> We tried so hard to reach a third member of Congress that our resourceful White House operators had the local police leave a note on the congressman's beach cottage door: "Please call the White House."[60]

The former President then went into "several reasons" why, "[w]hen a crisis breaks, it is impossible to draw the Congress into the decision-making process in an effective way . . . ." His reasons constitute a classic statement of executive distaste for measures such as the Resolution. Legislators are not suited for crisis management, in Mr. Ford's judgment, for a number of reasons:

> First, they have so many other concerns: legislation in committee and on the floor, constituents to serve, and a thousand other things. It is impractical to ask them to be as well-versed in fast-breaking developments as the President, the National Security Council, the Joint Chiefs of Staff, and others who deal with foreign policy and national security situations every hour of every day.
>
> Second, it is also impossible to wait for a consensus to form among those congressional leaders as to the proper course of action, especially when they are scattered literally around the world and when time is the one thing we cannot spare. Again, we should ask what the outcome would be if the leaders consulted do not agree among themselves or disagree collectively with the President on an action he considers essential.
>
> Third, there is the risk of disclosure of sensitive information

> through insecure means of communication, particularly by telephone. Members of Congress with a great many things on their minds might also confuse what they hear on the radio news in this day of instant communication with what they are told on a highly classified basis by the White House.
>
> Fourth, the potential legal consequences of taking executive action before mandated congressional consultation can be completed may cause a costly delay. The consequences to the President, if he does not wait for Congress, could be as severe as impeachment. But the consequences to the nation, if he does wait, could be much worse.
>
> Fifth, there is a question of how consultations with a handful of congressional leaders can bind the entire Congress to support a course of action—especially when younger members of Congress are becoming increasingly independent.
>
> . . . .
>
> Sixth, the Congress has little to gain and much to lose politically by involving itself deeply in crisis management.
>
> If the crisis is successfully resolved, it is the President who will get credit for the success. If his efforts are not successful, if the objectives are not met or if casualties are too high, the Congress will have seriously compromised its right to criticize the decisions and actions of the President.
>
> Finally, there is absolutely no way American foreign policy can be conducted or military operations commanded by 535 members of Congress on Capitol Hill, even if they all happen to be on Capitol Hill when they are needed.
>
> Domestic policy—for housing, health, education or energy—can and should be advanced in the calm deliberation and spirited debate I loved so much as a congressman.
>
> The broad outlines and goals of foreign policy also benefit immensely from this kind of meticulous congressional consideration.
>
> But in times of crisis, decisiveness is everything—and the Constitution plainly puts the responsibility for such decisions on the shoulders of the President of the United States.
>
> There are institutional limitations on the Congress which cannot be legislated away.[61]

Mr. Ford's assessment did not move Congress to repeal or otherwise limit the Resolution. To the contrary, in July 1977 the Senate Foreign Relations Committee considered amendments whose aggregate effect would have been to tighten the act's restraints on presidential use of force.[62] Three days of hearings were held on these proposals as well as on other aspects of the Resolution's "operation and effectiveness." No amendments resulted.

Unlike Presidents Nixon and Ford, Jimmy Carter had kind words for the war-powers legislation. Early in his presidency he described it as an "appropriate reduction" in the sort of control enjoyed by some Executives before Indochina. Similarly, Secretary of State Vance indicated during his confirmation hearings that the Resolution was compatible with the President's constitutional authority and that he anticipated no problems with its "good faith observance."[63] By the same token, during the Senate Foreign Relations Committee's July 1977 hearings, just mentioned, the Legal Adviser to the State Department repeated anew: "We believe that conscientious observance of the procedures set forth in the Resolution, including effective consultation and timely reporting, will assure that both the Executive and Legislative Branches possess the means to exercise their full and proper constitutional responsibilities."[64] A year later, in August 1978, the Legal Adviser assured the House International Relations Committee of Mr. Carter's continued "strong support of the War Powers Resolution."[65]

Congress constrained Jimmy Carter in matters of war and peace less than it did Presidents Nixon and Ford when Indochina and Watergate coalesced, but more than has been customary in the twentieth century. Mr. Carter was required to provide significant secret information to Congress, especially its intelligence committees. These committees and others concerned with foreign affairs and the armed forces have been frequently informed and consulted, often heeded, by the Executive. Despite presidential objections, the legislators have insisted on the use of concurrent resolutions to disapprove major arms sales abroad. They have cut off or curbed both military and economic aid to certain countries that the President very much wished to help. Individual Congressmen have dealt directly with foreign representatives—members of the Senate Foreign Relations Committee conferring with Moshe Dayan in a Washington hotel about proposed F-15 sales to Saudi Arabia and Egypt, for instance, and the House of Representatives threatening to cut off economic aid to South Korea unless its former ambassador to this country were returned to testify about South Korean influence buying in Congress. The Senate has coldly scrutinized the President's treaty initiatives, especially those involving the Panama Canal and SALT II, and many Congressmen reacted severely when the President alone terminated this country's Mutual Defense Treaty with the Republic of China.

Influenced by such constraints and by his own predilections, Mr. Carter used armed force very sparingly until late 1979, even when nothing more than deployment on the high seas was at stake. He had no need to report to Congress under the War Powers Resolution until spring 1980. Some legislators did feel that the administration's May 1978 activities in Zaire were reportable. At that time American, Belgian, and French citizens were threatened by Katangan forces in southern Zaire. Upon the request of Zaire, as well as Belgium and France, President Carter ordered U.S. transport aircraft to support rescue operations by Belgian and French troops. From May 19 to 23 the Air Force flew approximately thirty missions in Zaire, transporting matériel and some French troops to staging areas more than 100 miles from the site of the fighting. In June, after the Katangans had been repulsed, the Air Force flew the Belgians and French out while also transporting into Zaire elements of an African peace-keeping force. At one point during the June flights, as French legionnaires were loading a Peugeot onto a C-141, Zairian troops threatened to fire if the car departed with the French. The Peugeot was left on the runway without further incident. The American pilots and their support personnel took no weapons into Zaire. Nor did any American infantry or fighter aircraft accompany them.[66]

Under the circumstances, most Congressmen who paid any attention to the matter concluded that American forces had not been introduced either into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances" or "into the territory . . . of a foreign nation, while equipped for combat." Thus, no presidential report to Congress was obligatory under Sections 4(a) (1) or 4(a) (2) of the Resolution. A few Congressmen emphatically disagreed. Their disquiet led to the August 1978 House hearings mentioned above.

Events in the Middle East proved to be more trying. Oil from that area became increasingly central to Western economies during the late 1970s. As the decade neared its end, Iran spun from being a force for tranquility in the area to a source of acute instability. In November 1979 the Iranians took American diplomats hostage. After the hostages had been captive for almost a year, Iraq invaded Iran, heightening the threat to Western oil. Meanwhile the Soviets invaded Afghanistan, putting Russian troops on Iran's border and within striking distance of the Persian Gulf.

In response, President Carter became more active militarily. He deployed powerful naval forces in the vicinity of Iran, sent radar command aircraft to Saudi Arabia as well as several hundred military personnel to operate and maintain equipment and train the Saudis, established an American military presence in Egypt, created a Rapid Deployment Force for the Middle East, and declared the United States would keep the oil flowing one way or another. Carter also suggested that armed action might be necessary to recover the hostages, and sent six C-130 transports, eight RH-53 helicopters, and roughly ninety combat troops into Iran on April 24, 1980, in an abortive effort to bring the captives out. American fighter aircraft from carriers off Iran were prepared to defend the rescuers against Iranian attack had that proved necessary.

Amid this activity, the President reported under the War Powers Resolution only once, on April 26, 1980. See Appendix C. He rejected claims that other reports were necessary when, for instance, the American military presence in Saudi Arabia and the Persian Gulf increased during the Iraqi-Iranian War; Senator Javits agreed with him, as Appendix C indicates.

The April 26, 1980, report was seriously flawed. It said little and made no mention of Sections 4(a) (1) and (2) of the Resolution, under which it should have been submitted. Terming the rescue effort a "humanitarian mission," Jimmy Carter simply ignored the fact that the mission, while "humanitarian" in purpose, nonetheless "introduced" American armed forces into a situation "where imminent involvement in hostilities [was] clearly indicated by the circumstances." Combat with the Iranians was likely had the rescuers reached Tehran. Combat with others such as the Soviets was possible had the rescue degenerated into a prolonged struggle between American and Iranian forces. Moreover, the rescue effort obviously introduced U.S. forces "into the territory . . . of a foreign nation . . . while equipped for combat."

The April 26 report also claimed that Carter acted "pursuant to the President's powers under the Constitution as Chief Executive and as Commander-in-Chief of the United States Armed Forces, expressly recognized in Section 8(d) (1) of the War Powers Resolution," as well as pursuant to Article 51 of the United Nations Charter. The report was certainly free to argue that the President acted pursuant to his constitutional authority and international law, but it was wrong to suggest that he acted pursuant to Section 8(d) (1). In the context of the entire Resolution, especially Sections 2(c) and 4, it is clear that Section 8(d) (1) did not authorize the rescue attempt. Within the terms of the Resolution, the April 26 report was misleading and inadequate —at least as flawed as any report submitted by Gerald Ford. In practice, though not rhetoric, Jimmy Carter gave the Resolution's reporting requirements short shrift.

He also disregarded its consultation provisions. No one in Congress was informed, much less consulted, before the rescue effort began. Ironically, on the afternoon of April 24, Senators Church and Javits wrote Secretary of State Vance on behalf of the Senate Foreign Relations Committee, insisting under Section 3 of the Resolution that the President consult Congress before using force against Iran. "We write this letter to you in the context of the grave international crisis which has been developing for some months in the region of the Persian Gulf, precipitated by the seizure of the United States Embassy in Tehran and the holding of American hostages there, and by the brutal military occupation of Afghanistan by the Soviet Union," said Church and Javits. They noted that Carter had refused to exclude force as means of reclaiming the hostages from Iran and had threatened to fight if the Soviet Union moved into the Persian Gulf. They argued that the legislative history of the Resolution "makes it clear that the consultations called for do not necessarily signify at all that a decision has been made" to use force, but rather "the advance consultation provisions of the War Powers Resolution are intended to come into play *before* any such decision has been made, in order to ensure that any such decision, if made, is a national decision jointly entered into by the President and the Congress. . . . Accordingly, Mr. Secretary, we hereby request that you inform this Committee at an early date when consultations can begin . . . ."[67] The Senators' invocation of Section 3 was too little, too late.[68] Subsequent congressional unhappiness with Carter's failure to consult, however, did not lead to steps to strengthen Section 3.[69]

Inertia

A prior page suggested that it is up to Congress to break the gravitational pull of executive hegemony over American war and peace. The War Powers Resolution provided the necessary initial thrust. But since the legislation has been on the books, Congress has done little to generate any sustained thrust. Most members of Congress remain very much result oriented.[70] Their concern with the particulars of any specific policy still overshadows their concern with the institutional process by which that policy is made. So long as they and their constituents applaud an executive initiative, they do not seriously dispute their exclusion from its development.

Congress lost a singular opportunity to give the Resolution substance in the congressional mold when the legislators failed to participate in shaping the Saigon evacuation. Consultation under the Resolution has been minimal, largely because Congress has not insisted that the President meaningfully implement Section 3. Executives will rarely pay much attention to that section, especially during crises that arise suddenly, require constant, rapid, flexible response, and end quickly, unless the legislators designate a small committee of Senators and Representatives, primed to share the command headquarters with the Executive and made acceptable to him by a capacity for informed, responsible advice and by a willingness to keep tactical secrets. Similarly, there is little reason to imagine that Presidents will accept Section 2(c)'s view of their authority to enter hostilities without prior congressional approval. As with many of their predecessors, Presidents in the future will very probably construe the Constitution to permit them to commit troops whenever they believe it essential to the national welfare.

Even so, the War Powers Resolution retains a potent bite. Following President Ford's example, his successors will doubtless report their military initiatives to Congress, usually having told congressional leaders about their plans and given them a moment to object. It is also probable that future Presidents will either accept an end to their military initiatives by the Section 5(b) deadlines or by the 5(c) concurrent resolutions, or ask the Supreme Court to rule on the constitutionality of these sections.[71] Equally important, future legislators will have guaranteed opportunities to participate in deciding whether America fights, if the combat lasts more than forty-eight hours. While the Resolution may have slight impact on quick, surgical applications of armed force by the President, it should ensure legislative approval of any long-term commitment of the country to war.

Secretary of State Haig promised more for Congress during his January 1981 confirmation hearings. He committed the Reagan administration to compliance with both the letter and the spirit of the Resolution. Shortly thereafter several Senators charged the President with skirting the act while increasing the flow of American arms and advisers to El Salvador's civil strife. *Plus ça change . . . .*

Chapter XI: The War Powers Resolution of 1973

1. Dep't of Defense Appropriations Act, Pub. L. No. 93-437, § 839 (1974). For other such limits *see* Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 Minn. L. Rev. 1, 13 n.30 (1975); Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?* 16 Wm. & Mary L. Rev. 823, 851 n.164 (1975).

2. The necessary-and-proper clause received little attention at the Constitutional Convention. *See, e.g.*, 2 The Records of the Federal Convention 344-45 (M. Farrand ed. 1911). Recall, however, that a prime federalist objection to Confederation government was the dichotomy between its formal

powers, reasonably ample, and its impoverished authority over means necessary to implement them. Antifederalists during the ratification struggle strongly attacked the necessary-and-proper language. According to Hamilton, it and the supremacy clause were "held up to the people in all the exaggerated colours of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated." FEDERALIST PAPERS No. 33.

Madison in *Federalist No. 44* examined the problem in some detail. He argued that even without the necessary and proper language, Congress would control means: "Had the constitution been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

Madison argued, moreover, that it would have been impractical for the Constitution itself to attempt to deal more explicitly with means: "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect; the attempt would have involved a compleate digest of laws on every subject to which the constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce: For in every new application of a general power: the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object; and be often properly varied whilst the object remains the same."

Finally, Madison spoke to the possibility that Congress might attempt to usurp authority through necessary-and-proper legislation: "If it be asked, what is to be the consequence, in case the congress shall misconstrue this part of the constitution, and exercise powers not warranted by its true meaning? I answer the same as if they should misconstrue or enlarge any other power vested in them, as if the general power had been reduced to particulars, and any one of these were to be violated . . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort, a remedy must be obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers."

Since 1789 congressional authority under the necessary-and-proper clause has been generously read in most instances. As Chief Justice Marshall said in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *See also*, *e.g.*, United States v. Oregon, 366 U.S. 643 (1961); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). Note the suggestion that the necessary-and-proper clause is more sweeping in its grant of authority to Congress than are the enforcement provisions of the fourteenth and fifteenth amendments, in Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 99-108 (1966). Congressional power to prescribe means has been judicially restrained, as a rule, only when it impaired civil liberties; *e.g.*, Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960). *See generally* L. Henkin, Foreign Affairs and the Constitution 78, 331-32 n.54 (1972).

Many have indicated that war-power legislation would be constitutional. *See, e.g., Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971), at 7, 135 (Javits); 551, 554 (Bickel); 653-54 (William D. Rogers); 708 (Stennis); 774, 779 (Goldberg). *But cf.* William P. Rogers: "The question about whether a statute can change the President's constitutional powers or affect Congress['] constitutional powers is a very doubtful proposition." *Id.* 517. But, as will be noted in the text, there is a distinction between congressional authority to define the nature of constitutional powers, on the one hand, and the means for their realization, on the other. Rogers's comments seem to assume that war-power legislation does only the former.

3. 50 U.S.C. § 1541(b) (Supp. 1975). The Resolution as a whole covers §§ 1541-48 of the Code and is set out in Appendix C.

4. 119 Cong. Rec. 36,194 (1973).

5. 9 Weekly Compilation of Presidential Documents 1285-86 (1973). The text of the veto message appears in Appendix C.

6. Former Senator William B. Spong, Jr., of Virginia actively participated in these steps until January 1973. He has summarized them in two articles: *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?* 6 U. Rich. L. Rev. 1 (1971); *The War Powers Resolution Revisited: Historic Accomplishment or Surrender? supra* note 1, at 824-37. Notable collections of divergent views on the wisdom of war-power legislation were compiled early in the process, during the 1971 Senate Foreign Relations Committee hearings cited in note 2 above and during earlier proceedings in the House. *See Hearings on Congress, the President, and the War Powers Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970).

7. S. Res. 85, 91st Cong., 1st Sess., 115 Cong. Rec. S7153 (daily ed. June 25, 1969). For further discussion of Congress and national commitments, *see* 48 Cong. Digest 193-224 (1969).

8. S.440, 93d Cong., 1st Sess. § 3 (1973). Jacob Javits was the guiding spirit behind the Senate approach. *See* note 33 below. *See generally* J. Javits, Who Makes War: The President versus Congress (1973).

9. The House of Representatives almost adopted a requirement designed to preclude congressional inaction. It would have provided that, within 120 days after the beginning of a military initiative by the Executive, Congress "shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President . . . or . . . disapprove such action in which case the President shall terminate [it] . . . ." 119 Cong. Rec. 24,685 (1973) (Whalen amendment). But the most dyspeptic attack on the notion of ending an executive initiative by congressional *inaction* came in the Senate. Sam Ervin picked "invasion" to hammer home his point: "This measure is an absurdity. It says that when the United States is invaded, Armed Forces of the United States must get out of the fight against an invader at the end of 30 days if the Congress does not take affirmative action within that time to authorize the President to continue to employ the Armed Forces to resist the invasion. The bill is not only unconstitutional, but is also impractical of operation. In short,

it is an absurdity. Under it, the President must convert Old Glory into a white flag within 30 days if Congress does not expressly authorize him to perform the duty the Constitution imposes on him to protect the Nation against invasion." 119 Cong. Rec. 25,093 (1973).

10. *See* Spong, *supra* note 1, at 828 n.41, 874.

11. 119 Cong. Rec. 33,559 (1973).

12. 119 Cong. Rec. 36,189 (1973); *see* Spong, *supra* note 1, at 823.

13. 119 Cong. Rec. 33,557 (1973). Senator Eagleton has described his concerns at length in a book, *War and Presidential Power: A Chronicle of Congressional Surrender* (1974).

14. S. Rep. No. 220, 93d Cong., 1st Sess. 34 (1973) (supplemental views of J. W. Fulbright). *See* Glennon, *supra* note 1, at 3-5 n.15.

15. *Hearings on War Powers: A Test of Compliance Before the Subcomm. on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. 93 (1975).

16. Section 8(c) further narrows the meager § 2(c) discretion given the President by its broad definition of "introduction of United States Armed Forces" to include "the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

17. *See* pages 197-98. Admittedly, there is controversy over whether Congress may "legislate" by concurrent resolution when the legislative process runs in reverse. The touchstone for those who think not is Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953). Executives especially have questioned legislation by concurrent resolution. It does deprive them of an opportunity to veto congressional limits on their initiatives. As a Congressman asked and the Legal Adviser to the State Department answered in 1975:

"Mr. Solarz. . . . [I]s it your position that if the troops were sent in in the first place under the President's inherent constitutional authority that the concurrent resolution ordering them to be withdrawn would itself be unconstitutional or do you believe that the President would be constitutionally obligated to act in accordance with the provisions of the War Powers Resolution and withdraw the troops?

"Mr. Leigh. . . . I think it would be unconstitutional on the simple logic that if the President had the power to put the men there in the first place that power could not be taken away by concurrent resolution because the power is constitutional in nature. There might, however, be all sorts of reasons as to why the political process would force him to wish to comply with that concurrent resolution.

"There is a further question as to whether a concurrent resolution in this situation would have the dignity of law under the Constitution. I think a very strong argument can be made that a concurrent resolution in this situation would be insufficient and that the Congress must resort to the usual process for a statute and submit it to the President. If he disapproves it, it must then be pas[sed] over his veto by a two-thirds vote in each House." *War Powers Hearings*, *supra* note 15, at 91.

Precedent exists, however, for legislation by concurrent resolution. For instance, there was provision for ending presidential action by this means in two prominent war-power measures: the 1941 Lend Lease Act and the 1964 Gulf of Tonkin Resolution. It is also a fact of life that, if Presidents wish to have their constitutional cake by committing troops without prior congressional approval, it is not likely that they will be allowed to eat it too by denying simple majorities in both houses the right to call a halt.

It can be argued that precedents such as those just cited are not applicable because they "created a concurrent resolution procedure to control the exercise of authority delegated [by Congress] to the President," while the War Powers Resolution "does not delegate anything to the President. . . . It is . . . a procedural scheme for arranging an interchange in what is . . . a difficult area between the two branches . . . ." Accordingly, "to say that Congress would later by concurrent resolution take back what it had previously delegated overlooks the fact that nothing was delegated." *War Powers Hearings, supra* note 15, at 96-97 (remarks of Mr. Leigh); *cf*. Rostow, *Response*, 61 VA. L. REV. 797, 800-01 (1975): "There are some instances of true delegation between Congress and the Presidency in the field of foreign affairs. The President's discretion to change tariffs is a good example; only a statute could vest such authority in the President. However. in most cases a more accurate description is that a statute combines the overlapping powers of the Presidency and of Congress. In such instances, there is no delegation, but a pooling of the respective powers of the Presidency and of Congress. Thus in the Tonkin Gulf Resolution, the Formosa Resolution, and the Middle East Resolution, for example, language was carefully chosen to indicate that Congress and the President were making separate and also joint decisions, each exercising its own authority. No one attempted to draw a line marking the exact boundaries between the presidential zone and the congressional zone."

It is more likely than not, however, that Congress did delegate some authority to the President in the War Powers Resolution. To wholly disclaim that possibility, it is necessary to assume that the Executive has a constitutional prerogative to commit troops whenever and wherever he pleases, subject only to later restraint by a two-thirds vote of the Senate and House, overriding his veto. If, as is more probable, Congress has a constitutional right to vote on at least some troop commitments *before* they are made, then the Resolution does delegate to the President congressional approval to act in these cases if he thinks it necessary, subject to the deadline and concurrent resolution restraints in §§ 5(b) and (c).

18. *See* pages 198-99. Some assume that the President has a constitutional prerogative to defend American soil, perhaps no matter what Congress thinks. *Cf*. Senator Ervin's remarks in note 9 above and Legal Adviser Leigh's testimony to a House Subcommittee in 1975: "I [am] not sure that the Congress by imposing a condition subsequent on an appropriation which has not yet been fully expended could limit the President's power to carry out certain constitutional duties such as to defend the United States from hostile attack against its mainland territory. There is obviously no judicial decision on this but I would think that there would be a serious doubt as to the constitutionality of such a limitation if it were applied to prevent the President from defending the mainland territory of the United States from attack." *War Powers Hearings, supra* note 15, at 89.

19. *See also* Senator Javits: "If this is a statute, every part means something, whether it is written in subsection 2(c) or in section 3, as in the Senate bill." 119 Cong. Rec. 33,557-58 (1973).

20. 2 U.S. Code Cong. & Ad. News 2364 (1973).

21. 119 Cong. Rec. 33,555 (1973).

22. According to Representative Zablocki, the conference included § 2(c) "[i]n order to satisfy the Senate conferees"—"but it was intended as a statement of purpose and policy, a sort of sense of Congress." *War Powers Hearings, supra* note 15, at 32.

23. 119 Cong. Rec. 36,194 (1973). For further appraisal of § 2(c)'s mysteries, *see* Spong, *supra* note 1, at 837-41.

24. *See* pages 297-306 and note 25 below; *cf.* the Executive's rejection of the notion that the Resolution "delegates" any authority to him, note 17 above.

25. 119 Cong. Rec. 36,181 (1973); *accord*, the Legal Adviser to the State Department in 1975: "[W]e would not agree . . . that the specification of circumstances in which this power [the President's authority as commander in chief] might be used would be limited by section 2(c)." *War Powers Hearings, supra* note 15, at 11. *See also* note 26 below and accompanying text.

26. *War Powers Hearings, supra* note 15, at 90-91.

27. *Id.* 40.

28. Representative Zablocki's 1975 complaints are typical:

"Clearly, it was not the intent of Congress to be merely informed of decisions already made. In the fullest meaning of partnership and shared responsibility in foreign affairs, it was the desire of Congress to have a participatory role in the process of decisionmaking.

". . . .

"Measured against that clear directive of intent, it is apparent . . . that the executive branch proclivity is toward evasive and selective interpretation of the War Powers Resolution." *War Powers Hearings, supra* note 15, at vi.

29. This distinction does make sense on one score under the Resolution as presently written. Reports by the President pursuant to § 4(a)(1) permit Congress to end his initiatives by inaction or concurrent resolution. That is not justifiable if the President is acting with explicit congressional authorization (whether by declaration of war or some other form of approval). Accordingly, if the Resolution were amended to require presidential reports at the outset of any hostilities, it ought also to be amended to prevent the termination under §§ 5(b) or (c) of ventures previously approved by Congress.

30. *War Powers Hearings, supra* note 15, at 2.

31. 2 U.S. Code Cong. & Ad. News 2351 (1973).

32. *War Powers Hearings, supra* note 15, at 38-39. It does appear that the Resolution was not directed at "hostilities" involving foreign mobs, international criminals, or the like. *See, e.g.*, the June 15, 1973, Committee on Foreign Affairs report on the House bill that underlay the ultimate Resolution: "The term 'war powers' may be taken to mean the authority inherent in *national sovereignties* to declare, conduct, and conclude armed hostilities with other states." 2 U.S. Code Cong. & Ad. News 2348 (1973) (emphasis added). But so long as another nation is the adversary, Congress defined "hostilities" broadly, as indicated in the text.

33. *War Powers Hearings, supra* note 15, at 69. The Senator had previously elaborated:

"Now it is perfectly true, that [the Senate] bill which contained an authority test as well as a performance test was not the bill adopted in the sense that the House approach was adopted without the authority test. We did adopt the House approach, the methodology being that it is a performance test, it is not an authority test. That is, did he or didn't he have constitutional authority?

"The minute he puts troops into hostilities or imminent danger of hostilities, the act begins to operate. And he does not have to tell us he is doing it, because the 60-day clock starts to tick if a report is required, and even if he fails to do a report, it still begins to operate and it is up to us to press the button so he loses all authority if we do not agree with his actions. Now this is the key to this whole legislation. If the President takes emergency action, his action is only good until Congress acts dispositively because we have the declaration of war authority." *Id.* 63.

34. *Id.* 87.

35. According to the Resolution's legislative history, "[A] *commitment* [or introduction] of armed forces commences when the President makes the final decision to act and issues orders putting that decision into effect." 2 U.S. Code Cong. & Ad. News 2351 (1973).

36. *War Powers Hearings, supra* note 15, at 77.

37. See the terse accounts submitted by President Ford, Appendix C. "They are brief to the point of being in minimal compliance with the content requirements set forth in the law." *War Powers Hearings, supra* note 15, at 69 (remarks of Sen. Javits); *cf.* Thomas Ehrlich: "No one can expect preparation of a carefully reasoned, fully-developed brief within two days after a decision to use military force. But precisely for that reason, the requirement should have a useful impact. The need for justification to support a decision should be a strong incentive for a broader analysis of the impact of that decision than might otherwise be made. By requiring those in the Executive Branch to articulate the basis for an action, and to defend that basis, the Resolution will encourage them to think through their decisions more fully." *Response*, 61 Va. L. Rev. 785, 788 (1975).

38. The legislators cannot expect much tactical and strategic information from the President unless he is confident that it will not leak; *e.g.*, Legal Adviser Leigh's remarks to a House subcommittee about the *Mayaguez* hostilities:

"Now let me say a word about this final assault action which involved movements of troops from various parts of the Far East into a position to be effective. The President was extremely apprehensive that there be no breach of security in advance of the time that they actually were landed, so there were strong arguments for not revealing that information—even to a select group of members—very much in advance of the time it was to occur.

". . . .

When I was speaking about the President's judgment of confidentiality, I was speaking in terms of an assumption on my part. I do not know what the President actually thought on this subject. I do know that he went to great pains to request the Members of Congress who came for the briefing in the Cabinet room that they maintain absolute security about this because breach of security might prejudice the carrying out of military operations.

". . . .

"Section 3 of the War Powers Resolution has, in my view, been drafted so as not to hamper the President's exercise of his constitutional authority. Thus, Section 3 leaves it to the President to determine precisely how consultation is to be carried out. In so doing the President may, I am sure, take into account the effect various possible modes of consultation may have upon the risk of a breach in security. Whether he could on security grounds alone dispense entirely with 'consultation' when exercising an independent constitutional power, presents a question of constitutional and legislative interpretation to which there is no easy answer. In my personal view, the resolution contemplates at least some consultation in every case irrespective of security considerations unless the President determines that such consultation is inconsistent with his constitutional obligation. In the latter event the President's decision could not as a practical matter be challenged but he would have to be prepared to accept the political consequences of such action, which might be heavy." *War Powers Hearings, supra* note 15, at 81, 100. *See also* Chapter VII, note 38 and accompanying text.

39. 2 U.S. Code Cong. & Ad. News 2350-51 (1973).
40. *War Powers Hearings, supra* note 15, at 85. *But see id.* 3.
41. *E.g., id.* 64, 73 (remarks of Sen. Javits).
42. *Id.* 57 (remarks of Rep. Findley).
43. *Id.* 62 (remarks of Sen. Javits); *accord*, his views at 67-70, 73.
44. *Id.* 67.
45. *Id.* 63 (remarks of Sen. Javits).
46. Congressional umbrage at the missing references to § 4(a) (1) was met by Legal Adviser Leigh with various palliatives:

"There was nothing ulterior about this in any sense. We were not trying to mislead anyone. I think the factual situation was different as between the first case, the Danang sealift, and the other two. In the Danang sealift we were confident that we were not going to be involved in a section 4(a) (1) situation of hostilities, and in fact the President's orders required that the force avoid any kind of hostilities. We felt certain that that was going to fall under 4(a) (2) so we specified it in that case.

"Now the other distinction is that we didn't know at the time we were required to make the report, which has to be within 48 hours, when we would complete the task of picking up refugees, and as it turned out it went on longer than either of the other two.

"Now with respect to both the Cambodian and the Saigon evacuations, by the time the President made his report the last Americans and the last armed forces had already been taken out so that as lawyers we did not see that the specification of which of the three subsections of 4(a) was involved, was crucial to the operation of the mechanism which is established in section 5 of the War Powers Resolution because there would be no occasion for the 60-day period to even begin running.

". . . .

"It seems that the real thrust of the question is why the President in his April 30, 1975 report referred to section 4 in general, and not to any particular subparagraphs in that section. We presume that the President did so because the events giving rise to that report did not seem to be limited to just one of the three subparagraphs in section 4(a).

"Thus, although the events as known at that time indicated that hostilities may have existed between U.S. and communist forces, U.S. forces 'equipped for combat' were also introduced in the 'territory, airspace or waters' of South Vietnam—the situation apparently provided for in section 4(a)(2).

"Furthermore, since the operation had terminated by the time the report was prepared, the question of possible congressional action under section 5 of the Resolution was moot; thus, a specific reference to 4(a) (1) was not needed to call attention to possible action under section 5.

". . . .

"[T]he first three war powers reports contain the phrase 'taking note of . . . .' You inquire whether this suggests anything other than a full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended." *War Powers Hearings, supra* note 15, at 9, 39, 40.

47. The evacuations sparked a brouhaha over what was statutorily permitted and over the broader question of the President's constitutional right to order armed rescues. *Compare, e.g.*, the views of Glennon, *supra* note 1, *with* those of Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAWYER 187 (1975). *See also, e.g., War Powers Hearings, supra* note 15, at 26-32.

48. 121 CONG. REC. 10,006 (1975). In making this request, the President did not concede any constitutional necessity to do so. The Legal Adviser to the State Department suggested that Mr. Ford "wanted the political support of the Congress in what he saw was going to be necessary, and the fact that he asked for it should not, in my view, be interpreted as an indication of his belief that in the absence of congressional action he could not have done the things that he did. On the other hand, he obviously wished to have congressional support and there remains the question of the financing of this evacuation." *War Powers Hearings, supra* note 15, at 18; *cf.* Woodrow Wilson's requests for prior congressional approval of his Vera Cruz and merchantmen ventures, pages 158-59 above.

49. The Executive disliked restrictions in the bill as it ultimately emerged, *e.g.*, its severe limits on rescuing non-Americans. *See* the description of the measure in Glennon, *supra* note 1, at 17-19, and Spong, *supra* note 1, at 852-53. *See also* Legal Adviser Leigh's objections, *e.g., War Powers Hearings, supra* note 15, at 19-20, 34-35.

50. Eagleton, *Congress's "Inaction" on War*, N.Y. Times, May 6, 1975, at 39, col. 2. *See also* Glennon, *supra* note 1, at 19-20 n.66.

51. *War Powers Hearings, supra* note 15, at 131.

52. *E.g., id.* 82 (remarks of Rep. Zablocki); Spong, *supra* note 1, at 855 n.180.

53. *See* Emerson, *supra* note 47, at 193.

54. On May 15, 1975, the legal adviser and legislative assistant to the Chairman of the Joint Chiefs of Staff explained the bombing to a House committee:

"In conducting an operation of this nature, there is only one mission involved . . .: To achieve the return of the crew, the vessel. Thereafter you must execute the safe extraction of the forces that were put in in order to accomplish the two primary missions.

"The potential enemy had the capability of reinforcing from the places on the mainland that were struck. To strike those places . . . in the judgment of almost every military man involved in the situation—and I say almost everyone because I have not talked to everybody, everybody I have talked to shares this view—was essential to save the marines on that island.

"Now, you are forced . . . to make a judgment between using adequate force and failing to use sufficient force to protect the men on the ground. That judgment is a very close one . . . in almost every instance, whether it is a platoon operation under a sergeant, a division operation under a general, or an operation of this nature under the direct command of the Commander in Chief. That is a tactical decision that is easy sometimes to Monday-morning quarterback. The question has to be what would you do if you were responsible for the men on the ground at the time the decision was made . . . .

"We recognized that of all the manifestations of power, restraint is one that is greatly recognized. That fact was constantly a consideration in the minds of the military planners involved in this operation. Restraint was a goal, but protecting American lives . . . was the first goal.

" . . . .

"Mr. Wilson. I would like to comment that as far as the air strikes on the mainland were concerned, the military judgment was made apparently that it was necessary, but I think that the strikes on the mainland, and I would like to hear the Colonel's response, probably in addition to their military significance served to let the Khmer Rouge know we were serious about this.

"Mr. Zablocki. It would serve as a deterrent to any further intentions of any country, including Cambodia.

"Colonel Finkelstein. We certainly hope it will have that effect." *Hearings on the Seizure of the Mayaguez Before the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. 33-34, 34-35 (1975).

It seems likely that the bombing was meant both to protect American troops and demonstrate that America "cannot allow U.S. vessels to be seized with impunity" (remarks of Secretary of Defense Schlesinger in a May 21 interview). *Id.* 130. *See also id.* 42-43, 49.

55. According to May 14 testimony of the Deputy Assistant Secretary of State for East Asian and Pacific Affairs: "The Thai Prime Minister has called in our Chargé in Bangkok . . . and has in effect given us an aide memoire asking that our marines leave Thailand immediately." *Mayaguez Hearings, supra* note 54, at 16. The President had sent approximately 1,200 marines from Okinawa into Thailand when the crisis broke. Two hundred of them had then moved from there to the Cambodian theater. *Id.* 16, 43, 58.

56. *War Powers Hearings, supra* note 15, at 78. *But cf.* note 38 above, and Mr. Leigh's recognition that "the congressional leadership under the circumstances of the emergency action had been given an opportunity to express dissent or contrary views before the [President's] orders were *executed* [not before they were given]." *Id.* 81 (emphasis added).

57. *Id.* 61.

58. *Id.* 51; N.Y. Times, May 15, 1975, at 18, col. 7.

59. Address by Gerald R. Ford, Univ. of Kentucky, John Sherman Cooper Lecture, April 11, 1977, *reprinted in Hearings on a Review of the Operation and Effectiveness of the War Powers Resolution Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 327 (1977).

60. *Id.* 328.

61. *Id.* 328-30.

62. *See id.* 338-48. Perhaps most important among numerous proposed changes was the amendment that would have given operative effect to § 2(c)'s presently inoperative view that *prior* congressional approval is required for American use of force except in very limited circumstances. The impact of this amendment would have been softened only slightly by its expansion of the existing § 2(c) occasions in which the President may act alone to include (1) protecting Americans endangered abroad and (2) forestalling direct, imminent threats of attack on this country.

63. *See id.* 187, 322.

64. *Id.* 190. *See also* 126 Cong. Rec. S4114 (daily ed. April 23, 1980).

65. *Hearings on Congressional Oversight of War Powers Compliance: Zaire Airlift Before the Subcomm. on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations*, 95th Cong., 2d Sess. 15 (1978). *See also* Editorial, *The War Powers Skirmish*, N.Y. Times, May 2, 1980, at A26, col. 1.

66. *See Zaire Hearings, supra* note 65, at 2-4, 16, 32.

67. The full text of the Church-Javits letter is in Appendix C. *See also, e.g.*, Gwertzman, *Senators Bid Carter Consult over Iran Under '73 War Curb*, N.Y. Times, April 25, 1980, at Al, col. 6; 126 Cong. Rec. S4109-16 (daily ed. April 23, 1980); *id.* S4192-93 (daily ed. April 24, 1980).

68. The State Department's Assistant Secretary for Congressional Relations, however, did write soothingly to the Chairman of the Senate Foreign Relations Committee. The Assistant Secretary said in part:

"As you know, your letter was received after the commencement of the rescue mission in Iran on which the President reported to the Congress on April 26. For that reason, the letter has in a sense already been overtaken by events.

"The President did not find it possible to consult with the Congress before commencing this rescue mission, in view of its extraordinary nature which depended upon absolute secrecy. Nevertheless, let me assure you that this Administration remains fully committed to the effective implementation of the consultation provisions of the War Powers Resolution to which you refer, and to the maximum possible cooperation between the Executive and Legislative branches in decisions which might involve the United States in hostilities." Letter from J. Brian Atwood to Frank Church, May 6, 1980.

69. *Cf.* Editorial, *The War Powers Skirmish*, N.Y. Times, May 2, 1980, at A26, col. 2:

"Congress adopted the War Powers Resolution to remind Presidents of their accountability for the use of troops. It created a formal procedure for consultation and an as yet untested requirement that Congress consent to hostilities lasting longer than 90 days.

"But for all its bark, Congress has always been reluctant to bite. Successive Presidents have committed forces to emergency operations on eight occasions without real consultation with key committee chairmen. President Ford reported after the fact on the military airlift of Americans out of Southeast Asia and on the rescue of the crew of the Mayaguez. But he did not report on the evacuation of civilians from Cyprus and Lebanon, nor did Mr. Carter report on airlifts into Zaire during an insurgency in 1977.

"The war powers debate actually flared up before the rescue mission, in response to Mr. Carter's threats of a blockade against Iran. That is scarcely a minor matter; it could involve a direct challenge to a warship, including a Soviet ship. As Senators Church and Javits of the Foreign Relations Committee asked even before the rescue raid, the military options the President keeps threatening clearly should be discussed with leading members of Congress. That view will have a sympathetic advocate in Senator Muskie, Mr. Carter's nominee for Secretary of State.

"The legal scholar Edward Corwin once observed that the Constitution is 'an invitation to struggle for the privilege of directing American foreign policy.' In that struggle, Congress too often confines itself to tactical details, ignoring strategic design. If the will is there, Congress can now insist on a larger role and give real meaning to its War Powers Resolution."

70. Eugene V. Rostow has been among the most compelling critics of war-power legislation, the 1973 Resolution included. Such measures treat an "imaginary disease," in his view, one that resulted when congressional result-orientation was misdiagnosed as "presidential usurpation":

"That popular thesis [that the rules of constitutional balance were somehow violated in Indochina] is a myth. There was no presidential usurpation of Congress' war power in either Vietnam or Korea. . . .

"In the Korean War, and to a much greater extent during the war in Vietnam, we experienced naked political irresponsibility. First, the President and Congress, acting together in a constitutional mode that goes back to the time of Washington, made a series of decisions involving us in the wars. Later, when the wars became unpopular, many of the congressmen who had voted and voted and voted for them suddenly began to say that they were all the President's fault. They claimed that the President had involved the country in war through stealth and concealment. They argued that the difficulties were the result not of human mistakes in carrying out policies duly authorized and pursued, but rather of some structural imbalance in the Constitution. These representatives told their constituents, 'The President has stolen our clothes while we were swimming; we have never really authorized this Presidential war.' Then, having created the myth of presidential usurpation, Congress passed the War Powers Resolution to cure the imaginary disease.

"These events have had a significant effect on the spirit of cooperation between the Executive and Congress. When the Executive Branch deals with congressmen and senators who continue to vote for a war and then say, 'There's no one here but us chickens' after the war becomes unpopular, a mood of suspicion develops which is rather hard to allay. I personally have dealt with congressmen and senators about Vietnam, often reminding them that the Administration had long been trying to achieve goals which they had recommended in political speeches—reconvening the Geneva Conference, for example. Typically, their response was, 'I know that, but you must remember that I have to be elected in my district. The President has to do what must be done. I must take care of my reelection.' In short, a great many men slithered off the deck when the going got rough. This is simply a fact, not a reproach, something that happens in life.

"It is the ultimate reason why the War Powers Resolution and other structural remedies we have been considering are so unrealistic and unreal. President Johnson was very conscious of President Truman's experience in

Korea and of the political fact that Korea became 'Truman's War.' President Truman did not seek the support of a formal congressional resolution. President Johnson had the advantage of the SEATO Treaty, . . . the Tonkin Gulf Resolution, and a number of other congressional actions expressly designed to approve the decisions of four Presidents under the Treaty. This experience is what President Johnson had in mind when he observed, 'I knew that if I wanted Congress with me at the crash landing, they had to be with me at the take-off. But I forgot about the availability of parachutes.'" *Response*, 61 VA. L. REV. 797, 801-03 (1975).

71. *But cf.* the executive views in note 17 above. It is quite conceivable that the Supreme Court would agree to decide such a case if asked, and it is probable that the President would obey a decision against him. *See* pages 206-17 above.

PREPARED STATEMENT OF DAVID S. FRIEDMAN

A. INTRODUCTION

I WOULD LIKE TO THANK THE COMMITTEE FOR THE OPPORTUNITY TO TESTIFY ABOUT THE PROPER SCOPE OF THE PRESIDENT'S WAR POWER. DUE TO THE TIME LIMITATIONS, I WILL SUMMARIZE MY VIEWS BRIEFLY, AND PRESENT THE COMMITTEE WITH THE MORE DETAILED ANALYSIS CONTAINED IN MY ARTICLE.

THE FRAMERS OF THE CONSTITUTION CONSIDERED THE POWER TO INITIATE WAR FAR TOO IMPORTANT TO ENTRUST TO THE PRESIDENT ALONE, AND THEREFORE THE FRAMERS INTENDED THAT THE UNITED STATES REMAIN AT PEACE UNTIL THE CONGRESS AS WELL AS THE PRESIDENT AGREE THAT WAR SHOULD BE INITIATED. FROM 1789 THROUGH JUNE 25, 1950, WHEN WITHOUT ANY CONGRESSIONAL AUTHORIZATION PRESIDENT TRUMAN COMMITTED AMERICAN FORCES INTO COMBAT IN THE KOREAN WAR, THE 32 PRESIDENTS AND 80 CONGRESSES ADHERED TO THE FRAMERS' INTENT. DURING THIS 161-YEAR PERIOD, EVERY PRESIDENT SOUGHT AND RECEIVED CONGRESSIONAL AUTHORIZATION BEFORE HE SUBJECTED THE NATION TO THE DEATH AND DESTRUCTION OF WAR.

PRESIDENT TRUMAN'S DECISION TO FIGHT A MAJOR WAR IN KOREA AND HIS CONCOMITANT CLAIM OF AN UNLIMITED POWER TO MAKE WAR ON HIS OWN INITIATIVE CONSTITUTED A COUP D'ETAT AGAINST THE CONSTITUTION. TRUMAN'S USURPATION OF POWER HAS BEEN FOLLOWED BY HIS SUCCESSORS, SO THAT TODAY THE AMERICAN PRESIDENT POSSESSES SUBSTANTIALLY MORE POWER TO DECIDE THE FATE OF THE NATION AND THE WORLD THAN ANY ROMAN EMPEROR OR ABSOLUTE MONARCH EVER EXERCISED.

B. FRAMERS' INTENT

THE FRAMERS OF THE CONSTITUTION GRANTED A WAR POWER TO THE CONGRESS THAT WAS EXPLICIT AND BROAD. ARTICLE I OF THE CONSTITUTION STATES THAT "THE CONGRESS SHALL HAVE POWER. . .TO DECLARE WAR." MODERN ADVOCATES OF BROAD PRESIDENTIAL WAR-MAKING POWER CLAIM THAT THE CONGRESSIONAL POWER "TO DECLARE WAR" CONSISTS MERELY OF THE AUTHORITY TO ISSUE A FORMAL "DECLARATION OF WAR." THE RECORDS OF THE CONSTITUTIONAL CONVENTION SHOW THAT THE FRAMERS INTENDED THAT THE "TO DECLARE WAR" CLAUSE WAS A GRANT TO CONGRESS OF THE AUTHORITY TO AUTHORIZE WAR AND ALL OTHER MILITARY ACTIONS.

ALTHOUGH ARTICLE II OF THE CONSTITUTION SAYS THAT "THE PRESIDENT _SHALL BE_ THE COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES..." (EMPHASIS ADDED), THIS CLAUSE WAS NOT INTENDED BY THE FRAMERS TO CONFER UPON THE PRESIDENT THE POWER TO MAKE WAR ON HIS OWN INITIATIVE. IN THE _FEDERALIST PAPERS_, ALEXANDER HAMILTON WROTE THAT "COMMANDER IN CHIEF" WAS NOTHING MORE THAN A DESIGNATION OF MILITARY RANK.

C. HISTORICAL PRECEDENT 1789-1950

FROM 1789 UNTIL THE KOREAN WAR -- A 161-YEAR PERIOD WHICH WAS FREQUENTLY MARKED BY SIGNIFICANT THREATS TO THE NATIONAL SECURITY -- PRESIDENTS CLAIMED ONLY THE MOST NARROW POWER TO UNILATERALLY INITIATE WAR: THE AUTHORITY TO PROTECT AMERICAN TERRITORY AND CITIZENS FROM ATTACK. THE PRE-KOREAN WAR PRESIDENTS LACKED THE AUTHORITY TO PROTECT ANY OTHER NATIONAL INTEREST.

FOR EXAMPLE, AFTER DEFENSE OF ITS OWN TERRITORY, MAINTAINING THE BALANCE OF POWER IS THE MOST SIGNIFICANT INTEREST OF ANY NATION. YET PRIOR TO THE KOREAN WAR, DESPITE REPEATED AND SUBSTANTIAL THREATS TO THE BALANCE OF POWER, NO PRESIDENT EVER CLAIMED HE HAD ANY AUTHORITY TO USE THE ARMED FORCES TO PROTECT THE BALANCE OF POWER WITHOUT FIRST OBTAINING CONGRESSIONAL AUTHORIZATION. IN FACT, IN MAY 1940 WHEN THE NAZIS WERE ON THE VERGE OF CONQUERING ALL OF EUROPE, FRANKLIN ROOSEVELT, CITING CONSTITUTIONAL CONSTRAINTS, REMAINED NEUTRAL IN THE MOST MOMENTOUS BATTLE THE WORLD HAD EVER KNOWN. ROOSEVELT UNDERSTOOD THAT ONLY THE COMMITMENT OF AMERICAN MILITARY POWER COULD SAVE FRANCE FROM AN IMMINENT NAZI CONQUEST. HOWEVER, HE ALSO RECOGNIZED THAT UNDER THE CONSTITUTION HE WAS POWERLESS TO COMMIT AMERICAN FORCES. HE SPECIFICALLY ACKNOWLEDGED HIS LOYALTY TO 'CONSTITUTIONAL GOVERNMENT' WHEN HE SOLEMNLY AND SORROWFULLY DECLARED: "ONLY THE CONGRESS CAN MAKE A MILITARY COMMITMENT." SINCE CONGRESS WAS UNWILLING TO AUTHORIZE AMERICAN INTERVENTION TO PRESERVE THE BALANCE OF POWER, THE UNITED STATES REMAINED NEUTRAL AS FRANCE FELL.

D. TRUMAN'S KOREAN WAR COMMITMENT AND EXECUTIVE USURPATION

THUS, ROOSEVELT WAS OBEDIENT TO CONSTITUTIONAL PRINCIPLE DURING THE BATTLE OF FRANCE, EVEN AT THE PRICE OF LOSING A VITALLY IMPORTANT NATION TO THE MOST AGGRESSIVE, TOTALITARIAN, AND GENOCIDAL NATION IN HISTORY. IN CONTRAST, A

MERE TEN YEARS LATER, IN THE KOREAN PENINSULA -- AN AREA THAT THE UNITED STATES GOVERNMENT HAD NEVER BEFORE CONSIDERED VITAL, OR EVEN RELEVANT -- PRESIDENT TRUMAN ACTED WITHOUT ANY LEGISLATIVE AUTHORIZATION, AND COMMITTED AMERICAN FORCES TO A MASSIVE CONVENTIONAL WAR WHICH COULD HAVE EASILY ESCALATED INTO A NUCLEAR CONFLICT. EVEN THOUGH THE TRUMAN ADMINISTRATION ACKNOWLEDGED THAT SOUTH KOREA WAS COMPLETELY IRRELEVANT TO THE DEFENSE OF AMERICAN TERRITORY OR THE MAINTENANCE OF THE BALANCE OF POWER, TRUMAN IMPETUOUSLY DECIDED TO COMMIT AMERICAN FORCES TO SUPPORT SOUTH KOREA IN ITS WAR WITH NORTH KOREA. THUS, FOR THE FIRST TIME IN ITS HISTORY, THE UNITED STATES BEGAN FIGHTING A MAJOR WAR WITHOUT ANY CONGRESSIONAL AUTHORIZATION.

MOREOVER, IN AN ATTEMPT TO JUSTIFY HIS ACTION, TRUMAN FALSELY CLAIMED THAT THE COMMANDER IN CHIEF CLAUSE GRANTED THE PRESIDENT THE POWER TO USE FORCE TO PROTECT ANY "INTEREST OF AMERICAN FOREIGN POLICY." THE ALLEGED POWER TO EMPLOY FORCE TO PROTECT ANY "FOREIGN POLICY INTEREST" IS SO BROAD THAT IT IS VIRTUALLY LIMITLESS, BECAUSE EVEN THE MOST UNIMAGINATIVE PRESIDENT CAN ALWAYS FIND A "FOREIGN POLICY INTEREST" WHICH NEEDS PROTECTION.

TRUMAN'S SUCCESSORS IN THE OVAL OFFICE HAVE CONTINUED HIS USURPATION, AND HAVE BEHAVED AS THOUGH THE ARMY AND NAVY WERE THEIR OWN PERSONAL PROPERTY. POST-KOREAN WAR PRESIDENTS HAVE ARROGATED UNTO THEMSELVES A POWER TO USE FORCE TO ADVANCE SUCH MARGINAL INTERESTS AS PROTECTING DEMOCRACY IN UNDEMOCRATIC LANDS, AIDING THE ANTI-COMMUNIST FACTION IN ANY PETTY THIRD WORLD

DISPUTE, AND PROTECTING THE OIL EXPORTS OF KUWAIT.

UNFORTUNATELY, CONGRESS ACQUIESCED IN THIS PRESIDENTIAL PRACTICE DURING THE 1950'S AND 1960'S. HOWEVER, IN THE 1970'S CONGRESS _ATTEMPTED_ TO REGAIN ITS POWER.

E. _THE WAR POWERS RESOLUTION AND THE JAVITS BILL_

IN 1973, CONGRESS PASSED THE WAR POWERS RESOLUTION. CONGRESS HAD CONSIDERED, BUT THEN REJECTED, AN ALTERNATIVE WAR POWERS PROPOSAL: THE JAVITS BILL. THE JAVITS BILL WOULD HAVE REPUDIATED TRUMAN'S SWEEPING CLAIM OF WAR POWER BY RESTORING THE PRE-KOREAN WAR PROCEDURE. MORE SPECIFICALLY, THE JAVITS BILL RESTRICTED THE PRESIDENT'S AUTHORITY TO COMMENCE WAR TO THE CONSTITUTIONALLY PERMISSIBLE CATEGORIES OF PROTECTING AMERICAN TERRITORY AND AMERICAN CITIZENS. UNFORTUNATELY, THE JAVITS BILL WAS DEFEATED IN CONFERENCE COMMITTEE. THE HOUSE BILL, WHICH PERMITTED THE PRESIDENT TO EXERCISE UNLIMITED WAR POWERS FOR A 60-DAY PERIOD, WAS ENACTED INTO LAW.

NOT ONLY DOES THE WAR POWERS RESOLUTION FAIL TO REVERSE TRUMAN'S USURPATION, IT ALSO CONFERS LEGITIMACY UPON THIS UNCONSTITUTIONAL PRACTICE BY CODIFYING IT INTO THE STATUTE BOOKS. THIS IRRESPONSIBLE SURRENDER BY THE CONGRESS OF ITS CONSTITUTIONAL RIGHTS _AND CONSTITUTIONAL DUTIES_ IS THE GREATEST DEFECT OF THE WAR POWERS RESOLUTION.

THE SECOND GREAT DEFECT OF THE WAR POWERS RESOLUTION IS THAT IT PERMITS A PRESIDENT TO RADICALLY ALTER THE INTERNATIONAL SITUATION BEFORE CONGRESS EVEN HAS THE OPPORTUNITY

TO EXERCISE ITS POWER TO DECIDE UPON WAR. THE PRESIDENT'S COMMITMENT OF AMERICAN FORCES PUTS OVERWHELMING PRESSURE ON CONGRESS TO CONTINUE THE COMMITMENT, EVEN IF CONGRESS WERE TO DECIDE THAT THE PRESIDENT'S ACTION WAS UNWISE AND DANGEROUS. THIS IS BECAUSE IF CONGRESS WERE TO REPUDIATE THE PRESIDENTIAL COMMITMENT, THEN ALL OTHER COMMITMENTS WILL BE DOUBTED BY ANXIOUS ALLIES AND CHALLENGED BY AGGRESSIVE ENEMIES.

THE WAR POWERS RESOLUTION IS FLAWED FOR STILL A THIRD REASON. IN MODERN WARFARE SIXTY DAYS IS FAR TOO LONG TO GIVE THE PRESIDENT AN UNRESTRAINED LICENSE TO MAKE WAR AGAINST ANY NATION WITH ANY WEAPONS. RUSSIAN MISSILES CAN DESTROY AMERICAN CITIES IN JUST THIRTY MINUTES. NUCLEAR WAR CAN OCCUR NOT ONLY AS A RESULT OF A DELIBERATE RUSSIAN ATTACK BUT ALSO, AND MORE PROBABLY, AS A RESULT OF UNINTENTIONAL ESCALATION FROM A CONVENTIONAL WAR OR SUPERPOWER CRISIS. EVEN IF NUCLEAR WEAPONS WERE NOT EMPLOYED DURING THE FIRST 60 DAYS OF THE WAR, CONVENTIONAL WEAPONS CAN INFLICT MILLIONS OF CASUALTIES WITHIN WEEKS, IF NOT DAYS. THUS, CONGRESS ABDICATED ITS RESPONSIBILITY TO PROTECT THE MILLIONS OF AMERICAN SOLDIERS AND CIVILIANS WHO COULD BE KILLED DURING THE FIRST 60 DAYS OF A PRESIDENTIALLY-INITIATED WAR.

IN CONCLUSION, THE WAR POWERS RESOLUTION "LEGALIZES" TRUMAN'S USURPATION AND FAILS TO PROVIDE ANY EFFECTIVE RESTRAINT ON PRESIDENTIAL WAR POWER IN AN AGE OF WEAPONS OF MASS DESTRUCTION. ACCORDINGLY, THE WAR POWERS RESOLUTION SHOULD BE REPEALED. IN ITS PLACE, THE JAVITS BILL, OR SOME OTHER

LEGISLATION WHICH RESTRICTS PRESIDENTIAL WAR POWER TO THE CONSTITUTIONALLY PERMISSIBLE CATEGORIES OF PROTECTING AMERICAN TERRITORY AND LIVES, SHOULD BE ENACTED INTO LAW.

THANK YOU FOR GIVING ME THE OPPORTUNITY TO PRESENT MY VIEWS ON THIS IMPORTANT TOPIC. I WOULD BE HAPPY TO ANSWER ANY QUESTIONS.

WAGING WAR AGAINST CHECKS AND BALANCES--THE CLAIM OF AN UNLIMITED PRESIDENTIAL WAR POWER

I. Introduction

The Framers of the United States Constitution created a system of checks and balances[1] applicable to the decision to commence war.[2] Specifically, the drafters intended that the nation remain at peace until both Congress and the President agreed that the national interest at stake justified the suffering caused by war. Underlying the selection of this standard were three premises: first, that war was a tremendous evil, an event to be avoided if at all possible; second, that the decision to wage war was difficult and thus readily subject to error; and third, that the possibility of such error would be reduced if congressional participation in the decision were mandated.

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[1] *See generally* The Federalist Nos. 47-51 (J. Madison); W. Gwyn, The Meaning of the Separation of Powers 1-8 (1965); L. Henkin, Foreign Affairs and the Constitution 31-35 (1972); A. Sofaer, War, Foreign Affairs and Constitutional Power 60 (1976); Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. Chi. L. Rev. 463, 486-91 (1976). Checks and balances is a means to ensure the proper maintenance of a separation of powers. W. Gwyn, *supra*, at 3. Pursuant to checks and balances, each branch is granted some power over the same activity, along with the constitutional means necessary to avoid interbranch encroachment. The Federalist, *supra*, No. 51, at 355-59 (J. Madison) (B. Wright ed. 1961). In this manner, the checks-and-balances system serves to create a safe and effective method for the distribution of power while avoiding the potential abuse of power. *See* A. Sofaer, *supra*, at 60.

At the foundation of this division of power was the Framers' attempt to safeguard the emergent republic against human fallibility. The Federalist, *supra*, No. 70, at 451 (A. Hamilton); *id.* No. 31, at 237 (A. Hamilton); *id.* No. 73, at 468 (A. Hamilton). Above all, the Framers were concerned that man's ambitious nature would result in an intentional abuse of power. Indeed, in the words of James Madison: "Ambition must be made to counteract ambition." *Id.* No. 51, at 356 (J. Madison).

The Framers originally considered two theories of government: a pure separation of powers system and a separation of powers as modified by checks and balances. A. Sofaer, *supra*, at 60. In adopting the latter theory, the Framers attempted to ensure personal freedom by imposing sufficient restraints on governmental action, thereby preventing excessive authority in one institution. T. Eagleton, War and Presidential Power 4 (1974); *see* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). In *Myers*, Justice Brandeis, employing the popular term separation of powers instead of the more technical phrase checks and balances, stated:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

For over 160 years, the executive and legislative branches acted in accordance with this three-premise theory, and the attendant system of checks and balances. Despite grave threats to the United States itself and American interests abroad, American Armed Forces did not engage in any major military operation without prior congressional authorization. More importantly, throughout this period no President claimed any power to initiate combat in the absence of legislative approval, with the sole exception of authority to protect American citizens and territory. This practice changed radically with the Korean war and since then the practice of Presidents is to claim the authority to employ American military forces to protect any alleged threat to the "national security."

Not only have courts rejected the claim of unlimited executive war power, but the present presidential practice is inconsistent with checks and balances. The first premise of the Framers is as relevant today as it was in the 18th century, since the number of casualties in any modern war ranges from high to cataclysmal. Second, Presidents Truman through Reagan have adopted a foreign policy of global containment, resulting in so broad a definition of national interest that a virtually limitless number of nations and events purportedly threaten national security. Third, contempo-

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Myers, 272 U.S. at 293 (Brandeis, J., dissenting).

[2] Many commentators note that the issue of war-initiating power was of deep concern to the Framers, and therefore was intended to be controlled by the system of checks and balances. *See* T. Eagleton, *supra* note 1, at 10-11. The Framers sought to create a procedure whereby neither the executive nor the legislature alone could make a war-initiating decision, and thus established a system which required approval of both branches to put the nation at war. *Id.* at 10; *see* Casper, *supra* note 1, at 489-91; Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. Cal. L. Rev. 461, 461 (1971) ("divided allocation of warmaking authority reflects the familiar checks-and-balances motif"). *See generally* L. Henkin, *supra* note 1, at 31-35; A. Sofaer, *supra* note 1, at 60. Notably, even advocates of broad executive power concede that warmaking authority is shared by the President and Congress. *See, e.g.*, Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833, 834-35 (1972).

rary Congresses are certainly capable of making a positive contribution in the decision to commence war.

Moreover, a foreign policy of global containment in an age of highly destructive weapons has resulted in American Presidents jeopardizing upon their own initiative the paramount national interest—preservation of the nation-state—for far lesser national interests. This Article argues for the abolition of unlimited executive war power and the restoration of procedure that is both less menacing and more in accordance with the constitutional principle of checks and balances.

II. APPLICATION OF CHECKS AND BALANCES TO THE WARMAKING POWER

A. *The Three-Premise Theory*

Evidence that the Framers intended the war-initiating power[3]

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[3] The constitutional authority to conduct war must be distinguished from the power to initiate war. The power to initiate war requires the approval and consent of both the Congress and the President. *See* L. Henkin, *supra* note 1, at 105-08; A. Schlesinger, The Imperial Presidency 5-7 (1973). One commentator has noted that the power to initiate war is one of "joint possession." A. Schlesinger, *supra*, at 7; *see* W. Reveley, War Powers of the President and Congress—Who Holds the Arrows and Olive Branches? 63-64 (1981). The Second Circuit on a number of occasions has observed that the power to initiate war is a power that is shared by both political branches, and, therefore, both branches must participate in the war-initiating decision. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); DaCosta v. Laird, 448 F.2d 1368, 1370 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 429 F.2d 302, 305-06 (2d Cir. 1970).

In contrast, the power to conduct war belongs exclusively to the President. L. Henkin, *supra* note 1, at 51-52; *see* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827). In a discussion of the President's right to conduct war after an invasion occurs, the Supreme Court stated that "the authority to decide . . . belongs exclusively to the President, and . . . his decision is conclusive upon all other persons." 25 U.S. (12 Wheat.) at 30. Requiring legislative approval for such decisions as determining the movement of troops, weapons, and equipment, where and when a battle would be fought, whom to name as officers to direct each operation, or whether to open a new theater of operations, would undoubtedly cripple the Executive in conducting war. *See* G. Sutherland, Constitutional Power and World Affairs 76-77 (1919); Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid* (pt. 2), 1970 Duke L.J. 453, 463.

Despite exclusive presidential control over the conduct of war, it is clear that the Framers intended to apply checks and balances to the decision to commence war. *See* Wallace, *supra*, at 462-63. The debates at the Philadelphia Convention, *see infra* note 5 and accompanying text, the Ratification Debates, *see infra* note 6, judicial decisions throughout the nation's history, *see infra* notes 100-08, and many commentators, *see* L. Henkin, *supra* note 1, at 33-34; G. Sutherland, *supra*, at 72, state unequivocally that the war-commencing power is a shared power. Notably, Justice Sutherland, a firm advocate of singleness of command and concentration of power in the President once war has been authorized, was to be subject to checks and balances can be garnered from the express language of the Constitution,[4] as well as the debates at the

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equally emphatic in recognizing that the Framers intended to apply checks and balances to the decision to initiate war. Justice Sutherland stated that "[t]he Framers of our Constitution . . . concluded, and I think wisely, that such a power in the hands of a single person was not consonant with the genius and spirit of a republic such as ours." G. SUTHERLAND, *supra*, at 72; *see* A. SOFAER, *supra* note 1, at 56.

[4] Advocates of a broad presidential power to commence war have argued that the Commander in Chief clause, U.S. CONST., art. II, § 2, cl. 1, is an unrestricted grant of power to the President to utilize the armed forces as he sees fit. *See* U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966) [hereinafter cited as *1966 State Dep't Memo*]; U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173 *passim* (1950) [hereinafter cited as *1950 State Dep't Memo*]. These advocates, therefore, construe the Commander in Chief clause expansively, and narrowly construe the clause granting Congress the power to declare war. U.S. CONST., art. I, § 8, cl. 11. This interpretation of the interplay of these clauses, however, is contrary to the original meaning of these clauses. In fact, the Framers intended the function of Commander in Chief to be nothing more than the supreme commander of the American Army and Navy. THE FEDERALIST, *supra* note 1, No. 69, at 446, 450 (A. Hamilton); *see* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 228 (4th rev. ed. 1957). Professor Corwin stated that the only power the Framers intended to grant the President under the Commander in Chief clause is the authority to be

> top general and top admiral of the forces provided by Congress, so that no one can be put over him or be authorized to give him orders in the direction of the said forces; but otherwise he will have no powers that any high military or naval commander not also President might not have.

E. CORWIN, *supra*, at 228.

Clearly, a grant of authority to commence war unilaterally was not contemplated. *Id.* Rather, the clause expresses the Framers' intent that the President, once war has been authorized by Congress, was to possess an untrammeled power to command and to direct the movements of the naval and land forces. *Id.* Moreover, despite claims by advocates of broad executive warmaking powers that the grant of the power "to declare war" is the authority only to issue a formal declaration of war, it is evident that the Framers understood "declare" to mean authorize, make, or commence. L. HENKIN, *supra* note 1, at 80-81; Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 695 (1972); *see* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800). In Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971), the First Circuit cited Bas v. Tingy with approval and quoted the following language from that early case: "The hostilities against France in 1799 were . . . an authorized but undeclared state of warfare." *Id.* at 33.

To be sure, the clause "to declare war" initially was worded to grant "[t]he Legislature of the United States . . . the Power . . . to make war . . . ." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 167-68 (rev. ed. 1937). This clause was considered by the full Convention on August 17, 1787, *id.* at 318-19, and amended by deleting "make" and inserting "declare" in its place, *id.* According to Madison, this language change was needed to leave "to the Executive the power to repel sudden attacks." *Id.* at 318. Delegates King and Ellsworth propounded an additional reason for this alteration: that "make" war might be understood to mean "conduct" war which was an established executive function. *Id.* at 319. Thus, the change was not designed to take the warmaking initiative from Congress, but was intended instead to permit the President simply to defend American territory and to direct movement of the armed forces, following congressional authorization of war.

Philadelphia Convention[5] and the state ratification conventions.[6] It appears that imposition of the checks-and-balances standard to the war-initiating decision was founded upon three premises.

The first premise is derived from the Framers' attitude toward war. As opposed to viewing war as an ennobling event, the Framers regarded war as an event of grave consequence. Indeed, many commentators have concluded that statements of the Framers made during the constitutional debates manifest an unequivocal revulsion toward war's destructiveness.[7]

Second, the Framers perceived that defining national interests worthy of protection was not objective and error-free but a subjective and difficult determination.[8] Further, even assuming universal agreement as to the scope of national interest, the Framers realized that the decision as to whether any given national interest outweighed the potential misery of war was similarly subject to error.[9]

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[5] *See* Debates in the Federal Convention of 1787, at 418-19 (G. Hunt & J. Scott ed. 1920) [hereinafter cited as Debates in the Federal Convention]. *But see* Lofgren, *supra* note 4, at 675 ("the manner in which the nation should be committed to war was not one of the chief concerns of the delegates [at the] Philadelphia Convention").

[6] The ratifiers expressed views on the war-initiating decision similar to those put forth at the Philadelphia Convention, *see supra* note 5 and accompanying text, concluding that the war powers should be shared, *see* A. Sofaer, *supra* note 1, at 48-51. According to James Wilson:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: and this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

II The Debates in the Several State Conventions on the Adoption of the Federal Constitution in 1787, at 528 (J. Elliot 2d ed. 1836) [hereinafter cited as Debates]. Significantly, the Commander in Chief power received "extraordinarily short treatment." A. Sofaer, *supra* note 1, at 48.

[7] *See, e.g.*, Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 36 (1972). The Framers' aversion to war, according to Raoul Berger, influenced their decision to split the warmaking powers. *Id.* Similarly, Justice Story recognized the Framers' attitude toward war as bearing upon the division of warmaking power: "[T]he power of declaring war is . . . so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation . . . ." *Id.* at 82 (quoting 3 J. Story, Commentaries on the Constitution of the United States § 1166, at 60 (1833); *see* 1 M. Farrand, *supra* note 4, at 316; Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243, 1284 (1969) ("[t]he Framers recognized the potentially momentous consequences of foreign conflict and wished to check its unilateral initiation by any single individual or group"). *See generally* Rostow, *supra* note 2, at 841 (discussing whether the drafters of the Constitution intended "to make it hard to go to war, and easy to make peace").

[8] Note, *Congress, the President and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771, 1783 (1968). A nation can decide that some interests are important enough that safeguarding them is worth the cost of war. *Id.*; B. Brodie, War and Politics 342-45 (1973). In addition to the paramount goal of retaining the independence and integrity of the United States, the maintenance of a balance of power, the advancement of the import and export of trade, and the promotion of ideological aims abroad were deemed to be legitimate

Third, the Framers believed that congressional participation in a decision to initiate war would reduce the probability that American citizens would be required to fight in an unnecessary

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objectives of the National Government. *See* THE FEDERALIST, *supra* note 1, No. 6, at 111-13 (A. Hamilton); W. ROSTOW, THE DIFFUSION OF POWER 607-10 (1972). *See generally* F.R. DULLES, AMERICA'S RISE TO WORLD POWER 1 (1954).

At all times, the proper scope of the national interest is subject to debate. As one commentator noted:

> We hear much glib talk about those interests, as if the speakers knew exactly what they are or ought to be. Yet they are not fixed by nature nor identifiable by any generally accepted standard of objective criteria. They are instead the products of fallible human judgment, on matters concerning which agreement within the nation is usually less than universal.

B. BRODIE, *supra*, at 343. Some have defined national interest broadly. For example, in 1812, Speaker of the House Henry Clay and Senator John C. Calhoun argued that the United States had an interest in maintaining its trade relations with every nation and had an interest in defending the international legal principle of freedom of the seas. R. FERRELL, AMERICAN DIPLOMACY 136-38 (3d ed. 1975). Other members of Congress, however, failed to adopt such a broad definition of national interest. *Id.* at 139. More contemporary assessments of national objectives may or may not include avoidance of nuclear conflict, creation of a more stable world order, or maintenance of the credibility of a promise to defend other nations from attack. *See* R. CLOUGH, EAST ASIA AND U.S. SECURITY 29 (1975); W. ROSTOW, *supra*, at 605-11.

[9] The fact that a national interest is at stake does not end the inquiry as to whether a war should be commenced. Indeed, the question remains whether the national interest is worth the suffering of war. This decision is more subjective, more difficult, and more prone to error than the decision of defining the scope of national interest. The Framers were determined to avoid the misery attendant to war unless the gain to the national interest outweighed the costs. *See War Powers Legislation, 1973: Hearings on S. 440 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 23 (1973) (statement of Prof. Bickel) [hereinafter cited as *Hearings on War Powers Legislation*]; S. REP. No. 797, 90th Cong., 1st Sess. 7 (1967) [hereinafter cited as NATIONAL COMMITMENTS REPORT]; W. REVELEY, *supra* note 3, at 102; Reveley, *The Power to Make War*, in THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 93-94 (1976) [hereinafter cited as Reveley, *The Power to Make War*]; Berger, *supra* note 7, at 82; Reveley, *supra* note 7, at 1284 & n.138; Note, *supra* note 8, at 1784.

During the state ratification debates, James Wilson, one of the most active participants in the Philadelphia Convention, commented that the Framers sought to ensure that war would be initiated only after the President and Congress concurred that the national interest at stake warranted military involvement. II DEBATES, *supra* note 6, at 528. One commentator noted:

> Presumably, any resort to war . . . is justified only because in some sense United States security is thought to be at stake. . . . That decision [to defend] will depend on a variety of factors—proximity to the United States; the value of the country as an ally; other United States interests involved, such as military bases and military sites; and the nature of the aggression and the aggressor.

Note, *supra* note 8, at 1783.

war.[10] Indeed, Alexander Hamilton noted that "it cannot be doubted that [joint] participation would materially add to the safety of the society,"[11] and regarded congressional participation as reducing the probability of erroneously defining the national interest.[12] From these three premises, the Framers concluded that congressional as well as presidential authorization is to be required to initiate war.[13]

B. *Assumed Authorization*

Although the system of checks and balances articulated in the Constitution applies at all times to the decision to commence war, in certain instances the imperatives of the system can be fulfilled without actual congressional authorization;[14] that is, a legislative grant of authority to the President to wage war at times can be assumed. This assumed authority can be invoked only when the following condition is satisfied: a congressional vote in favor of war is a foregone conclusion.[15] Clearly, the circumstances in which it can be properly asserted that congressional approval is a foregone conclusion are rare.[16]

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[10] The late Alexander Bickel, an eminent constitutional lawyer, stated that the Framers' requirement of congressional participation reduces the possibility that the nation might shed its blood in vain. He observed that "Congress and the President are indeed capable of acting unwisely, singly or together, but hopefully less likely together than singly." *Hearings on War Powers Legislation*, *supra* note 9, at 23. Similarly, Professor Reveley recognized that democracy "requires federal officials to take clear responsibility for national action and account for it to the voters, all on the assumption that the full play of representative democracy is most likely to produce policy in the general interest." Reveley, *The Power to Make War*, *supra* note 9, at 93. Finally, the Report of the Senate Foreign Relations Committee states: "Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions and, in so doing, limited the ability of anyone to impose tyranny or disaster on the country." National Commitments Report, *supra* note 9, at 26-27.

[11] The Federalist, *supra* note 1, No. 75, at 478 (A. Hamilton).

[12] *Id.*

[13] The Framers clearly and explicitly intended to foreclose unilateral executive action to commence war. National Commitments Report, *supra* note 9, at 8-9; T. Eagleton, *supra* note 1, at 11-12; W. Reveley, *supra* note 3, at 15-16, 54-56, 314 n.14; Berger, *supra* note 7, at 82; Reveley, *supra* note 7, at 1284 n.138. At the North Carolina Convention, Speaker James Iradell stated that "[t]he President has not the power of declaring war by his own authority . . . ." IV Debates, *supra* note 6, at 107. Major Pierce Butler, a delegate to the Federal Convention, voiced similar concerns at the South Carolina Convention. *See id.* at 263. As a Congressman, Abraham Lincoln reiterated the intent of the Framers that no one branch possess the power to commence war. A. Schlesinger, *supra* note 3, at 42-43. The Constitution was framed, Lincoln noted, so " 'that *no one man* should hold the power of bringing this oppression upon us.' " Letter from Abraham Lincoln to W.H. Herndon (Feb. 15, 1848), *quoted in* A. Schlesinger, *supra* note 3, at 43 (emphasis in original). If Congress should favor war while the President opposes it, Congress similarly would be without power to put the nation at war. *See* C. Berdahl, War Powers of the Executive in the United States 93-96 (1921). *See generally* Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 Am. J. Int'l L. 1, 7, 10-11 (1918). Congress, however, typically has been the less militant branch. *See* Foundations of American Diplomacy 1775-1872, at 261-62 (R. Ferrell ed. 1968) [hereinafter cited as Foundations of American Diplomacy] (suggesting that the President is more apt to favor war than Congress).

Only a single case occurred to the Framers in which the requirement of legislative authorization can be fulfilled without an actual statute: surprise attack against the United States when Congress is not in session.[17] The Framers' decision to exempt this category and the decision's underlying rationale provide guidance in identifying other situations, if any, in which assumed authorization can fulfill checks-and-balances requirements.

Inherent in the exemption of an attack on American territory is the recognition that defense of the American state is a national interest of the highest order.[18] Only the American state can defend the lives and rights of the American people.[19] Absent this protection, the foreign invader would subject the American people to its unrestrained power.[20] The unique importance of this interest led the Framers to conclude that every legislator certainly would have voted in favor of a war to defend the American state.[21]

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[14] The Framers believed that a unilateral presidential power to defend the nation's territory from attack when Congress was out of session could be exercised without explicit congressional authorization. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 8-9; 2 M. FARRAND, *supra* note 4, at 318-19; Lofgren, *supra* note 4, at 700; Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1; 9 (1972).

[15] Note, *supra* note 8, at 1783.

[16] *Id.*

[17] Mitchell v. Laird, 488 F.2d 611, 613-14 (D.C. Cir. 1973); Note, *supra* note 8, at 1784; *see* U.S. CONST. art. II, § 2, cl. 1. In *The Prize Cases*, the Supreme Court stated that the President possesses a unilateral authority to protect the political independence of the state. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863). At issue in *The Prize Cases* was the validity of President Lincoln's unilateral decision to blockade the ports of the rebellious South. *See id.* at 665-66. In dictum, the majority opinion accepted the premise that in the case of surprise attack against American territory, congressional authorization is conclusively presumed, stating that "[i]f war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force." *Id.* at 668. Therefore, in such circumstance, the President need not await special legislative authorization. *Id.*

The unqualified recognition of the legality of unilateral use of force by a President in defending the territorial integrity and political independence of the United States was reaffirmed during the litigation concerning the constitutionality of the Vietnam war. For example, in Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia stated:

> [W]e are unanimously of the opinion that there are some types of war which without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack . . . . Otherwise the country would be paralyzed. Before the Congress could act the nation might be defeated or at least crippled. . . . Any other construction of the Constitution would make it self-destructive.

Id. at 613.

The conclusion to be drawn from the foregoing discussion is that checks and balances is the principle[22] and actual authorization by statute is the rule.[23] Naturally, any exception to the rule must be drawn narrowly so as to ensure consistency with the principle of checks and balances.

Although the Framers considered only a single case in which assumed authorization could be invoked,[24] they decided to rely upon governmental practice to establish any additional exceptions.[25] The claims and actions of successive Presidents, the responses of the Congresses, and judicial review of the political branches' interpretation of checks and balances were to be used to flesh out the checks-and-balances system.[26] It is important to remember, however, that in implementing this authority, there must forever be compliance with constitutional principles.[27]

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[18] *See* U.S. Const. art. IV, § 4. Pursuant to article IV of the Constitution, the United States guarantees "to every State in [the] Union a Republican Form of Government, and . . . protect[s] each of them against Invasion . . . ." *Id.* In addition to protecting the lives, liberty, and properties of its citizens from external threats of invasion, the state provides internal protection and security from individuals within the state. *See* R. Gilpin, War and Change in World Politics 15-18 (1981); J. Herz, The Nation-State and the Crisis of World Politics 126-28 (1976). Since the state provides its citizens with these essential benefits—protection from both internal and external threats—it may be argued that the Framers assumed that any reasonable man would be willing to give his life to preserve the state.

[19] *E.g.*, J. Herz, *supra* note 18, at 100-04. According to Professor Gilpin: "The state is sovereign in that it must answer to no higher authority in the international sphere. It alone defines and protects the rights of individuals and groups. Individuals possess no rights except those guaranteed by the state itself; they have no security save that afforded by the state." R. Gilpin, *supra* note 18, at 17.

[20] *E.g.*, J. Herz, *supra* note 18, at 100-04, 126-28.

[21] 2 M. Farrand, *supra* note 4, at 318; Note, *supra* note 8, at 1783.

[22] *See supra* notes 2-12 and accompanying text.

[23] *See supra* note 13 and accompanying text.

[24] *See supra* note 17 and accompanying text.

[25] *See* Reveley, *Constitutional Allocation of War Powers Between the President and Congress: 1787-1788*, 15 Va. J. Int'l L. 73, 82-83 (1974). It is apparent that the Framers deliberately refrained from providing an answer for every situation that might arise. *Id.* Realizing the difficulty in foreseeing and outlining all possible exigencies, the Framers observed that some areas would be better served by practice and experience. *Id.* In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall stated that the function of a constitution is to state fundamental principles and not to provide an exact answer to every situation. *Id.* at 407. Chief Justice Marshall's analysis, although directed at the relationship between a national bank and the congressional commerce power, may also be applied to the assumption of legislative authorization and the principle of checks and balances. *See id.* at 407-13.

III. THE CLAIMS AND ACTIONS OF THE POLITICAL BRANCHES BEFORE AND AFTER THE KOREAN WAR

In examining the distribution of the warmaking power between the executive and legislative branches, a number of fundamental constitutional principles must be borne in mind.[28] The relevant authorities in determining the Constitution's allocation of the war power are the claims and actions of the executive branch and Congress,[29] judicial review,[30] and the Framers' intent.[31] Although the question of whether judicial precedent overrides the original understanding in constitutional interpretation is largely unsettled,[32] the initiatives of the political branches must yield to both precedent[33] and original understanding[34] when in conflict with either.

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[26] *See infra* notes 29-31 and accompanying text. The Framers were very conscious of the interrelationship among the three branches of government. Madison's view of the "intentionally 'mixed' powers" served as an insight into the purposes of the ambiguity. *See* A. SOFAER, *supra* note 1, at 58. By not having a single superior branch, the interpretations of each branch are valued and checked against the other two, thus serving as the fulcrum of the balance of power. *Id.*

[27] *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177-78 (1803). If the Congress were permitted to act in a manner contrary to the Constitution, "[i]t would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits." *Id.* at 178. It is therefore accepted that the officials of the executive and legislative departments can utilize, but not exceed, the specific powers accorded them by the Constitution. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

[28] *See infra* notes 29-34 and accompanying text.

[29] *See* Rostow, *supra* note 2, at 846-48. Generally, courts regard the practice of the political branches as a relevant authority in interpreting the Constitution. *See id.* at 850; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); Missouri v. Holland, 252 U.S. 416, 433 (1920); United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915).

[30] *See* Rostow, *supra* note 2, at 850. The Supreme Court, through judicial interpretation, has formulated rules of constitutionality, and these rules "have dominated constitutional usage and doctrine." *Id.*

[31] Bell v. Maryland, 378 U.S. 226, 288-89 (1964) (Goldberg, J., concurring). In *Bell*, Justice Goldberg stated that, "[o]ur sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purpose of the Framers." *Id.* (Goldberg, J., concurring). Other cases also have stated this general proposition that the original understanding is a relevant authority in constitutional interpretation. *See* Powell v. McCormack, 395 U.S. 486, 532-41 (1969) (considering the Framers' intention to deny Congress the power to vary membership qualifications); Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (determining the original purpose of the fourteenth amendment); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872). This proposition certainly has application in determining the proper allocation of warmaking authority. *See* A. SCHLESINGER, *supra* note 3, at 13-23. Only investigation into the intention of the Framers can disclose the true meaning of the Constitution. *Id.* at 13; *see* Lofgren, *supra* note 4, at 673; Van Alstyne, *supra* note 14, at 5-13.

A. *Pre-Korean War Practice*

The thirty-two Presidents and eighty Congresses of the pre-Korean war period were presented with continual threats to a wide range of important national interests, including the political independence and territorial integrity of the United States,[35] the maintenance of the balance of power,[36] the export and import trade,[37] ideological concerns,[38] and the protection of American citizens.[39]

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[32] *See generally* Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 278-352 (1981). The engagement in noninterpretive review by the Supreme Court when it looks "to a value judgment other than the one constitutionalized by the Framers" is a subject of controversy. *Id.* at 279; *see* J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

[33] W. REVELEY, *supra* note 3, at 206. It has been noted that "[j]udges are . . . better able than politicians to avoid the dangers accompanying constitutional evolution by practice. When ruling on the authority of the President or Congress, courts are less likely to adopt self-serving interpretations." *Id.* Moreover, the Supreme Court has held the practice of the President or Congress unconstitutional in a number of cases. *E.g.*, United States v. Nixon, 418 U.S. 683, 713 (1974); Powell v. McCormack, 395 U.S. 486, 550 (1969); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952).

[34] *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374-87 (1981) (Framers' intent ranks higher in constitutional hierarchy than practice). In Powell v. McCormack, 395 U.S. 486 (1969), Representative Adam Clayton Powell, Jr. of the 18th Congressional District of New York claimed that he was unlawfully excluded from taking his seat in the House of Representatives. *Id.* at 489. Although Powell met the standing requirements of age, citizenship, and residence contained in article I, section 2, of the Constitution, *id.* at 489, the House claimed that it had the power to exclude him for certain acts of misconduct, a ground which is not mentioned in article I, section 2, *id.* at 491. John McCormack, Speaker of the House of Representatives and named as a defendant, claimed that since previous Congresses had excluded member-elects on the ground of misconduct, the congressional practice was authority for a power to exclude on grounds other than those specified in article I. *See id.* at 544-45. Moreover, the House defendants argued that in the event of a conflict between practice and original understanding, practice should take precedence over original understanding. Rejecting this argument, the Supreme Court stated that the original understanding is a higher authority than the practice of previous Congresses. *Id.* at 546-47. The broad exclusion practice, therefore, was unconstitutional because it conflicted with the original understanding. *Id.*

Significantly, Professor William Van Alstyne noted: "The claim that constitutional legitimacy may be settled by the sheer weight of an unexamined governmental practice . . . ought not lightly be accepted. . . . [R]ecent practice is perhaps the *least* instructive source of constitutional legitimacy." Van Alstyne, *supra* note 14, at 3 (emphasis in original). Van Alstyne observed that the executive and legislative branches' reliance on their own behavior as authority was expressly and unequivocally rejected in *Powell* and *Youngstown*. *Id.* at 4-5.

[35] *See* R. LECKIE, THE WARS OF AMERICA 222-29 (1968). During the period immediately following the formation of the American nation, the very existence of the National Govern-

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ment was threatened by a lack of funds, a lack of administrative guidelines, and a lack of armed forces. *Id.* at 222.

In 1814, the British planned a major invasion of the United States which might have permanently detached large portions of territory from the American state. R. Weigley, The American Way of War: A History of United States Military Strategy and Policy 51 (1973). The small, ill-equipped and uncoordinated American force was in real danger of being defeated by the British with the consequent surrender of American territory and relinquishment of the newly won independence. In fact, when British forces attacked the nation's capital in 1814, the defending militia fled Washington, D.C. The British then took control of the national capital, convened a mock session of Congress, and debated whether they should "burn the Yankee capital down?" R. Ferrell, *supra* note 8, at 143. The motion passed and the British did just that, setting fire to the Capitol and to the White House. *Id.*

[36] *See* R. Leckie, *supra* note 35, at 627-29, 677-707. Napoleon, who ruled France from 1799 to 1815, sought to destroy the balance of power in Europe and make France predominant. R. Ferrell, *supra* note 8, at 125. His attempt to upset the European balance of power during these critical years in our nation's history meant a potential or actual threat to the American state. *Id.* The period between 1815 and 1914 was one of relative peace and stability in Europe. This permitted the United States to concentrate on its domestic policies. Americans embarked upon a massive settlement and development of the states west of the Mississippi River, engaged in a war with Mexico over Texas and other territory in the Southwest, R. Leckie, *supra* note 35, at 320-24, and experienced a civil war to resolve such issues as states' rights and slavery. *Id.* at 382-85.

The next surge of activity involving the world balance of power came with the Spanish-American War in the late 1800's. *See id.* at 542-49. World balance received its greatest threat during the periods accompanying the two World Wars when German forces were on the verge of shifting the entire European power structure to an unbalanced domination by Germany. *See id.* at 627-29, 677-707.

[37] Foundations of American Diplomacy, *supra* note 13, at 11. From 1775 to 1872, "[p]rotection and increase of commerce was an end of American diplomacy second only to independence." *Id.* at 9. Moreover, in the post-World War II world, the health and prosperity of the American economy is increasingly dependent upon international trade and investment. R. Keohane & J. Nye, Power and Interdependence 8-19 (1977). It is recognized that international trade is an important determinant of the level of production, employment, and inflation. *See, e.g.*, W. Schneider, Food, Foreign Policy, and Raw Materials Cartels 39-50 (1976).

[38] *See* F.R. Dulles, *supra* note 8, at 1. Historian Foster Rhea Dulles observed that the encouragement of freedom thoughout the world has been a concern of American foreign policy since the formation of the Republic. *Id.* America's commitment to advancing freedom within foreign nations is grounded in both altruism and self-interest. S. Hoffmann, Duties Beyond Borders 108-20 (1981). Under the premise that all human beings are equal and entitled to protection for their lives, liberty and property, America has sought to bring these benefits of democracy to people everywhere. *See id.* at 97, 108-10. In addition, America has sought to promote human rights in order to create more moderate and stable nations. It is argued that a government which mistreats its own people is also likely to be an aggressive nation. Thus, the promotion of human rights would diminish the propensity of the dictatorial regime to commit acts of violence against its own citizens and its neighbors. *Id.* at 110-11.

In addition to the desire to bring democracy and human rights to nations less fortunate than our own, the United States has declared that it has an interest in preserving peace

Yet, with the sole exception of the protection of American citizens,[40] no President ever claimed that congressional authorization

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throughout the world. B. Brodie, *supra* note 8, at 62. To be sure, it has been stated that "'an orderly world requires a single durable structure of world security, which must everywhere be protected against aggression: if aggression were permitted to go unpunished in one place, this by infection would lead to a general destruction of the system of world order.'" *Id.* at 116.

[39] Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 Cal. L. Rev. 623, 655-56 (1972). Since the late 1700's, there have been roughly 80 cases of military operations to protect citizens abroad. *See id.* at 654. In this regard, Chief Justice Marshall has stated:

> The *American* citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the *American* government in his favour, would be considered a justifiable interposition.

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804) (emphasis in original).

[40] *See* Wormuth, *supra* note 39, at 658-59. Under certain conditions, throughout the pre-Korean war period Presidents and Congress conceded and courts endorsed assumed authorization for the purpose of rescuing American citizens who were in immediate danger of losing their lives. The conditions under which Presidents protected American citizens were that no rescue mission could be dispatched unless the maximum number of American lives to be lost were zero or de minimis and that these low casualties could be predicted before the mission was dispatched with nearly complete certainty. R. Russell, The United States Congress and the Power to Use Military Force 242-43, 312 (1967) (unpublished Ph.D. thesis available from Fletcher School of Law and Diplomacy Library); *see* J. Javits, Who Makes War 51 (1973). The practice of Presidents complied with this stringent condition on all occasions when military force was used to protect American citizens. Even though the armed forces of the United States frequently landed on foreign soil for the purpose of protecting American citizens, Presidents never sent an American force to rescue endangered Americans in a strong nation which could fight back and inflict heavy casualties on the American soldiers. *See* J. Javits, *supra*, at 106-11. Rather, they dispatched landing parties against either weak states, R. Russell, *supra*, at 312, or people who were not even organized into a state, *id.* at 242-43.

The response of successive Congresses to these presidential rescue missions was approval. Moreover, in the case of protecting American citizens in primitive, stateless territories or in states with weak, impotent military forces the judicial branch endorsed the presidential claim and congressional acceptance of the executive practice. In The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court, in dictum, stated: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government." *Id.* at 79.

In addition, the practice of the political branches was consistent with the Framers' three-premise theory. The Framers' concern about the suffering caused by war was not violated in the case of conducting military operations against an impotent enemy. The maximum number of American casualties assuredly would be small since the American landing party possessed overwhelming military superiority. Moreover, without the deployment of the rescue party, the American citizens very probably would have been killed. Consequently, the net effect of dispatching a rescue party was the saving of American lives.

The fact that the presidential practice of claiming a power to protect citizens was deliberately and repeatedly accepted by successive Congresses, was endorsed by the courts, and could be assumed until President Truman did so in June 1950.[41] Successive Presidents, Congresses, and courts agreed that the scope of assumed authorization extended no further than the protection of American citizens in certain circumstances and the defense of the American state.[42]

It may be argued, however, that the modern world poses far greater threats to national interests than those faced by pre-Korean war Presidents. It is useful in this connection, therefore, to

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was consistent with the checks-and-balances system, leads to the conclusion that legislative authorization can be properly assumed in the case of protecting American citizens in stateless territories and powerless states. J. JAVITS, *supra*, at 105-11. Consequently, the executive branch acquired the unilateral authority to commence military operations in this narrow situation.

In summary, before the Korean war, Presidents' unilateral warmaking authority was limited to the narrow categories of protection of the state and citizens under limited conditions.

[41] *See* A. SCHLESINGER, *supra* note 3, at 135-36. Senator William Spong, a member of the Senate Foreign Relations Committee, observed that "[t]he sending of armed forces to Korea in 1950 by President Truman without congressional authorization or consultation is the first instance of a President claiming an inherent power to act 'in the broad interest of American foreign policy.'" Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1, 7 (1971) (footnote omitted).

It is important to emphasize that although many Presidents actually *used* the armed forces for purposes other than the protection of state and citizens prior to the Korean war, no President ever *claimed* a power beyond the narrow authority of defending state and citizen. Instead, Presidents veiled their true purposes with a claim of protection of American territory or citizens. J. JAVITS, *supra* note 40, at 86-95. For example, in 1846 President Polk rationalized an attack on Mexico by claiming he was defending American territory, specifically Texas, from Mexican attack. *Id.* Similarly, President McKinley's avowed military aim in China during the 1900 Boxer Rebellion was to protect American citizens in Peking. E. CORWIN, *supra* note 4, at 212. Perhaps the greatest obfuscation of the true purpose of a military operation was Franklin Roosevelt's unauthorized naval deployments against Germany in 1941. *See* A. SCHLESINGER, *supra* note 3, at 111-13. In the summer and fall of that year, President Roosevelt ordered the American navy to convoy British vessels into waters which were patrolled by German submarines, and to "shoot-at-sight" any German submarine which sought to attack the American convoy. *Id.* at 112. Although done to aid Britain and preserve the European balance of power, Roosevelt asserted that his convoy and "shoot-at-sight" orders were designed to protect American territory and citizens; he never claimed any warmaking power beyond the traditional authority. *Id.*

[42] *See supra* notes 39-41 and accompanying text. Political scientist Francis Wormuth and noted historian Arthur M. Schlesinger, Jr., both concluded that it was not until Truman made a claim of general warmaking power at the outbreak of the Korean war that any President had claimed a unilateral power beyond the two traditional and narrow categories. A. SCHLESINGER, *supra* note 3, at 138; Wormuth, *supra* note 39, at 664. Congress, after thoroughly studying the history of presidential warmaking, also concluded that Truman's claim of a general war power was without precedent. A 1967 Senate Report in referring to Truman's claim states, "here, clearly expostulated, is a doctrine of general or 'inherent' Presidential power—something which had not been claimed by previous Presidents." NATIONAL COMMITMENTS REPORT, *supra* note 9, at 16; *see* Spong, *supra* note 41, at 7.

examine the dangers that confronted Presidents and Congresses for a period of over 150 years. Despite glib assertions of the novelty and gravity of the post-Korean war period, the threats confronting the United States during the first quarter century of government under the Constitution imperiled the very independence and survival of the nation.[43] The United States Government fought wars against France and England, the two greatest powers of that period, to protect its existence, preserve the balance of power, and defend its commerce.[44] Notably, both conflicts, the Franco-American War[45] and the War of 1812, were authorized by statute.

The Monroe Doctrine, which proclaimed that the United States Government would view any attempt by a European nation to deprive a Latin American state of its newly won independence as a threat to the security of the United States, was announced by President Monroe in 1823.[46] Certainly, maintenance of a balance of power within the nation's own hemisphere is a crucial interest. Yet, when Colombia asked Monroe's Secretary of State, John Quincy Adams, whether the United States would defend Colombia from a Spanish invasion, Adams replied that congressional authorization could not be assumed, and therefore statutory authorization was required before the United States would implement the doctrine with force.[47]

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[43] *See supra* note 35 and *infra* note 44.

[44] R. Leckie, *supra* note 35, at 223-29; *see supra* notes 35-38. During the early years of the United States Government, the environment of war still existed. British influence was still being felt in the Northwest since Britain had not removed the troops from seven posts as it originally had agreed. *Id.* at 223. At the same time, the Revolutionary French Government asked the United States to live up to the Treaty of Alliance which the United States had signed with the French monarchy in 1778. R. Ferrell, *supra* note 8, at 75. As a result, Britain began detaining French-bound American vessels in order to prevent American supplies from reaching France. *Id.* at 224. The world balance of power was endangered as a result of the cataclysmic war between Britain and France which began in 1793. *See id.* at 223; A. Sofaer, *supra* note 1, at 150.

[45] For a discussion of presidential actions during the Franco-American War and the War of 1812, see R. Russell, *supra* note 40, at 89-102, 130-41. *See generally* C. Berdahl, *supra* note 13, at 103; *infra* note 52.

In the early days of the Republic, the decision to fight to protect American honor against France in 1798 and Tripoli in 1801 was authorised by joint resolution. A. Sofaer, *supra* note 1, at 139-64, 214-16. In 1797, France issued a decree which charged any American working as a crewmember on a ship of an enemy nation of France with piracy. France also began seizing American merchant vessels that did not comply with the edict. *Id.* at 139. Eventually, "Congress transformed the national policy from peace to war, without a formal declaration." *Id.* at 145.

[46] E. Tatum, The United States and Europe 250 (1967). The "unsettled state" of Europe during the period preceding the Monroe Doctrine was a constant threat to the United States, since any incident involving England inevitably would disturb American interests. *Id.* at 252-53. Concomitant with the growth of resentment against Europe was a flourishing of an American spirit of nationalism. Fueled by "[t]he feeling that the United States and the New World were . . . different from Europe and England, . . ." American policymakers looked to maintaining the status quo amidst the turmoil of Europe. *Id.* At the same time, Spanish colonies in South and Central America were gaining independence as emerging republics. *Id.* at 260-61. The instability of these fledgling nations gave rise to the possibility that France would intervene in their affairs. *Id.* at 253-55. Thus, the United States barred all foreign nations from South America. President Monroe enunciated the doctrine which

One of the greatest threats to the global balance of power and to the American state occurred when Nazi Germany attacked France and was on the verge of defeating the French Armed Forces and of occupying France.[48] On June 14, 1940, French Premier Paul Reynaud made an urgent request of President Roosevelt to commit American Armed Forces to aid France. The French leader pleaded: " 'The only chance of saving the French nation, vanguard of democracies, and through her to save England, by whose side France could then remain with her powerful navy, is to throw into the bal-

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warned "Europe against interference across seas . . . ." Perkins, *Deter the Continental Allies in the Western Hemisphere*, in THE MONROE DOCTRINE 19 (A. Rappaport ed. 1964). Although at the time, the United States lacked the necessary power to implement effectively the doctrine, the admonition nevertheless bore an impact, primarily because the British, anxious to maintain stability in South America, were able to patrol the waters of both North and South America and ward off potential intrusion. *See* E. TATUM, *supra*, at 263.

[47] *See* Nerval, *Egoistic from Its Pronouncement*, in THE MONROE DOCTRINE 92, 93 (A. Rappaport ed. 1964). In July 1824, the Colombian Minister to the United States, expressed his joy " 'that the government of the United States [had] undertaken to oppose the policy and the ulterior designs of the Holy Alliance.' " *Id.* at 93. The Colombian Minister then inquired as to the nature of resistance the United States would use against any interference. In his reply, Secretary of State Adams stated that " 'by the constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government.' " *Id.*

[48] *See* R. DIVINE, THE RELUCTANT BELLIGERENT 83 (1965). After conquering Poland in September 1939, Hitler waited until the spring of 1940 to resume his campaign of military aggression. W. SHIRER, THE RISE AND FALL OF THE THIRD REICH 916-62 (1960). On April 9, 1940, German armies invaded Denmark and Norway. *Id.* at 697. Denmark was defeated that very same day. *Id.* at 698. Norway was conquered by the end of April. *Id.* at 706-12. The Führer then turned his attention to the West. *Id.* at 713. On May 10, Nazi armies attacked Belgium, the Netherlands, and France. *Id.* at 770. The Dutch surrendered by May 15. *Id.* at 948.

While the French and British moved to reinforce Belgium, the Nazis readied for the penetration of France by way of the Ardennes. *Id.* at 723. This rough-terrained area was considered the most unlikely invasion site. *See id.* When the Nazis tore a 50-mile-wide gap in the Allied front on May 13, the German breakthrough was met with little, if any, resistance. France's strategic reserve was virtually nonexistent, an incredible condition considering that the conflict had barely begun. *Id.* at 726. So powerful and swift were the blitzkrieging German forces, that within a week after the invasion had begun, it was obvious that the French Army was going to be defeated by the revolutionary changes in weaponry and strategy that the Nazis had developed and deployed. *See id.* at 723-28.

ance, this very day, the weight of American power.' "[49] Reynaud and Roosevelt both fully understood the grave consequences of a Nazi conquest of France—complete German control over continental Europe. The Führer could then direct his attention and his armed forces against Great Britain and ultimately the United States.

Roosevelt replied to this urgent request with what came to be known as the Utmost Sympathy Speech.[50] Roosevelt praised the French soldiers for their heroic resistance to German aggression and expressed his utmost sympathy for their plight, but refrained from committing American military power. Recognizing that it was a foreign state that was to be defended and not the territory of the United States, Roosevelt concluded: "These statements carry with them no implication of military commitments. Only the Congress can make such commitments."[51]

While American blood was shed in the pre-Korean war period to protect such essential national interests as the balance of power, economic concerns, and ideological commitments, it was not shed unless and until Congress concurred. Thus, the naval war against France, the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II were all authorized by statute.[52] In all of these instances, the definition of the national inter-

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[49] R. Divine, *supra* note 48, at 84.

[50] E. Corwin, *supra* note 4, at 246.

[51] *Id.*

[52] *See* C. Berdahl, *supra* note 13, at 103; R. Leckie, *supra* note 35, at 327. The decision to go to war with France was a joint judgment. C. Berdahl, *supra* note 13, at 103. The legislative authorization was expressed in the form of a joint resolution. A. Sofaer, *supra* note 1, at 139-54. The 1812 war against Britain was authorized by declaration of war. *Id.* at 287.

After the War of 1812, a sense of nationalism grew in the United States which culminated in the Monroe Doctrine of 1823, R. Leckie, *supra* note 35, at 318-20; *see supra* note 46 and accompanying text, and manifested itself in the westward expansion of the United States. This expansion resulted in a conflict over the territory of Texas between Corpus Christi and the Rio Grande River. *See* T. Franck & E. Weisband, Foreign Policy by Congress 65 (1979). Two weeks after Mexico had ambushed an American camp across the Rio Grande, President Polk approached Congress and received a formal declaration of war and a $10 million appropriation for war purposes. R. Leckie, *supra* note 35, at 327.

The Spanish-American War found its origins in the Cuban revolt against Spanish rule. American sympathies demanded intervention on behalf of the revolutionaries. After the destruction of the American battleship U.S.S. *Maine* in Havana harbor, President McKinley "asked Congress for authority to use force to intervene . . . ." *Id.* at 546. On April 25, 1898, Congress declared a state of war between Spain and the United States. *Id.*

Still another example of congressional participation in the warmaking decision came with the Selective Service Act of May 18, 1917, which authorized the President to raise the est and the decision to wage war to protect it were joint determinations of the President and Congress.

B. *The Korean War and the Cold War Claim of an Unlimited Unilateral Power to Initiate War*

In the early morning of June 25, 1950, the North Korean Democratic People's Army launched a massive offensive in an effort to reunite the northern and southern portions of Korea.[53] That evening, the Truman administration decided to commit American air and sea forces to the support of South Korea.[54] On June 29, Truman decided to make a commitment of ground forces.[55] Thus, for

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necessary number of men needed to fight in World War I. *See* C. Berdahl, *supra* note 13, at 107. Although President Wilson initially attempted to remain out of the war with Germany, he eventually concluded that "[t]he world must be made safe for democracy" and asked Congress for a declaration of war on Germany. Wilson received the authorization on April 6, 1917. R. Leckie, *supra* note 35, at 629. Finally, after the Japanese attack on Pearl Harbor on December 7, 1941, Roosevelt called upon Congress to declare a state of war to counter "the unprovoked and dastardly attack by Japan." F.R. Dulles, *supra* note 8, at 207.

[53] 3 S. Morison, The Oxford History of the American People 432 (1972). Prior to the conclusion of World War II, Korea was divided at the 38th parallel. The North was occupied by the Soviet forces, which helped establish a pro-Soviet Communist regime. The southern sector was occupied by American forces which helped establish a pro-American government. By 1948, both the United States and the Soviet Union withdrew the vast majority of their troops from the area, leaving the two bitter Korean rivals with radically divergent philosophies to resolve their differences by themselves. *Id.* at 432-33. Border skirmishes began almost immediately after the withdrawal, threatening an outbreak of a full-scale civil war. S. Warren, The President as World Leader 336-37 (1964). On June 25, 1950, an estimated 90,000 Northern Korean troops pressed across the 38th parallel using hundreds of Soviet-supplied armored tanks. The North Koreans launched the invasion in an attempt to unify the peninsula under one government. R. Leckie, *supra* note 35, at 850-51.

[54] R. Leckie, *supra* note 35, at 853. While the Security Council of the United Nations was preparing to meet for a discussion on the Korean crisis, President Truman instructed General Douglas MacArthur to take command of American military forces and to use his best efforts to defeat the aggressors. 3 S. Morison, *supra* note 53, at 434-35. After examining the most productive avenues of assistance available, it was concluded that an immediate supply of arms and equipment to the defenders was imperative. It was thus necessary to employ American ships and aircraft to protect the supply lines as well as to safeguard American citizens yet unable to escape from South Korea. The President, moreover, positioned the Seventh Fleet in the Formosa Straits in order to deter both Communist and Nationalist China from entering the conflict. R. Leckie, *supra* note 35, at 853; *see* S. Warren, *supra* note 53, at 336-37.

[55] R. Leckie, *supra* note 35, at 857. The United Nations ordered a cease-fire with an accompanying withdrawal by the North Koreans from territory below the 38th parallel. This was ignored by the invading army, and the United Nations called for its members to lend support throughout the conflict to the South Koreans. 3 S. Morison, *supra* note 53, at 435. While this support was being organized, the South Korean troops were being pushed southward. It became apparent to the President, through advice received from General MacArthur, that the South Korean military was not capable of thwarting the North Korean thrust.

the first time in its history, the United States began fighting a sustained and major war without any congressional authorization.[56]

In an attempt to justify this action, the Truman administration claimed that the President, as Commander in Chief, possessed the authority to begin a war to protect any "interest of American foreign policy" without seeking and receiving legislative approval.[57] This novel theory of presidential power was supported by the claim that Presidents throughout American history had employed the Armed Forces not merely for the protection of state and citizens, but for the protection of any national interest.[58] As has been

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The President, therefore, ordered into Korea 83,000 ground troops with which MacArthur could confront the approaching aggressor and protect South Korea against conquest. R. LECKIE, *supra* note 35, at 857-58.

[56] Address by Senator Fulbright, Yale University (March 3 to 4, 1971) *reprinted in* 117 CONG. REC. 10,355 (1971) [hereinafter cited as Sen. Fulbright Address]; *see* A. SCHLESINGER, *supra* note 3, at 137.

[57] *See 1950 State Dep't Memo, supra* note 4, at 173 *passim*. The 1950 Department of State memorandum stated:

> The President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof. He also has authority to conduct the foreign relations of the United States. Since the beginning of United States history, he has, upon numerous occasions, utilized these powers in sending armed forces abroad. The preservation of the United Nations for the maintenance of peace is a cardinal interest of the United States. Both traditional international law and article 39 of the United Nations Charter and the resolution pursuant thereto authorize the United States to repel the armed aggression against the Republic of Korea.
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> . . . .
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> The basic interest of the United States is international peace and security. The United States has, throughout its history, upon orders of the Commander in Chief to the Armed Forces and without congressional authorization, acted to prevent violent and unlawful acts in other states from depriving the United States and its nationals of the benefits of such peace and security. It has taken such action both unilaterally and in concert with others. A tabulation of 85 instances of the use of American Armed Forces without a declaration of war was incorporated in the *Congressional Record* for July 10, 1941.

Id. at 173-74.

The memorandum reprinted the list of 85 instances of presidential use of American force. *Id.* at 177-78. The memo asserted that although many of the 85 instances were for the purpose of rescuing American citizens, in some of the cases the Armed Forces were used for the purpose of advancing "the broad interests of American foreign policy." *Id.* at 174. It is true that in a few instances before the Korean war, Presidents actually *used* the Armed Forces for purposes other than the protection of state and citizens. Neither those Presidents nor any other pre-Korean war President, however, ever *claimed* a power beyond the narrow authority of defending state and citizen. *See supra* note 41.

[58] *Id.; see* U.S. CONST. art. II, § 2; U.N. CHARTER art. 39. The 1950 memorandum cites resolutions passed by the Security Council pursuant to article 39 of the United Nations Charter as authority for unilateral executive intervention into the Korean war. *See 1950 State Dep't Memo, supra* note 4, at 176. This claim, however, is spurious since United Na-

demonstrated, historical precedent supports the very opposite conclusion. No President from George Washington through Franklin Delano Roosevelt ever claimed any authority beyond the defense of state and citizens.[59] Like the commitment of forces itself, this claim of presidential power was without precedent in American history.

Truman's successors claimed and exercised authority to employ the full military power of the United States without limitation.[60] For example, the Johnson and Nixon administrations made

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tions resolutions passed pursuant to article 39 cannot accord the President war power beyond that which he already possesses. It is article 43 of the United Nations Charter that makes provision for member nations of the international organization to "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage necessary for the purpose of maintaining international peace and security." U.N. [illegible]ARTER, art. 43, para. 1. In order to "prescrib[e] the domestic, internal arrangements with[illegible] Government for giving effect to our participation" in the United Nations, Congr[illegible]cted the United Nations Participation Act of 1945 (the Act). *See* 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 190 (1963). The Act permits the President to exercise unilateral war power pursuant to authority granted to him under an article 43 military agreement, *id.* at 191-93, but prohibits him from exercising unilateral war power under any other United Nations provision. *See* United Nations Participation Act of 1945, § 6, Pub. L. No. 79-264, 59 Stat. 619, 621. Section 6 of the Act expressly declares that "nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council . . . armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements." *Id.* The legislative history reiterates the prohibition against the President acquiring any new power through the United Nations Charter. The House Committee on Foreign Affairs asserted that the United Nations Charter did not create an inroad on "the exclusive power of the Congress to declare war." H.R. REP. No. 1383, 79th Cong., 1st Sess. 8, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 927, 934.

Pursuant to the Act, before the President can commit any troops to an international peace force, he must negotiate a military agreement with other members of the United Nations and must submit this international agreement to Congress for its approval. *Id.* at 191-92. At the time of the Korean war, no article 43 military agreements had been concluded. *Id.* at 194. Consequently, President Truman could not, and in fact did not, rely on article 43 as a source for unilateral war power. *Id.*

[59] *See supra* notes 41-42 and accompanying text.

[60] *See* T. EAGLETON, *supra* note 1, at 72, 76; A. SCHLESINGER, *supra* note 3, at 159, 170-76. President Eisenhower worked closely with Congress with regard to the use of military force. T. EAGLETON, *supra* note 1, at 72. He often stated that he would use his authority to commit troops in emergency situations but only within his constitutional limits and only to protect American people and property. *Id.* at 72-75. This is evidenced by his congressional request for permission to use force to defend Formosa and its neighboring islands against attack by Communist China if it became necessary. *See id.*; Spong, *supra* note 41, at 7. In 1958, however, Eisenhower sent 14,000 American troops into Lebanon to stabilize a tense situation and prevent a civil war. Eisenhower justified this hazardous military venture on the ground that the President possessed the authority to employ the Armed Forces to protect the national security. A. SCHLESINGER, *supra* note 3, at 162.

explicit assertions of presidential power to use force against any nation for any purpose. In a 1966 State Department memorandum, prepared by Legal Adviser Leonard Meeker, the Johnson administration asserted:

> Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of the United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.[61]

President Kennedy was even more bold in claiming and in exercising a capacious presidential prerogative. T. EAGLETON, *supra* note 1, at 76. On his own authority, he ordered an invasion of Cuba in 1961 (the "Bay of Pigs" invasion) and went to the brink of nuclear war with the Soviet Union in order to compel the Soviets to remove missiles that they placed in Cuba in 1962 (the "Cuban missile" crisis). President Kennedy did not believe that congressional authorization was necessary to take these military actions. *Id.* at 76-77; A. SCHLESINGER, *supra* note 3, at 170-76.

[61] *1966 State Dep't Memo*, *supra* note 4, at 484. To equate the interest of defending the state with defending the national security is, of course, fallacious. It has been concluded:

> There are a number of difficulties with the theory that, for purposes of presidential warmaking power, an attack on another country—even if under circumstances specified by a mutual defense treaty—is equivalent to an attack on the United States. Presumably, any resort to war—even where authorized by Congress—is justified only because in some sense United States security is thought to be at stake. Hence, the fact that "security interests" are involved does not in itself alter the normal processes for deciding whether such interests are worth defending at the price of war. That decision, where a foreign state is attacked, will depend on a variety of factors—proximity to the United States; the value of the country as an ally; other United States interests involved, such as military bases and military sites; and the nature of the aggression and the aggressor. In each case difficult political and military decisions must be made which may well lead reasonable men to different conclusions in determining whether the interest involved is necessary to the defense of the United States. Where, on the other hand, the attack is against the United States itself, there can be no question presumably that the "security interest" involved warrants defending at the cost of war if necessary; to require the President to await what amounts to an obvious, foregone conclusion on the part of Congress is at best a needless formality, and at worst may occasion dangerous delay.

Note, *supra* note 8, at 1783. Bernard Brodie observes that the defense of state is an interest of a different character than the defense of the national security. B. BRODIE, *supra* note 8, at 344, 347; *see supra* notes 14-24 and accompanying text.

The unilateral executive power to protect American territory is a power granted to the President. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863). In contrast, the Framers did not grant the President a unilateral power to defend the "national security." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641-42 (1952) (Jackson, J., concurring); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28

The 1966 memorandum broadly construed the power granted to the President at the Constitutional Convention " 'to repel sudden attack.' " The memo then continued:

> In 1787 the world was a far larger place and the Framers probably had in mind attacks upon the United States. In the 20th Century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security.
>
> The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.[62]

Similarly, President Nixon justified bombing attacks on Laos and Cambodia by claiming authority to send troops into foreign territories on his own initiative.[63]

According to the 1967 National Commitments Report of the Senate Foreign Relations Committee, "every President since World War II has asserted at one time or another that he had the authority to commit the armed forces to conflict without the consent of Congress."[64] Moreover, even when no claim was asserted, these Presidents have undertaken military action as though they possessed this authority.[65] Despite variations in the forcefulness

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(1801). Indeed, unlike the concept of defense of state, which is recognized in judicial decisions as well as in the original understanding, the concept of defense of "national security" is without any constitutional roots. The phrase "national security" was not even coined until 1945. D. YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE 194-96 (1977).

[62] *1966 State Dep't Memo*, *supra* note 4, at 484-85.

[63] *See* A. SCHLESINGER, *supra* note 3, at 190-94; Wormuth, *supra* note 39, at 623-25, 650-51. President Nixon faced the decision of whether to continue military action in Southeast Asia after the termination of the Vietnam war via the Paris agreement. The issue arose in response to North Vietnam's refusal to withdraw its forces from Cambodia and Laos as was stipulated in the ratified agreement. The President, claiming an inherent power to order bombing attacks pursuant to the Paris agreement, authorized such bombings at an estimated cost of $4,800,000 per day. T. EAGLETON, *supra* note 1, at 154-59.

[64] NATIONAL COMMITMENTS REPORT, *supra* note 9, at 21.

[65] An example of unilateral presidential action was the dispatch of troops to Lebanon in 1958 by President Eisenhower. This followed the withdrawal of French and British troops from the Middle East as a result of the Suez crisis. Fearing a Communist incursion as a result of instability of the region, the United States took an active role in providing both economic and military aid. A. GEORGE & R. SMOKE, DETERRENCE IN AMERICAN FOREIGN POLICY 309-10 (1974). In July 1958, President Eisenhower employed military intervention in an attempt to stabilize a civil war in Lebanon. *Id.* at 349. It is believed that President Eisenhower committed troops not only to prevent Soviet subversion, but also to improve the

with which modern Presidents have put forward their claim of unlimited war power, not a single one has repudiated Truman's theory.[66] To the contrary, all have acted as though Truman's usurpa-

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image of the United States in the eyes of its allies and to impress upon the Soviets that the United States backs its commitments. *Id.* at 353.

In addition, during the Cuban missile crisis, President Kennedy committed naval forces to a blockade of Cuba in 1962 to compel the Soviet Union to withdraw the medium and intermediate range ballistic missiles which they had sent into the country. The Soviets intended to supply Cuba with an arsenal capable of penetrating far into the United States. *See id.* at 447-48, 460; R. KENNEDY, THIRTEEN DAYS 5 (1971).

Other examples of unilateral presidential action include President Johnson's deployment of marines into the Dominican Republic in 1965, *see* B. BLECKMAN & S. KAPLAN, FORCE WITHOUT WAR—U.S. ARMED FORCES AS A POLITICAL INSTRUMENT 289-342 (1978), President Nixon's coercive diplomacy during the 1973 Yom Kippur War, *see* M. KALB & B. KALB, KISSINGER 450-99 (1974), and the war in Vietnam, *see* D. HALBERSTAM, THE BEST AND THE BRIGHTEST 805-09 (1973). More recently, President Reagan committed 800 marines, as part of a 2,000-member peacekeeping force, to Beirut to aid in the evacuation of the Palestine Liberation Organization forces from that city. This peacekeeping force was comprised of American, French and Italian troops. After accomplishing their task in Lebanon, they withdrew on September 10, 1982, only to be ordered back to that country by President Reagan following a bloody massacre of Palestinians by the Christian Militia forces in West Beirut. *U.S. Presses Israel to Let UN Troops Move Into Beirut*, N.Y. Times, Sept. 20, 1982, at 1, col. 6. A senior State Department official indicated that Congress would be *informed* of the deployment of the combat force. *U.S. Plans to Send Marines Back into Beirut; Reagan Terms Israeli Pullout 'Essential,'* N.Y. Times, Sept. 21, 1982, at 1, col. 6.

The United States also has adopted a significant commitment to El Salvador. President Reagan has asked for over $100 million in both economic and military aid to that country. *U.S. Is Said to Plan $100 Million Rise in Salvadoran Aid*, N.Y. Times, Jan. 31, 1982, at 1, col. 6. This country also has top military advisers in El Salvador and although President Reagan has stated unequivocally that the United States will not send troops into that country, *id.*, he has not ruled out a blockade to stop the flow of arms to the guerrilla forces, *id.* at 12, col. 3.

[66] *See* J. JAVITS, *supra* note 40, at 251-52, 272-73. Truman's successors have encouraged the myth that the office of the President possesses a virtually unlimited war power. *Id.* at 251. "Many advocates of presidential prerogative in the field of war and foreign policy . . . [argue] that the President's powers as Commander in Chief are what the President alone defines them to be." *Id.* at 272. In 1967, the Senate repudiated such a broad reading of the Commander in Chief clause. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 23.

In addition, the Supreme Court has refused to accept such a construction. *See* Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850). In *Fleming*, the Supreme Court stated:

> [The President's] duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.

Id. at 615.

In a more recent case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Jackson rejected the idea that the Commander in Chief clause grants the President the authority "to do anything, anywhere, that can be done with an army or navy." *Id.* at 641-42 (Jackson, J., concurring). Moreover, Justice Jackson characterized Truman's sweeping view of presidential power as "sinister and alarming," *id.* at 642 (Jackson, J., concurring), and endorsed the Framers' narrow interpretation of the Commander in Chief function of power was legal.[67]

The congressional response to this presidential claim of a unilateral, unlimited war power during the height of the cold war—the period beginning in June 1950 and ending approximately by 1965—was generally one of acquiescence.[68] The National Commitments Report identified the perception of recurrent crises as the most important cause of the presidential claim of unlimited war power and congressional acquiescence in this usurpation. This 1967 report states that "crisis has been chronic and . . . has given rise to a tendency toward anxious expediency in our response to it. The natural expedient—natural because of the real or seeming need for speed—has been executive action."[69] The report concluded that the feeling of "anxious expediency" during the period of peak cold war tension had caused Congress to disregard constitutional procedure.[70]

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tion, *id.* at 642 n.10 (Jackson, J., concurring).

[67] *See supra* note 65.

[68] *See* National Commitments Report, *supra* note 9, at 6. Congress is at least partially to blame for the shift in the balance between the legislative and executive branches on the issue of war powers. *See* Spong, *supra* note 41, at 10. Beginning with President Truman's commitment of combat troops in Korea, Congress has been unmindful of the procedure which the Constitution provided for the initiation of war. T. Eagleton, *supra* note 1, at 70-74.

Despite the usual response of acquiescence during the 1950-1965 period, voices of dissent were raised in Congress from time to time. For example, in January 1951 Senator Taft said that President Truman had no authority whatsoever to commit American troops to Korea without consulting Congress and without congressional approval. "The President," he stated, "simply usurped authority in violation of the laws and the Constitution, when he sent troops to Korea . . . ." National Commitments Report, *supra* note 9, at 16-17.

The greatest resistance to unilateral executive action during the 1950-1965 period occurred in 1951 when Truman indicated his intention to send four more divisions to reinforce the American Army in Europe without referring this momentous matter to Congress. *See* A. Schlesinger, *supra* note 3, at 138-43. Since many members of Congress and presidential advisers believed that the Soviet Union was poised on an all-out assault on Europe, the President was claiming the authority to commit troops to a potentially major war against a very large and powerful enemy. *See id.* at 139. Representative Coudert objected to Truman's conception of limitless war power, stating, "[i]f the President alone is allowed to send anywhere abroad, at any time, hundreds of thousands of American troops without a declaration of war . . . then, indeed, there is little left of American constitutional government." *Id.* at 136. Coudert remarked that if Truman's theory of presidential power were accepted, then the fate of American soldiers would be subject to the whim of presidential decree. *Id.* at 140. This Great Debate of 1951 ended inconclusively. *Id.* at 143. The Congress did not forbid Truman to send the four divisions to Europe, but the Senate did pass a "sense of the Senate" resolution in which the Senate approved the sending of the four divisions but stipulated the necessity for future congressional consent to additional troop movements. *Id.*

[69] National Commitments Report, *supra* note 9, at 6.

[70] *Id.* Senator Fulbright, a former advocate of unlimited presidential power, discussed

Congressional acquiescence must be understood in light of the Korean war's influence on substantially expanding the objectives of American foreign policy interests[71] and on creating a perception of continual crises involving the forces of the free world, led by the United States, and the forces of international communism, controlled allegedly by the Soviet Union.[72] The world which existed in 1945 was undoubtedly a different world than the one which existed before World War II. The invention of nuclear weapons, the collapse of the balance of power in Europe, and marked improve-

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how quickly procedure is cast aside when a crisis is perceived and quick and decisive action is allegedly needed to meet an actual or potential threat. He explained that the cold war crises had "one common attribute: the subordination of constitutional process to political expediency in an atmosphere of urgency and seeming danger, resulting in each case in an expansion of presidential power at the expense of Congress." Sen. Fulbright Address, *supra* note 56, at 10,355. Arthur Schlesinger agrees that the presidential perception of global threats and the propagation of a policy which committed American military power to the containment of these threats extirpated the procedure of checks and balances, which was believed to have become an obstacle to the alleged need for quick and decisive presidential action. A. Schlesinger, *supra* note 3, at 168-69. He proffered:

> [T]he Constitution could not easily sustain the weight of the indiscriminate globalism to which the Korean war gave birth. It was hard to reconcile the separation of powers with . . . [the post-Korean war] foreign policy . . . nor with an executive branch that saw everywhere on earth interests and threats demanding immediate . . . American commitment and action. This vision of the American role in the world unbalanced and overwhelmed the Constitution.

Id.

[71] *See* A. George & R. Smoke, *supra* note 65, at 140; A. Schlesinger, *supra* note 3, at 135-37; *cf.* W. LaFeber, America, Russia and the Cold War 107-14 (4th ed. 1980) (discussing events triggering changes in foreign policy objectives and strategies). Professors George and Smoke observe that the Korean war caused the globalization of containment. A. George & R. Smoke, *supra* note 65, at 140. Arthur Schlesinger, Jr., also concludes that the Korean war marked the abandonment of the previous foreign policy of prudent and limited containment and the adoption of an overzealous and ambitious policy of containing Soviet aggression throughout the entire world. A. Schlesinger, *supra* note 3, at 168-69.

[72] A. Schlesinger, *supra* note 3, at 163-65. The new American commitment to international containment of Soviet aggression created the ever-present sense of impending conflict. The new objective was to preserve the non-Communist status of every non-Communist nation. *Id.* at 164. Washington appointed itself the leader of the "Free World" and "endowed itself with worldwide responsibility and a worldwide charter." *Id.* The United States adopted increasingly large military budgets and upgraded its forces in size and technological achievement in order to be able to counter a Communist move against any non-Communist nation anywhere in the world. By 1952, the United States had 3.6 million men trained to wage war. *Id.* at 165. This fact alone served to increase the presidential ability to take military action since a large, effective fighting force was placed at the disposal of post-Korean war Presidents who could use the great standing armies, navies, and air forces without any additional congressional action. *Id.* America, for the first time, "possessed a standing army, sufficiently large, sufficiently well-established, and sufficiently mobile to make possible, through presidential action alone and on very short notice, conflicts of unforeseeable dimensions anywhere in the world." Note, *supra* note 8, at 1791.

ments in the range, firepower, and mobility of conventional weapons, presented novel dangers to the defense and security of the United States.[73] Yet, these changes did not cause an abandonment of checks and balances during the period between the end of World War II and the outbreak of the Korean war.[74] In fact, for 5 critical years, the Truman administration collaborated with Congress to devise and implement a policy of containing Soviet expansionism.[75] Commitments were made to defend Britain, France, and other Western European nations vital to American security, but only after congressional consultation and approval.[76]

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[73] J. Spanier, Games Nations Play 116-20 (1972). The invention of the atom and hydrogen bombs, coupled with the development of intercontinental-range vehicles to deliver the weapon, rendered American territory completely vulnerable to extensive and immediate destruction. The fatalities from a nuclear attack could easily reach 100 million within 1 month. Office of Operations Analysis, U.S. Arms Control & Disarmament Agency, The Effects of Nuclear War 16-26 (1979). Millions more would perish from disease, starvation and radiation. *Id.* at 16. The destruction of the European balance of power presented a second novel threat to the United States. J. Spanier, *supra*, at 9-17; R.W. Tucker, A New Isolationism: Threat or Promise 39-44 (1972). From the end of the Napoleonic wars in 1815 until 1945, a balance of power had existed in Europe. No single nation was powerful enough to control Europe. J. Spanier, *supra*, at 10. Since no European power was ever able to dominate or destroy all of its rivals, there was little or no chance that the United States could be menaced by a European nation. *Id.* Thus, the balance of power had provided the United States with its first line of security.

By 1945, the balance of power was destroyed. W. Miller, A New History of the United States 430-31 (1968). The Soviets emerged from World War II as the predominant power; England and France had been weakened substantially, and defeated Germany was destroyed and divided. J. Spanier, *supra*, at 12-17. Consequently, the United States could not depend on other European powers to insulate it from attack.

The second line of defense was provided by the vast distance between the continent of Europe and the eastern shore of the United States. *See* R.W. Tucker, *supra*, at 41; D. Yergin, *supra* note 61, at 200. The invention of long-range bombers and submarines reduced the military protection that the geographic buffer previously provided. *Id.*

[74] *See* W. LaFeber, *supra* note 71, at 75. During the 1945-1950 period, American interests were gravely threatened by actual or potential Communist aggression. In addition to the risk that the Soviet Union would employ its military power against Western Europe and the United States, Communist guerrillas had attacked the pro-American government in Greece. Yet, the commitments to Greece and to the North Atlantic region were not made without legislative authorization. *See infra* notes 75-76. In 1948, however, "a united administration, enjoying strong support on foreign policy from a Republican Congress, set off with exemplary single mindedness to destroy the Communist threat that loomed over Europe." *Id.*

[75] *See* R. Barnet, Intervention and Revolution 97-128 (1968). The policy of containing Soviet expansionism began with President Truman's address to a joint session of Congress in March 1947 in which the President requested authorization to provide economic aid and to send military personnel for the purpose of countering the Communist guerrilla movement in Greece. E. May, "Lessons" of the Past 43-44 (1973). This signaled the beginning of the implementation of the Truman Doctrine, a policy based on the commitment of the United States to aid free peoples in maintaining their political independence and territorial integrity against aggressive, totalitarian movements. *See* R. Barnet, *supra*, at 97-128.

The Korean war was a seminal event in American foreign policy as well as in American constitutional law.[77] Prior to the outbreak of the Korean war, the United States had adopted and followed a limited and carefully considered containment policy. Before the Korean war, the United States Government had identified only one nation, the Soviet Union, as its enemy.[78] In addition, only nations such as Britain and France, which were intrinsically vital to the American national interest, were considered worthy of American military protection.[79] As a result of the Korean war, both tenets of American foreign policy—perceiving the U.S.S.R. as the sole state that threatened the national security and defending only intrinsically important nations—were altered radically.

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[76] *See* J. Javits, *supra* note 40, at 242-44. The United States commitment to defend Western Europe in the event of an armed attack has not been brought about by unilateral presidential initiatives. Rather, these defense arrangements have always been subject to congressional scrutiny. In June 1949, when the Truman administration was seeking passage of the NATO treaty, Secretary of State Dean Acheson acknowledged that the Framers had designed a system in which congressional power would check presidential power. He stated that "[u]nder the Constitution, the Congress alone has the power to declare war." *See* S. Rep. No. 123, 81st Cong., 1st Sess. 1337 (1950). Moreover, he defined the term "war" broadly, and submitted that independent presidential power existed only with regard to the traditional categories of defense of state and citizens. *See id.*

The Report of the Senate Committee on Foreign Relations which considered and then approved the NATO treaty reaffirmed the narrowness of unilateral executive authority: "Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? . . . The answer is . . . 'No.' " S. Rep. No. 8, 81st Cong., 1st Sess. 8 (1950).

[77] *See supra* note 71. The effect of the Korean war on United States foreign policy has been noted by John Lewis Gaddis, a leading diplomatic historian, who observed:

> By the end of Truman's administration the United States had moved from implementation of a restrained and cautious policy with limited objectives toward a new and far more sweeping program of action that posited the challenge to United States security as worldwide and made no real distinction between varieties of communism. Containment became globalized; it was at this point that the gap between Washington's commitments and its resources for meeting them began to widen.

Gaddis, *Harry S. Truman and the Origins of Containment*, in Makers of American Diplomacy 207-08 (1974).

[78] *See* W. LaFeber, *supra* note 71, at 27. Treatment of China during the 1945-1950 period is illustrative of pre-Korean war policy toward leftwing countries other than the Soviet Union. No policy was implemented to check Chinese aggression on a permanent basis, even though President Truman expected the Chinese Communists to invade Taiwan and defeat Chiang Kai-shek's forces. *See* A. George & R. Smoke, *supra* note 65, at 140. The United States containment policy remained focused solely upon Soviet aggression until the period immediately preceding Chinese intervention in Korea, at which time United States policymakers realized the need to contain Communist China as well as the Soviets. *Id.* at 150. It was not until November 30, 1950 that President Truman intimated that "the United States would use all its power to contain the Chinese." W. LaFeber, *supra* note 71, at 119.

[79] *See* Gaddis, *supra* note 77, at 206-07. *See generally* R. Barnet, *supra* note 75, at 23-24; B. Brodie, *supra* note 8, at 343-65. Arthur Schlesinger wrote that prior to the Korean war the United States had adopted a policy of responsible and selective containment, which

After the Korean war, President Truman and his successors abandoned the policy of limited containment and adopted a sweeping policy of global and indiscriminate containment. As a result of the new containment policy, Presidents began to claim that the threat to national security came not only from the Soviet Union, but from any nation or any guerrilla group that was a participant in the alleged worldwide conspiracy of international Communism, directed by, from and for the Soviet Union.[80] American Presidents adopted extremely broad criteria to determine whether a war fought solely by the citizens of a sovereign nation-state was in fact authorized by the Soviet Union.[81] The application of these

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was "addressed to the historic interests of the United States, committed only to regions of the world where American security was directly and vitally involved . . . ." A. Schlesinger, *supra* note 3, at 168. Another author has observed that the "Cold War arose over the fate of Central Europe, but it has been fought almost everywhere else." R. Barnet, *supra* note 75, at 13.

[80] *See* R. Barnet, *supra* note 75, at 26-27. Beginning with the Truman administration, American Presidents have conducted foreign policy on the assumption that any Communist or leftwing nation which maintains beneficial relations with the Soviet Union is an agent or puppet of the Soviet state. During the cold war era, Presidents have asserted that Mao Tse-tung and Ho Chi Minh were nothing more than Soviet pawns. *See id.*

Both the belief that every Communist nation is part of a single international Communist conspiracy, *id.* at 60; *see* Paterson, *The Search for Meaning: George F. Kennan and American Foreign Policy*, in Makers of American Diplomacy 264 (1974), and the view that the Kremlin instigates and controls the military activities of revolutionary third world countries, R. Barnet, *supra* note 75, at 60, have been used to justify the exercise of wide-ranging powers by the President. Gaddis, *supra* note 77, at 212-14; Trask, *The Congress as Classroom: J. William Fulbright and the Crisis of American Power*, in Makers of American Diplomacy 351-52 (1974).

[81] *See* R. Barnet, *supra* note 75, at 7. The following criteria have been used by Presidents to identify whether a seemingly sovereign nation is actually no more than an agent for the Soviet-principal:

> a) whether a nation was ruled by a powerful Communist Party;
>
> b) even if the Communist Party did not control the government, whether a nation adopted Communist or leftwing policies such as nationalization, land reform, or "autarchic trade practices"; or
>
> c) regardless of a nation's political system and domestic policies, whether the nation took pro-Soviet actions in its foreign policy, such as signing a treaty of alliance with the Soviet Union, accepting weapons from the Soviets, or even accepting economic aid.

Id. at 9; Gaddis, *supra* note 77, at 212, 214; Paterson, *supra* note 80, at 264; Trask, *supra* note 80, at 351, 358; *see* Head, *The Hot Deals and Cold Wars of Henry Kissinger*, in At Issue: Politics in the World Arena 249-52, 254-55, 260 (1977); Raskin, *An American Metternich: Henry A. Kissinger and the Global Balance of Power*, in Makers of American Diplomacy 379, 381 (1974). Thus, Sukarno's Indonesia and Mossadeq's Iran, have been in-standards has led to the unreasonable conclusion of the executive branch that when such nationalistic states as Mao's China, Sadat's Egypt, and Indira Gandhi's India attack *their* enemies, these states are no more than Soviet agents.

In addition, the Presidents of the global containment era have declared that nations which have no intrinsic relationship to the national interest are nevertheless vital to national security.[82] For example, the United States fought in Vietnam[83] and may fight in El Salvador[84] even though these nations ostensibly add little if anything to the defense of the United States, the balance of power, or American trade and investment. This seeming paradox of declaring peripheral nations vital to national interests is based upon Truman's dubious logic, enunciated at the outbreak of the Korean war and maintained by his successors, that the United States must

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cluded within Moscow's demesne. R. BARNET, *supra* note 75, at 9.

[82] *See* B. BRODIE, *supra* note 8, at 341-42, 351-55; Gaddis, *supra* note 77, at 205-09. Brodie states:

> In the instances both of Korea and of Vietnam, the citizenry repeatedly demanded assurance that the purpose of the interventions was indeed to enhance American security, and they repeatedly received that assurance from their national leaders, who no doubt sincerely meant it. We saw the same thing happening in the case of President Franklin Roosevelt and his assurances, but there are significant differences in dimensions between the menace posed by a Hitler on the rampage in combination with Japan and Italy, and a Ho Chi Minh reaching for the control of South Vietnam. It is a strange approach to international affairs that seeks to assert that *all* threats to the peace are all on the same plane, alike not only in character but also in magnitude of danger; but this is what some of the more doctrinaire purveyors of the "indissolubility of peace" would have had us believe.

B. BRODIE, *supra* note 8, at 353 (emphasis in original).

[83] R. BARNET, *supra* note 75, at 29-31; B. BRODIE, *supra* note 8, at 347. The leaders who committed American forces to the defense of South Vietnam, it is suggested, did not believe that the conquest of South Vietnam would either make an attack against American territory more likely, increase the military power of the Soviet Union, or impair American trade and investment. Vietnam was merely a symbol in the struggle between the forces of the Free World and international Communism.

[84] *See Proposal for Aid to Salvador Cut By Senate Panel*, N.Y. Times, May 27, 1982, at 1, col. 2. It is difficult to conceive of a more strategically insignificant nation than El Salvador. It is one of the smallest, poorest, least powerful nations in the world. Sanction, *Terror, Right and Left*, TIME, March 23, 1982, at 28 (per capita income is $670 a year; the Salvadoran Army consists of only 14,000 men, twice as many as the leftist guerrillas). The Reagan administration may be willing to concede this, but it probably would argue that what is at stake in El Salvador is the "worldwide Soviet interventionism that poses an unprecedented challenge to the free world." *Id.* at 18 (quoting Secretary of State Alexander Haig). Hence, in El Salvador, United States aid and military personnel are being used to counter political forces which are perceived as threatening United States interests. In El Salvador alone, over $60 million will be appropriated for military aid in 1983, despite some limited congressional success in reducing such expenditures. *Proposal For Aid to Salvador Cut by Senate Panel*, *supra*, at 1, col. 2.

be able and willing to respond with armed force to defend a relatively insignificant nation from aggression so as to render credible the American commitment to defend more important nations. Thus, it is contended, critical American allies are reassured of American support and the Soviet Union and its "co-conspirators" are deterred from further aggression.[88] Hence, the hysteria unleashed by the Korean war and reinforced by the solemn pronouncements of successive Presidents led to a foreign policy of potentially defending any nation in the world.[89] The broad definition of Communist or Soviet-controlled, combined with an expansible area to be defended from the Kremlin-led conspiracy, resulted in a foreign policy of global and indiscriminate containment. It is with this in mind that the congressional response of acquiescence to the executive claim for power must be viewed.

In 1970, Congress used its financial power to prohibit the expenditure of appropriated funds to support American groundtroops in Laos and Thailand, and to effect a complete cutoff of any combat activity in Cambodia, Laos, and Vietnam.[87] During the 1950's and 1960's, however, the response of Congress was acquiescence.[88]

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[88] *See generally* B. BRODIE, *supra* note 8, at 201-02; R. BARNET, *supra* note 75, at 28. One justification commonly relied upon for the use of American forces to contain the spread of Communism in peripheral areas is that the perception of United States' reluctance to participate in any conflict might encourage Russian aggression elsewhere. According to Richard J. Barnet, United States policymakers view the Third World as "the testing ground for the Communist strategy of Wars of National Liberation. If they win here, they will strike elsewhere. If they lose, they will not be so ready to start another." R. BARNET, *supra* note 75, at 28. George Kennan, the intellectual architect of the containment policy, described Soviet policy as tending to fill "every nook and cranny available to it in the basin of world power." G. KENNAN, AMERICAN DIPLOMACY 1900-1950, at 118 (1951). Kennan believed that Soviet expansion must be met wherever it is directed:

> [I]t will be clearly seen that the Soviet pressure against the free institutions of the Western world is something that can be contained by the adroit and vigilant application of counter-force at a series of constantly shifting geographical and political points, corresponding to the shifts and maneuvers of Soviet policy . . . .

Id. at 120.

Daniel Yergin concludes that nations and events which have, *in fact*, a minimal and remote effect or even no effect upon our national security are perceived as significant and urgent, threatening our security immediately, directly, and momentously. He states:

> And what characterizes the concept of national security? It postulates the interrelatedness of so many different political, economic, and military factors that developments halfway around the globe are seen to have automatic and direct impact on America's core interests. Virtually every development in the world is perceived to be potentially crucial. An adverse turn of events anywhere endangers the United States. Problems in foreign relations are viewed as urgent and immediate threats. Thus, desirable foreign policy goals are translated into issues of national survival, and the range of threats becomes limitless. The doctrine is characterized by expansiveness, a tendency to push the subjective boundaries of security outward to more and more areas, to encompass more and more geography and more and more problems.

D. YERGIN, *supra* note 61, at 196.

[89] *See* Paterson, *supra* note 80, at 279-81.

It is important to recognize that this acquiescence did not render the presidential practice legal nor permit the President to acquire an unlimited power to use force to defend any national interests. Rather, congressional acquiescence during this 15-year period of crisis-induced fear is entitled to little interpretative weight, since the precedents created during this interval were not based upon a reading of the Constitution, but instead were based upon a knowing disregard and abandonment of checks and balances. Despite attempts to legitimize the Chief Executive's seizure and exercise of power in the 1950 and 1966 State Department Memos,[89] the presidential theory of war power and the congressional acquiescence in it can most accurately be viewed not as a good-faith attempt by the political branches to apply the Constitution to the changed conditions of the post-World War II world, but as a design to avoid constitutional limits on executive war power. The advocates of abandoning constitutional principle attempted to justify this action by a claim of "necessity."

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[87] *See* A. SCHLESINGER, *supra* note 3, at 293. The June 1973 vote to prohibit the further use of funds clearly demonstrated congressional opposition to the war. *Id.* At that time, however, there was an insufficient number in Congress to override President Nixon's veto of the funding cutoff. United States District Court Judge Orrin Judd noted that if the courts were to rule that Congress was required to override presidential vetoes in order to terminate unauthorized military actions, Presidents could sustain wars with the support of only "one third (plus one)" of the membership of either House. *See id.*

[88] *See* Sen. Fulbright Address, *supra* note 56, at 10,356. No official congressional action was taken to check the unilateral commitment of troops abroad until 1970. For example, when President Truman committed United States air and sea forces in Korea without seeking congressional authorization or advice, Congress, as a whole, remained idle. T. EAGLETON, *supra* note 1, at 71. Some individual members of Congress, however, were quite vociferous. Senator Robert Taft, for instance, stated that the President had "simply usurped authority, in violation of the laws and the Constitution." *Id.* Similarly, Senator Arthur Watkins contended that "the United States [was] at war by order of the President." *Id.*

[89] *See 1966 State Dep't Memo*, *supra* note 4, at 474; *1950 State Dep't Memo*, *supra* note 4, at 173. The 1950 State Department Memo sought to justify President Truman's use of American troops in Korea by asserting that previous presidential practice and a United Nations Security Council Resolution were authority for this action. *1950 State Dep't Memo*, *supra* note 4, at 173; *see supra* notes 57-59 and accompanying text. The 1966 document was prepared for a similar purpose—to formulate a legal justification for President Johnson's unauthorized use of military power in Vietnam. *See 1966 State Dep't Memo*, *supra* note 4, at 474; *see supra* notes 61-65 and accompanying text. The 1966 memo, however, argued that the President's unilateral war power should be extended from a power to protect the state to a power to protect the national security. *See 1966 State Dep't Memo*, *supra* note 4, at 474.

The "necessity advocates" believed that a Chief Executive capable of taking quick and decisive military action on his own initiative was necessary to contain effectively Soviet expansionism. In 1951, Truman's Secretary of State, Dean Acheson, claimed that in time of crisis, constitutional procedure can be ignored in order to permit the President to act. He suggested that "[w]e are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."[90] In 1961, Senator J. W. Fulbright, then chairman of the Senate Foreign Relations Committee, argued that the ability to act is the sole issue, and that it is irrelevant whether the procedure chosen for initiating the action is constitutional.[91] He advocated abandoning what he termed "18th century procedures of measured deliberations" in order to be better able to counter Communist aggression.[92]

In conclusion, notwithstanding that Congress did not repudiate the claim of broad warmaking power during the period of acute cold war tension but acquiesced in the presidential practice, Congress' response must be interpreted in light of the surrounding circumstances of continual crises and the consequent demand for quick executive action. Presidents have promulgated a foreign policy theory of a ubiquitous Communist chimera which Congress accepted, along with the fallacious argument that in times of danger constitutional procedure must be ignored and abandoned so that Presidents can act.[93] Hence, little weight is to be accorded both the claims and actions of the Chief Executive, as well as acquiescence by Congress. Furthermore, the claim of necessity has been denounced as an illegal and dangerous theory by the Congress of the 1970's.[94] Finally, the practice of the political branches during this 15-year period is inconsistent with two higher ranking constitutional authorities—judicial review and Framers' intent.

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[90] A. SCHLESINGER, *supra* note 3, at 138 (quoting S. REP. No. 797, 90th Cong., 1st Sess. 17 (1967)).

[91] Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961). Senator Fulbright admitted that congressional acceptance of executive primacy in utilizing American military power was inconsistent with the constitutional system of checks and balances, yet argued that constitutional principles in this context should be abandoned:

> [T]he price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past. We should do so with no illusions as to the reasons for its necessity. It is distasteful and dangerous to vest the executive with powers unchecked and unbalanced. My question is whether we have any choice but to do so.

Id.

[92] *Id.* A decade after he asserted that constitutional procedures were inappropriate in the modern international arena, Senator Fulbright recanted his necessity argument. The Senator recognized that the notion that necessity outweighs the Constitution was illegal, unwise, and dangerous:

> In those days [of the 1950's and 1960's] . . . it was possible to forget the wisdom of the Founding Fathers who had taught us to mistrust power, to check it and balance it, and never to yield up the means of thwarting it. Now, after bitter experience, we are having to learn all over again that no single man or institution can ever be counted upon as a reliable or predictable repository of wisdom and benevolence; that the possession of great power can impair a man's judgment and cloud his perception of reality; and that our only protection against the misuse of power is the institutionalized interaction of a diversity of independent opinions.

Sen. Fulbright Address, *supra* note 56, at 10,356.

IV. JUDICIAL REJECTION OF THE CLAIM OF UNLIMITED EXECUTIVE POWER

The Supreme Court has rejected the claim that a crisis empowers the President to disregard the Constitution in order to pursue allegedly essential emergency action.[95] From the Civil War case of *Ex parte Milligan*[96] to the steel seizure case, *Youngstown Sheet*

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[93] *See* A. SCHLESINGER, *supra* note 3, at 141-52, 168-70.

[94] NATIONAL COMMITMENTS REPORT, *supra* note 9, at 7; *see* Sen. Fulbright Address, *supra* note 56, at 10,356.

[95] *See* C. ROSSITER, CONSTITUTIONAL DICTATORSHIP 212-13 (1948). In a discussion of "crisis institutions and procedures," Rossiter stated that the Framers had considered the theory that the President's powers should expand during an emergency, but they rejected the notion. *Id.* at 212. As he observed: "Emergency does not create power. . . . The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government . . . were determined in the light of emergency and they are not altered by emergency." *Id.* at 213 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934)).

[96] 71 U.S. (4 Wall.) 2 (1866). In his opinion, Justice Davis rejected the contention that the abandonment of constitutional procedures was justified as a consequence of emergency conditions existing during the Civil War. *Id.* at 120-21. Referring to the constitutional system formulated by the Framers, the Court stated:

> Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection . . . all circumstances . . . . [T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . .

Id.

During the Great Depression, a Minnesota statute was enacted which imposed a moratorium on mortgage foreclosures in the event of debtor default. Home Bldg. & Loan Ass'n v.

& Tube Co. v. Sawyer,[97] the Supreme Court unequivocally has held that all of the provisions of the Constitution will continue to function during every exigency.[98] Justice Jackson's concurring opinion in *Youngstown* contains a cogent repudiation of the claim of necessity, warning that enlarging the power of the President during a period of alleged peril is dangerous as well as unconstitutional. Justice Jackson wrote:

> [The Framers] knew what emergencies were, knew the pressures they engender[ed] for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not

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Blaisdell, 290 U.S. 398, 415-16 (1934). Although the Supreme Court upheld the statute, the Court reiterated the *Milligan* doctrine, stating: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power . . . are not altered by emergency." *Id.* at 425.

In another Great Depression case, the Supreme Court struck down the validity of the National Industrial Recovery Act. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 528-29 (1935). The *Schecter* Court reaffirmed the principle that no crisis, no matter how severe or extraordinary, can justify the abandonment of constitutional procedure:

> The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and [in] peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

Id.

[97] 343 U.S. 579 (1952). Holding that President Truman's seizure of steel factories was unconstitutional, the *Youngstown* Court rendered seven separate opinions overwhelmingly rejecting the view that a state of emergency justifies the exercise of powers not authorized by the Constitution. *Id.* at 582-614. Justice Douglas, reaffirming the *Milligan-Blaisdell* doctrine, *see supra* note 96, stated that, "[t]here can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power [in the executive branch] . . . ." *Id.* at 629 (Douglas, J., concurring). Justice Douglas reasoned further that expediency cannot justify reinterpretation of established constitutional doctrine, stating "[i]f we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency." *Id.* at 632 (Douglas, J., concurring). The Framers' rejection of the theory that emergency can enlarge executive power is also recognized and endorsed by the opinion of the Court written by Justice Black, *id.* at 588-89, in Justice Frankfurter's concurring opinion, *id.* at 593 (Frankfurter, J., concurring), and in Justice Jackson's concurring opinion, *id.* at 649-53 (Jackson, J., concurring).

[98] *See* C. ROSSITER, *supra* note 95, at 211-15.

convinced it would be wise to do so . . . .[99]

With respect to the warmaking authority specifically, every court which has addressed the claim raised by post-Korean war Presidents of an unlimited, unilateral war power has rejected it. In addition, contemporary courts, citing with approval pre-Korean war precedent, have not endorsed unilateral executive authority beyond the traditional categories of defense of American territory and protection of American citizens.[100]

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[99] 343 U.S. at 650 (Jackson, J., concurring) (footnotes omitted). In his *Youngstown* concurrence, Justice Jackson rendered a strong repudiation of inherent power. *See id.* at 649-50 (Jackson, J., concurring). Having considered the case of Nazi Germany, which had adopted the theory that necessity caused by crisis can expand the power to cope with an alleged emergency, Justice Jackson stated:

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

Id. at 652 (Jackson, J., concurring).

[100] *See* A. SCHLESINGER, *supra* note 3, at 288-95. Schlesinger correctly observed that even though the courts did not declare the Vietnam war unconstitutional, no judge sustained the war on the theory that the President possesses the power to protect the national security. *Id.* at 290. Instead, the courts relied upon the political question doctrine, or found congressional authorization in the Gulf of Tonkin Resolution, military appropriation bills and selective service laws. *Id.* at 278-84.

The following is a nonexhaustive list of cases in which the constitutionality of the United States involvement in the Vietnam war was questioned. Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Massachusetts v. Laird, 327 F. Supp. 378 (D. Mass.), *aff'd*, 451 F.2d 26 (1st Cir. 1971); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972); Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y.), *aff'd*, 429 F.2d 302 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971); *see* New York Times Co. v. United States, 403 U.S. 713, 722 (1971) (Douglas, J., concurring).

In Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 936 (1974), it was alleged that the military activities of the United States in Cambodia violated article I, section 8, of the Constitution, inasmuch as the activities had not been authorized by Congress. *Id.* at 554. After an initial victory was obtained by congressional opponents of the war in Cambodia in the form of an injunction against further bombing, the issue was eventually disposed of on the ground that it was a political question, and therefore not a matter for the courts to decide. A. SCHLESINGER, *supra* note 3, at 293-94. Although the Supreme Court in *Holtzman* denied certiorari, two of the Justices rejected the claim of broad executive war power in opinions issued in chambers. *See* Holtzman v. Schlesinger, 414 U.S. 1304, 1315 (1973) (Marshall, J.) (application to vacate stay); *id.* at 1316-18 (Douglas, J.) (reapplication to vacate stay). For an excellent description of the complicated procedural history of the *Holtzman* case, see Note, *The In-*

In *New York Times Co. v. United States*,[101] Justice Douglas, in a concurring opinion, stated: "The Constitution by Art. I, § 8, gives Congress, not the President, power '[t]o declare War.' Nowhere are presidential wars authorized."[102] In *Holtzman v. Schlesinger*,[103] Justice Douglas reiterated judicial opposition to the post-Korean war claim of unlimited executive power, citing *The Prize Cases*[104] for the proposition that the President "has no power to initiate or declare a war . . . against a foreign nation."[105] Justice Douglas observed that even though it has become popular to think the President has the power to initiate war on his own authority, "there is not a word in the Constitution that grants that power to him. It runs only to Congress."[106]

In *Holtzman v. Schlesinger*, Justice Marshall stated that the scope of unilateral executive authority is limited to the case of a pressing emergency, supporting this narrow construction by citing the holding of *Talbot v. Seeman*[107] that the war power was vested by the Constitution in Congress. Justice Marshall then rejected the argument that the situation in the modern world required an increase in executive power, stating that nothing in the 172 years since the *Talbot* decision was rendered altered the requirement of congressional authorization.

Additionally, the lower federal courts uniformly have repudiated the assertion in the 1966 State Department Memo that the President's authority should be broadened to include the power to protect the national security, and have refused to recognize unilateral executive power in any situation other than an actual invasion of the United States.[108]

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dochina War Cases in the United States Court of Appeals for the Second Circuit: The Constitutional Allocation of War Powers, 7 N.Y.U.J. INT'L L. & POL. 137, 147-60 (1974).

[101] 403 U.S. 713 (1971).

[102] *Id.* at 722 (Douglas, J., concurring).

[103] 414 U.S. 1316 (1973); *see supra* note 100.

[104] 67 U.S. (2 Black) 635, 668 (1862); *see supra* note 17.

[105] 414 U.S. at 1317-18.

[106] *Id.* at 1317.

[107] 5 U.S. (1 Cranch) 1 (1801).

[108] Berk v. Laird, 429 F.2d 302, 304-05 (2d Cir. 1970); Mottola v. Nixon, 318 F. Supp. 538, 541-43 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972); Orlando v. Laird, 317 F. Supp. 1013, 1016-17 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

V. The Continuing Relevance of the Framers' Three-Premise Theory of Checks and Balances

The cold war practice of an unlimited executive war power is in conflict with the Framers' theory of checks and balances. Contemporary Presidents and their advisers,[109] as well as Congressmen,[110] foreign policy experts,[111] and commentators[112] have argued that the three premises underlying the checks-and-balances standard are not relevant in the modern world.

Though the consequences of war are immeasurably graver today than in 1787, the advocates of the abolition of checks and balances often appear indifferent to the potential casualties of modern warfare. For example, during the Cuban missile crisis President Kennedy stated that he found 150,000,000 American deaths an acceptable level of casualties.[113] Second, proponents of broad presidential power assert that the decision to go to war is objectively determined by the international environment. Thus, the argument is made that if the President is informed as to international reality, then he alone can decide when war is necessary.[114] Finally, presidential power advocates assert that the members of Congress invariably lack the requisite information, expertise, and judgment to render a sound warmaking decision,[115] and that Congress as an institution is too slow and inflexible to make effective and timely determinations in a world of nuclear arms and other powerful, fast-moving weapons.[116] It can be demonstrated, however, that the cited objections are palpably inaccurate, and that the three-premise theory is still relevant, indeed essential, in today's world.

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[109] *See United States Commitments to Foreign Powers, Hearings Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 108, 140-54 (1967) (statement of Nicholas deB. Katzenbach, Undersecretary of State to President Johnson) [hereinafter cited as *Hearings on U.S. Commitments Abroad*]; *1966 State Dep't Memo*, *supra* note 4, at 484 (President has very broad powers enabling him to deploy American forces abroad when he deems it necessary to maintain the security and defense of the United States); Rogers, *Congress, the President, and the War Powers*, 59 Calif. L. Rev. 1194, 1207-12 (1971) (recognizing fundamental historical changes in the world which must be considered in defining war powers); Rostow, *supra* note 2, at 900 (arguing that a tense and unstable world requires that the President possess the power to take immediate and flexible military action in order to preserve the peace).

[110] *See* Fulbright, *supra* note 91, at 7 (questioning the adequacy of the "18th-century" Constitution in shaping foreign policy in a dynamic 20th century); Goldwater, *The President's Ability to Protect America's Freedoms—The Warmaking Powers*, 1971 Law & Soc. Ord. 423, 444-45 (the President has the right to take military actions which he believes necessary without being restrained by Congress); Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 Va. J. Int'l L. 463, 464-67 (1973) (the President must have some degree of independence in foreign affairs).

[111] G. Allison, Essence of Decision: Explaining the Cuban Missile Crisis 14-26, 32-35 (1971) (a process endorsed by foreign policy scholars as the best method for deciding foreign policy and defense issues is that the government act as a rational, unitary decisionmaker); A. Schlesinger, *supra* note 3, at 166, 169-70; J. Spanier & E. Uslaner, How American Foreign Policy Is Made 54-62, 68-78, 132-51 (1978).

[112] *Cf.* Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 Yale L.J. 345, 359-65 (1955) (the President can use his warmaking powers when the interests of the United States so require); Monaghan, *Presidential War-Making*, 50 B.U.L. Rev. 19, 33 (1970) (the apparently unlimited powers exercised by the President in the Vietnam "war" were not unconstitutional); Ratner, *supra* note 2, at 467 (in modern world, President must be given power to defend allies who have been attacked). *See generally* R. Hirschfield, The Power of the Presidency 206 (1968); L. Koenig, The Chief Executive 240 (1981).

[113] In his address announcing the decision that the United States Government would seek to compel the Soviet Union to withdraw its nuclear missiles from Cuba, President Ken-

A. *Premise One: War Is Infinitely More Dangerous in the Modern World Than in the World of the Framers*

War is immeasurably more dangerous in the modern world than in the world of the Framers, and thus the first premise is as relevant today as it ever was. The number of casualties in any contemporary war—whether conventional[117] or nuclear[118]—can range

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nedy acknowledged that his policy could result in an all-out nuclear war. In his October 22, 1962 address to the nation, the President stated: "We will not prematurely or unnecessarily risk the costs of worldwide nuclear war in which even the fruits of victory would be ashes in our mouth—but neither will we shrink from that risk at any time it must be faced." R. Kennedy, *supra* note 65, at 156. The President estimated the probability of a nuclear war occurring as "between one out of three and even." T. Sorensen, Kennedy 705 (1965).

[114] *See* J. Spanier, *supra* note 73, at 60, 385-87. It has been asserted that the international system fixes the behavior of a nation. *Id.* at 60. The President and Congress do not have a choice in deciding that war should be initiated, since the international environment requires the United States to fight. Thus, the argument goes, since the decision to go to war is objectively determined by the external reality, every American leader would reach the same conclusion as to whether a war should be fought. *Id.* at 60, 385. Hence, the President need only be adequately informed as to the needs of the United States in order to utilize the power to make war correctly. *Id.* at 385-87. *But see* B. Brodie, *supra* note 8, at 343-45 (arguing against the theory that the decision to initiate war is objectively determined and universally accepted).

[115] *See* A. Schlesinger, *supra* note 3, at 14.

[116] J. Spanier & E. Uslaner, *supra* note 111, at 138. When confronted with a crisis situation, it is argued, Congress necessarily will be bypassed because of the need for a rapid decision in order to prevent further complications. *Id.* During the Cuban missile crisis, President Kennedy perceived a blockade as the proper course of action. His idea was to start low on the "escalation ladder" and control the movement upward so as to give the opponent sufficient time to weigh the risks and costs and thus prevent nuclear war. *Id.* at 139; *see infra* note 188. The President stated that "[t]hese steps must be carefully timed, coordinated, and calculated, for the risks of miscalculation are ever present." J. Spanier & E. Uslaner, *supra* note 111, at 139.

[117] Modern weapons are highly destructive, exceptionally mobile, and of great range. W.

from high to catastrophic.[119] What is intended as a minor war against a relatively weak nation may result in a major war against an able, determined enemy.[120] Vietnam provides a vivid illustration. The small, technologically primitive nation of North Vietnam, a nation without an air force and with ground forces woefully inferior to the United States Army, inflicted over three hundred thousand casualties on American forces.[121] Since the Soviet Union

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KOENIG, WEAPONS OF WORLD WAR III 24 (1981); J. SPANIER, *supra* note 73, at 117-19. This is exemplified by the 1941 German attack on the Soviet Union. J. SPANIER, *supra* note 73, at 116-19. It is estimated that the Soviets suffered "at least three million" casualties during the first 3 months alone. P. CALVOCORESSI & G. WINT, TOTAL WAR 183 (1972). Adding the one million German casualties to this figure indicates a total of four million dead or wounded during the first 3 months of that campaign. *Id.* at 182.

Since today's weapons are swifter and more powerful and accurate than those of World War II, Ginsburgh, *The United States Air Force*, in THE U.S. WAR MACHINE 150 (1978); *see* L. MARTIN, ARMS AND STRATEGY 61 (1973), it can reasonably be stated that the casualties produced by an all-out conventional war today, such as a NATO-Warsaw Pact conflict, would easily surpass those of 40 years ago, *see* H. OWEN & C. SCHULTZE, SETTING NATIONAL PRIORITIES 67 (1976).

[118] *See supra* note 73 and accompanying text.

[119] It is impossible to predict with certainty whether a particular use of the armed forces in a noncombat situation will culminate in war. B. BLECHMAN & S. KAPLAN, *supra* note 65, at 230; H. KAHN, ON ESCALATION 9-13 (1965); Note, *supra* note 8, at 1795. Deterrence strategists advocate using the armed forces in situations short of fighting, such as the deployment of ground forces into a troubled nation, a naval show of force, or airlifting persons and equipment across disputed and hostile territory. It is argued that this will demonstrate that the United States is prepared and willing to go to war to defend an ally, A. GEORGE & R. SMOKE, *supra* note 65, at 58-60, and thereby lead a potential aggressor to conclude that the benefits to be derived from contemplated aggression are now outweighed by its costs, *id.* at 97-103. If this favorable outcome results, then it is said that the American military action has deterred the outbreak of war. *Id.*

The American military move, however, might not result in the prevention of war, but rather may lead to its outbreak. Note, *supra* note 8, at 1795. Furthermore, assuming there is an outbreak of war, there is the difficulty of limiting the casualties and duration of the conflict. R. LECKIE, *supra* note 35, at 853; Reveley, *supra* note 7, at 1288-89; Note, *supra* note 8, at 1796. One commentator observes that in the modern world "it can no longer be said with any degree of assurance that the commitment of troops to combat under *any* conditions is unlikely to result in major conflict." Note, *supra* note 8, at 1796 (emphasis in original). Also, Professor Reveley concludes: "In any use of force today, unlike the nineteenth century, it is difficult to predict the ultimate price. What is initially intended to be a minor effort, perhaps involving only a bloodless show of force, can easily grow into a major war, even a nuclear one." Reveley, *supra* note 7, at 1288-89.

[120] President Truman intended the American commitment to Korea to be small and of short duration, with minimal American casualties. R. LECKIE, *supra* note 35, at 850-58. Moreover, the United States ruefully underestimated the ability and determination of the Vietnamese Communists. Note, *supra* note 8, at 1796.

[121] American military superiority forced the Vietnamese Communists to resort to guerrilla warfare. *See* R. LECKIE, *supra* note 35, at 943-44. The Communist forces were weaker, poorly equipped and fewer in number relative to the American and South Vietnamese forces. *See id.* at 972-73. Despite having a relatively weaker military, the Communist regime

and other technologically advanced nations have provided Third World countries with powerful weapons, even the most backward nation in the world is capable of killing tens of thousands of Americans.[122] Furthermore, an even greater risk than the danger of a relatively weak nation using its own military forces to inflict massive casualties on American troops is the ever-present possibility of such a nation becoming allied with the Soviet Union.[123] Such intervention would present the prospect of Soviet conventional and nuclear forces being employed against American soldiers and civilians. For example, during the October 1973 war, Egypt sought and received a Soviet commitment that the U.S.S.R. would use Soviet conventional and nuclear power to preserve the cease-fire and to save the encircled Egyptian Third Army, even though Egypt's alliance with the Soviet Union was tenuous at the time.[124] President

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killed 58,000 Americans. Newsweek, Dec. 27, 1982, at 38.

[122] The Soviet Union has supplied modern weapons to such Third World countries as India, Afghanistan, Egypt, Iraq, Algeria, Cuba and Guinea. J. Spanier, *supra* note 73, at 448-49; *see* Smolansky, *The Soviet Union and the Middle East Empire* in Expansion & Detente 264-68 (W. Griffith ed. 1976). If the United States were to enter into a conflict with one of these lesser-developed nations, American forces doubtlessly would be confronted with some of the most modern weapon systems. *See* Congressional Quarterly, Inc., The Middle East 47-49 (5th ed. 1981) [hereinafter cited as Middle East].

[123] Soviet intervention on behalf of Third World nations has not been limited to treaty allies or Communist regimes. For example, the non-Communist government of Egypt had neither signed a mutual defense treaty, granted base rights to the Soviet military, nor otherwise aided Soviet military policy when the Soviet Union threatened to use its forces on behalf of Egypt during the 1956 Suez crisis. *See* A. George & R. Smoke, *supra* note 65, at 319; W. LaFeber, *supra* note 71, at 192; A. Ulam, The Rivals 257-58 (1971). On October 29, 1956, Israel invaded the Sinai Peninsula and quickly routed the Egyptian Army. W. LaFeber, *supra* note 71, at 191. The next day, the British and French began the attack on the Suez Canal. *Id.* The air attacks were followed by an Anglo-French landing on November 4. A. Ulam, *supra*, at 257. At this juncture, the Soviets threatened to send troops to aid Egypt and to attack Britain and France with nuclear weapons. R. Ferrell, *supra* note 8, at 746. Seventeen years later, the Soviet Union again threatened to use its military power on behalf of a non-Communist, nonallied nation. *See infra* notes 124-28 and accompanying text.

[124] Anwar el-Sadat succeeded Gamel Abdel Nasser in 1970, and shortly thereafter Egyptian-Soviet relations began to deteriorate. Middle East, *supra* note 122, at 75. President Sadat became increasingly disillusioned with the Soviet Union. H. Kissinger, White House Years 1276 (1979). On July 18, 1972, Sadat ordered more than 15,000 Soviet military advisers out of Egypt. *Id.* at 1295. In addition, the Soviet bases and equipment set up in Egypt were to become Egyptian property. *Id.* Despite this discord, the Soviet Union was prepared to employ its military power on behalf of Egypt during the October 1973 war. *See* M. Kalb & B. Kalb, *supra* note 65, at 489-92; R. Nixon, The Memoirs of Richard Nixon 938-40 (1978).

In that war, the Israelis encircled the best fighting force in the Egyptian Army, the Third Army. M. Kalb & B. Kalb, *supra* note 65, at 489-92. Cut off from any resupply, the Third Army was at the mercy of the Israelis. *Id.* Sadat feared that the cream of the Egyp-

Nixon, who had decided to counter any Soviet intervention with the deployment of American conventional forces and the threat of striking the Soviet Union with nuclear weapons, recognized that his decision to use American military power might have led to a nuclear holocaust.[125] In his memoirs, the President states: "We neared the brink of nuclear war."[126]

The prospect of nuclear war is both real and substantial. It is most likely to occur through a process of unintended and unwanted escalation during a conventional war or superpower crisis.[127] While this has not occurred to date, success at a lottery in the past is no guarantee of success in the future.[128] American Pres-

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tian Army would be destroyed and his regime overthrown. *Id.* at 490. When the October 24 cease-fire went into effect, Sadat urgently appealed to Brezhnev and Nixon to send a joint Soviet-American peacekeeping force to the Middle East to ensure compliance with the cease-fire. *Id.* at 489. The Soviets accepted the Sadat proposal, while the United States opposed a joint Soviet-American peacekeeping force. *Id.*

[125] A message sent by Premier Brezhnev to President Nixon was characterized by the President as representing "the most serious threat to U.S.-Soviet relations since the Cuban missile crisis eleven years before." R. Nixon, *supra* note 124, at 938. Brezhnev charged that Israel was in violation of the cease-fire. Therefore, he urged the United States to join the Soviet Union in dispatching military forces into the Middle East to enforce the cease-fire. *Id.* The Soviet leader coupled his request for joint action with a threat of unilateral Soviet intervention if the United States failed to comply. *Id.*

President Nixon reiterated his opposition to joint action and, as part of a strategy to deter the Soviets from sending forces to rescue the encircled Egyptian Third Army, increased the alert status of all American conventional and nuclear forces. M. Kalb & B. Kalb, *supra* note 65, at 492. In addition, Nixon sent a letter to Brezhnev in which he called the Soviet plan for unilateral military action "a matter of the gravest concern" and implied that it would be opposed by American military forces, including nuclear weapons. R. Nixon, *supra* note 124, at 939. These actions were taken during the night of October 24. *Id.* The Nixon counter-threat substantially increased the probability of a confrontation between American and Soviet forces.

[126] R. Nixon, *supra* note 124, at 922. The crisis ended in the late morning of October 25, when the Soviet Union agreed to an American peacekeeping proposal. The proposal specifically excluded the forces of the two superpowers, but called for the United Nations to send a force to supervise the cease-fire. M. Kalb & B. Kalb, *supra* note 65, at 496.

[127] *See* H. Kahn, *supra* note 119, at 3-15, 74-82; J. Spanier, *supra* note 73, at 170-71; T. Schelling, The Strategy of Conflict 190-91 (1960). It has been American policy to run the risk of escalation to nuclear war in order to win a superpower crisis or conventional war. *See infra* note 129. President Nixon exploited the Soviet fear of nuclear war during the October 1973 crisis, *see supra* notes 124-26 and accompanying text, and President Kennedy employed the risk of escalation during the Cuban missile crisis. *See infra* note 131. In addition, the present NATO strategy requires the United States to use nuclear weapons in order to prevent the defeat of European allies in a conventional war. B. Brodie, *supra* note 8, at 399-405.

[128] Kenneth Boulding has developed a very useful visual image of nuclear risk-taking during a superpower crisis. The crisis situation may be dramatized by conceptualizing it as "a bag containing one black ball amid many white balls . . . ." K. Boulding, The Meaning

idents from Harry Truman through Ronald Reagan have recognized that although Soviet nuclear forces assuredly could destroy the United States, American nuclear forces likewise could destroy the Soviet Union, and thus, American Presidents have employed the threat of nuclear war to influence the behavior of Soviet leaders during various crises.[129] While the probability is virtually nil that an American President who is in control of events would choose to implement the threat,[130] world history in general and the much briefer history of nuclear brinksmanship indicate the ever-present danger that events may elude the control of the superpower leaders and consequently, the threat may escalate into a nuclear war intended by no one.[131]

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of the Twentieth Century 91 (1964). The black ball is nuclear war. When the leaders of the two superpowers engage in nuclear risk-taking, they must dip their hands into the bag. Up to now, the leaders have always drawn a white ball; and the world goes smugly on. But the possibility of nuclear warfare, represented by the black ball, is always present. Herman Kahn concludes: "[W]hen one competes in risk-taking, one is taking risks. If one takes risks, one may be unlucky and lose the gamble." H. Kahn, *supra* note 119, at 15.

[129] J. Kahan, Security in the Nuclear Age 14-15, 18-25, 78-79, 80-84 (1975); M. Kalb & B. Kalb, *supra* note 65, at 484-99; J. Spanier, *supra* note 73, at 121-24, 146-56. Professor Gilpin correctly observes that "[a] major and disturbing consequence of the advent of [nuclear] weapons . . . is that they have enhanced the threat of war as an instrument of policy." R. Gilpin, *supra* note 18, at 214.

[130] *See* J. Spanier, *supra* note 73, at 118-20. President Eisenhower recognized that if the United States ever initiated a nuclear strike against the U.S.S.R., the Soviets would certainly retaliate and annihilate the United States. *See* J. Kahan, *supra* note 129, at 15.

[131] As long ago as the 5th century B.C., it was recognized that in time of war, risk of miscalculation is high and an initial limited move can escalate inexorably into a much more violent conflict than any adversary desired. R. Gilpin, *supra* note 18, at 200-02. One commentator noted that as war continues, it generally becomes an affair of chance for both sides. *Id.* at 202. Moreover, many historians and political scientists believe that World War I resulted from a competition in risk-taking in which experienced and able statesmen of the European powers lost control over events. *See generally* B. Tuchman, The Guns of August 71-97 (1962).

Scholars and statesmen have recognized that whenever the United States issues a nuclear threat, or takes or threatens a highly provocative conventional action, the Soviet Union might not back down as it did during the 1962 Cuban missile crisis and the 1973 Middle East war, but instead issue a counter-threat. Then, from a process that is not entirely foreseeable, from reactions that are not fully predictable, and from decisions that are not wholly deliberate, that threat might be implemented. *See* T. Schelling, Arms and Influence 98 (1966). During the Cuban missile crisis, President Kennedy was aware of and concerned about nuclear war erupting inadvertently either by a mistaken interpretation of enemy intent or by an irreversible series of limited moves on each side. J. Kahan, *supra* note 129, at 81. *See generally* H. Kahn, *supra* note 119, at 9-15. For example, if Khrushchev would have reached the conclusion that the United States was preparing to launch a nuclear attack against the Soviet Union, then he might have decided to attack first in order to prevent the American strike from destroying his missiles. *See* G. Allison, *supra* note 111, at 141, 213. While President Kennedy had made no such plans or preparations to attack Soviet

B. *Premise Two: An Erroneous Decision to Commence War is More Likely with a Foreign Policy of Indiscriminate Global Containment*

Proponents of broad presidential power assert that the decision to go to war is objectively determined and universally accepted. More specifically, they argue that the international environment compels every American decisionmaker to conclude, in certain situations, that war is the correct policy choice. Since the decision is objectively fixed by international reality, it is argued that if the President is adequately informed as to the needs of the United States, then he alone can correctly make the decision to go to war. For example, it was contended that any reasonable man who was aware of the requirements of the global balance of power would have to conclude that the United States had to fight in Vietnam.[132]

The Framers of the Constitution, however, clearly held a diametrically opposed view. They knew that the decision as to the scope of the national interest is neither objective nor capable of universal acceptance. Even if Congress accepted a presidential definition of the extent of national interest, the drafters' logic ran, Congress nevertheless could conclude that the national interests at stake were not worth the costs of war.[133]

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territory, Khrushchev had no way of knowing this and, in interpreting American intent, might have accepted as real what were only suspicions and fears. *See* H. KAHN, *supra* note 119, at 10. When an American U-2 plane accidentally wandered into Soviet airspace, Khrushchev interpreted the presence of the American plane as an American reconnaissance plane whose mission was to survey targets in the Soviet Union in preparation for an imminent American nuclear attack. G. ALLISON, *supra* note 111, at 141. This interpretation, combined with the amassing of an invasion force in Florida and an unauthorized leak from the State Department threatening "further action" if work continued on the Cuban missile bases, nearly prompted Khrushchev to launch a Soviet preemptive strike. *Id.* at 47-48, 64-66.

In addition to miscalculation, a series of limited conventional moves may compel responses until the nuclear rung on the escalation ladder is reached and crossed. G. ALLISON, *supra* note 111, at 56-62. President Kennedy predicted that an American airstrike or invasion of Cuba would have killed many Soviets and thus forced Khrushchev to have made his own nonnuclear move. "If they don't take action in Cuba, they certainly will in Berlin," the President stated. R. KENNEDY, *supra* note 65, at 14-15, 98. Thus, after the first round, the United States would have won in Cuba, and the Soviet Union would have used its conventional superiority around Berlin to succeed there. The scenario thus leads to the question whether the confrontation would have ended after each side employed its conventional power, or proceeded to all-out nuclear conflict. *See generally* R. GILPIN, *supra* note 18, at 214; Shribman, *Experts Fear That Unpredictable Chain of Events Could Bring Nuclear War*, N.Y. Times, June 24, 1982, at A10, col. 1.

[132] *See supra* note 114 and accompanying text.

[133] *See supra* notes 8-9 and accompanying text.

More significantly, the logic employed by the advocates of unbridled presidential initiative generally has been refuted by history. Pre-Korean war Congresses and Presidents did not wage war unless and until agreement was reached on the definition of the scope of national interest and the determination that the benefits to be derived from the war outweighed its costs.[134] It is specious to contend that such decisions were clear-cut and without controversy. From 1945 to 1950, for example, Western Europe lay ravaged as a result of 6 years of total war, and was completely vulnerable to the victorious and powerful Red Army.[135] The loss of Western Europe to the Soviet Union would have impaired significantly three fundamental interests of the United States: the balance of power, since one nation would be in complete control of Europe; the territorial integrity of the United States, in that the Soviet Union could then or at some future time attack the United States; and trade, in that a market for American products and a source of American imports would be lost.[136] Yet, despite the urgency and magnitude of this Soviet threat to the most vital of American interests, no commitment to defend Western Europe was made prior to securing legislative authorization.[137]

Moreover, if legislative authorization could not be assumed in the case of protecting intrinsically important nations against a major and unambiguous Soviet threat, then, a fortiori, legislative authorization cannot be assumed in the case of defending an unimportant nation against more minor and ambiguous aggression in which the harm to the interests of the United States is unlikely, remote, and speculative.[138] South Korea was in the latter category,

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[134] *See supra* notes 35-52 and accompanying text.

[135] *See supra* notes 74-76 and accompanying text.

[136] *See id.*

[137] *See id.*

[138] *See* B. BRODIE, *supra* note 8, at 355, 358-59. *See generally* A. SCHLESINGER, THE BITTER HERITAGE 117-26 (1966). The futility of practicing global containment by committing American forces to areas of minor United States interest is evidenced by the recent conflict in Vietnam. Schlesinger contends that the presidential judgment had been warped by absolute, unlimited, and unchecked power to make war. A. SCHLESINGER, *supra* note 3, at 183-84. It is indisputable that throughout the last 32 years, Presidents have made some misguided determinations that the national interest at stake was sufficiently important and threatened that war was necessary and wise.

The result was a policy of indiscriminate global intervention which has neither advanced nor strengthened the national interest. Instead, it has weakened the nation's security by involving the United States in remote, dangerous, and potentially cataclysmic confrontations and wars. A. SCHLESINGER, *supra* note 3, at 168-69. Moreover, while the United States has devoted its attention, resources and blood to marginal problems in peripheral areas, the strategically[139] and economically valueless.[140] In fact, before the outbreak of the Korean war, Truman and his advisers calculated American interests in Korea and concluded that in the event of a North Korean attack, the best policy for the United States was neutrality.[141] Moreover, Congress had considered this contingency

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American commitment to the parts of the world which are truly vital to the national interest has been neglected. *See* A. SCHLESINGER, *supra*, at 142-43.

Two eminent scholars of international relations, Alexander George and Richard Smoke, identified and criticized the false premises and fallacious logic that the Presidents of the 1950's and 1960's employed, stating that "the Cold War had been dominated by a belief in the necessary *indivisibility of issues*, with everything somehow connected with everything else . . . ." A. GEORGE & R. SMOKE, *supra* note 65, at 598 (emphasis added). The advocates of containment perceived the Soviet ruler as possessing an almost compulsive desire for expansion in order to enhance Soviet influence and ultimately bring the rest of the world under Soviet hegemony. The Soviet Union was viewed as the head of an international Communist movement, designed to upset the status quo or exploit any takeover by a reformist or revolutionary group. The perception of the Soviet rulers as malevolently and ruthlessly efficient gradually has given way, however, as the Soviet Union exhibits caution and a lack of success in expanding its influence. Moreover, the beneficiaries of Soviet economic and military aid display an unexpected independence of their benefactors. *Id.* at 597.

[139] *See* R. LECKIE, *supra* note 35, at 849 (Secretary of State Acheson and Chairman of the Senate Foreign Relations Committee Connally commented that Korea was unimportant to the defense of American territory or to the balance of power); E. MAY, *supra* note 75, at 58-62. During successive careful and high-level deliberations over a 2-year period before the North Korean invasion, there was " 'fairly unanimous agreement to abandon the Koreans to their fate,' the grounds being 'that Southern Korea is without strategic value to us, is, in fact, a strategic liability . . . .' " *Id.* at 59.

[140] *See* R. LECKIE, *supra* note 35, at 846-47. In 1945, the Soviet Union occupied northern Korea and established the 38th parallel as the demarcation line between the industrial north and the agricultural south. *Id.* The Soviets then isolated the south by shutting off electric power and cutting off railroad access. *Id.* at 847. Trade between the two halves of the country became nonexistent. *Id.* The south lacked coal and chemicals and suffered from spiraling inflation. *Id.*

[141] E. MAY, *supra* note 75, at 59-67. Whenever "American officials reflected . . . upon the possibility of North Korean aggression, they apparently took it as a foregone conclusion that the United States should not and would not resist with force." *Id.* at 64. Moreover, Professor May states:

> It was the policy of the United States in June 1950 to avoid using American military forces in Korea. This had been the consistent position of the Joint Chiefs, twice considered by the National Security Council, and on both occasions approved by the President . . . . [T]he government can be said to have coolly assessed the national interest and decided what decision ought to be made in the event of a [North Korean attack] . . . .

Id. at 67.

Presently, an analogous situation exists in El Salvador. *See The Peekaboo Offensive*, NEWSWEEK, Mar. 15, 1982, at 35. Although the United States continues to supply military and economic aid to El Salvador, former Secretary of State Haig denied any intention of sending United States ground troops to the Central American nation. *Id.* at 36. The distinct possibility, however, that Reagan will send troops should the Salvadoran Government falter is evident. *Id.*

and was firmly behind the policy of nonintervention in the Korean civil war.[142] Yet, the decision was made to intervene.[143]

In a world where any commitment of American military forces may lead to a major war or even to nuclear holocaust, a requirement of congressional authorization is necessary to prevent the President from unnecessarily endangering the lives of American troops and civilians. Since any President who adopts a foreign policy of indiscriminate global containment perceives a virtually limitless range of threats to the national interest,[144] there is a very high probability that a decision will be made to intervene in a foreign conflict which has only a slight, indirect, or illusory effect on the defense of American territory, the balance of power, and American economic interests. This foreign policy of limitless containment, combined with the destructiveness of modern weapons, may result in American Presidents risking survival of the state and countless American lives, for interests that, by comparison, are trivial.[145] Thus, congressional participation is required now more than at anytime in our history.[146]

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[142] *See* E. MAY, *supra* note 75, at 66-67.

[143] *Id.* at 69, 81-82. " 'Communism was acting in Korea just as Hitler, Mussolini, and the Japanese had acted ten, fifteen, and twenty years earlier. . . . If this was allowed to go unchallenged,' " President Truman concluded, " 'it would mean a third world war, just as similar incidents had brought on a second world war.' " *Id.* at 81-82 (quoting 2 H. TRUMAN, MEMOIRS 332-33 (1955)). Again and again throughout the post-Korean period of global and indiscriminate containment, the lesson of Munich was cited as the authority for interpreting events and determining American policies. B. BRODIE, *supra* note 8, at 70, 118, 351, 353, 432. The notorious "domino theory" was based on the Munich analogy. *Id.* at 144-53. Every commitment of American forces during the last 32 years was based, at least in part, on the notion that Soviet foreign policy goals and methods were identical with Nazi ambitions and techniques. For example, former Secretary of State Haig asserted that the war in El Salvador is not really a civil war, but only the latest move in "worldwide Soviet interventionism." Isaacson, *A Lot of Show But No Tell*, TIME, Mar. 22, 1982, at 18.

[144] *See* B. BRODIE, *supra* note 8, at 344, 350; J. SPANIER, *supra* note 73, at 216. It should be stated that the Constitution permits the adoption of any foreign policy, including indiscriminate global containment. Article I of the Constitution gives Congress the power to declare war, U.S. CONST., art. I, § 8, cl. 11, while article II makes the President the Commander in Chief of the Army and Navy and bestows on him the power to make treaties with the advice and consent of the Senate, *id.*, art. II, § 2, cls. 1-2. No specific foreign policy is mentioned in, much less mandated by the Constitution. While the Constitution permits the adoption of any foreign policy, the President "shall take care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. It follows that, if the President chooses a policy of global containment, the means by which he implements that policy must be consistent with, and faithful to, the laws passed by Congress and the Constitution itself.

[145] B. BRODIE, *supra* note 8, at 344, 350; A. SCHLESINGER, *supra* note 3, at 168-70, 183-86, 273-75, 288-89; J. SPANIER, *supra* note 73, at 216; *cf.* NATIONAL COMMITMENTS REPORT, *supra* note 9, at 26 ("Congress has permitted its war power to be transferred to the hands of an executive which, though less susceptible to self-doubt than the Congress, is no less susceptible to error").

C. *Premise Three: Congressional Participation in the War-Commencing Procedure Can Reduce the Probability of an Erroneous Decision*

Proponents of presidential power have asserted that congressional participation in the war-commencing process would not make a positive contribution, but would only burden the process with error and delay.[147] It is submitted that this criticism, that members of Congress lack sufficient information, expertise, and judgment to define the national interest and determine whether the national interests at stake justify the dangerous risks of modern war,[148] is meritless. Although some Presidents and their advisers may be more experienced and educated in foreign affairs than some members of Congress, a comparison of the knowledge and skill of Senators and Representatives with Presidents and their advisers reveals that executive branch individuals are in no better position to make such decisions than members of Congress.[149] If either branch contains more informed and experienced members, it is probably the Congress. Senators and Congressmen who are on the Foreign Relations or Armed Services Committee, for example, presumably have had more extensive involvement in analysis of American interests and commitments than the more transient Presidents and their advisers.[150] Legislative participation in fact will reduce the probability of engaging in an unnecessary war by playing the role of a constructive adversary.[151] Congress can prevent the President from defining the national interest overbroadly or from reaching an erroneous determination as to whether the gains to be derived from a military involvement exceed the costs.[182] Moreover, Congress is in a better position than the President to gauge the willingness of the American people to suffer the misery of war.[183] In conclusion, Congress can reduce the probability of fighting an unnecessary war by scrutinizing presidential policy and by ensuring the representation of public sentiment in the warmaking decision.[184]

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[146] *See supra* notes 133-45 and accompanying text.

[147] *See supra* notes 115-16 and accompanying text.

[148] *See supra* text accompanying note 115.

[149] A. SCHLESINGER, *supra* note 3, at 282-84, 326, 452 n.94.

[150] In 1974, the executive branch was headed by Gerald Ford who had never held any foreign affairs position. In contrast, the Senate Foreign Relations Committee was comprised of many experienced foreign policy decisionmakers, namely Senators Fulbright, Mansfield, Church, Symington, McGovern, Muskie, Humphrey, Case, Javits and Percy. A. SCHLESINGER, *supra* note 3, at 452 n.94.

[151] R. DAHL, CONGRESS AND FOREIGN POLICY 104 (1950); Reveley, *supra* note 7, at 1295. Professor Reveley states: "The determination that military action is in our national interests requires the setting of priorities in light of existing values." Reveley, *supra* note 7, at 1295. Congress is certainly as able as the executive branch to make that decision. *Id.* Political scientist Robert Dahl observes that in deciding what elements to include in national interest and whether the national interest is worth war, legislators are as qualified as the President and his advisers. According to Dahl, "[t]he more important the questions of preference become, the less competent becomes the expert. . . . [A]t the top of the pyramid, the skills of

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an Acheson [former Secretary of State] and a Vandenberg [former Chairman of the Senate Foreign Relations Committee] may be of much the same kind." R. Dahl, *supra*, at 104. Dahl speaks of "bring[ing] the highest competence of the *entire* skill group to bear upon the making of policy." *Id.* (emphasis in original).

[182] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring); *id.* at 629-30 (Douglas, J., concurring); *id.* at 652-53 (Jackson, J., concurring); National Commitments Report, *supra* note 9, at 7; T. Franck & E. Weisband, *supra* note 52, at 32. In *Youngstown*, Justice Frankfurter in a concurrence observed that the American scheme of government lacks the power to act with complete, swiftly moving authority. The price of this restriction, however, according to Justice Frankfurter, is outweighed by the safeguards it affords. *Id.* at 613-14 (Frankfurter, J., concurring). He cited Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), in which Justice Brandeis stated that the doctrine of the separation of powers was adopted by the Constitutional Convention not to promote efficiency, but, through the inevitable friction among the three branches of government, to prevent the establishment of autocracy. 343 U.S. at 613-14 (Frankfurter, J., concurring).

Senator William Fulbright noted that American policymakers, from Korea to Berlin to Cuba to Vietnam, implemented a policy of containment based on assumptions that few really questioned. The premises of containment were never reexamined by the architects of our foreign policy, nor were these premises subject to criticism in constructive adversary proceedings. H. Nash, American Foreign Policy: Response to a Sense of Threat 2 (1973).

Professor Bickel perceived the modern relevance and significance of preventing the President from committing hasty and ill-conceived military moves by the check of congressional questioning, constructive criticism, and creative initiative. He stated:

> There is no assurance of wisdom in Congress, and no such assurance in the presidency . . . . The only assurance there is lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent. . . . Singly, either the President or Congress can fall into bad errors . . . . So they can together, too, but that is somewhat less likely, and in any event, together they are all we've got.

Bickel, *The Need for a War-Powers Bill*, New Republic, Jan. 22, 1972, at 18. Professor Reveley conceded that "the mere process of articulating and debating goals and strategies might lead all concerned to a fuller understanding of the interests and alternatives at stake." Reveley, *supra* note 7, at 1301.

[183] Berger, *supra* note 7, at 85; Note, *supra* note 8, at 1775.

[184] 128 Cong. Rec. S1706-07 (daily ed. Mar. 8, 1982) (statement of Sen. Byrd); Berger, *supra* note 7, at 84; Reveley, *supra* note 7, at 1295; *see* Roberts, *A Majority in Poll Want U.S. to Stay Out of Salvador War*, N.Y. Times, Mar. 21, 1982, at 1, col. 2; *Byrd Seeking to Bar U.S. Combat Troops from Salvadoran War*, N.Y. Times, Mar. 7, 1982, at 17, col. 1. On March 8, 1982, Senator Robert Byrd, the leader of the Democratic Party in the Senate,

VI. THE RESTORATION OF CONSTITUTIONALISM

A. *The War Powers Resolution: The Failed Attempt to Restore Checks and Balances*

The Vietnam war caused many legislators to reexamine cold war assumptions concerning the respective roles of Congress and the President in committing American military forces abroad.[155] Between 1969 and 1973, Congress considered various bills that sought to reverse presidential usurpation and restore checks and balances.[156] In the fall of 1973, the War Powers Resolution became law.[157]

The resolution is a hybrid of two different concepts of limiting presidential power.[158] The House bill required the President to terminate hostilities automatically by the end of a given period unless Congress had declared a war or otherwise authorized the use of the military,[159] and permitted Congress to terminate hostilities at any

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announced that he would introduce legislation which would bar the President from ordering combat troops to El Salvador without seeking a prior statutory authorization from Congress. The bill, an amendment to the War Powers Resolution of 1973, would restore constitutional procedures at least in regard to the decision to fight in El Salvador. *Byrd Seeking to Bar U.S. Combat Troops from Salvadoran War*, *supra*, at 17, col. 1.

[155] W. Reveley, *supra* note 3, at 225; Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 Wm. & Mary L. Rev. 823, 823-24 (1975); *see* Firmage, *The War Powers and the Political Question Doctrine*, 49 U. Colo. L. Rev. 65, 89-90 (1977). Professor Berger criticized the extension of presidential warmaking power:

> Through presidential conduct of foreign policy, . . . we have become entangled in a succession of great wars. If we are to forfend such catastrophes we must begin by demanding to be consulted—for example, does the nation want to risk a confrontation with the Soviet Union to halt its expansion into Africa? Perhaps it should, but the decision cannot be left to Mr. Kissinger and Mr. Ford. Too many calamitous executive decisions counsel against making them the sole and secret arbiters of foreign policy.

Berger, *The Tug-of-War Between Congress and the Presidency—Foreign Policy and the Power to Make War*, 16 Washburn L.J. 1, 8 (1976).

[156] Spong, *supra* note 155, at 824.

[157] Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1976 & Supp. IV 1980)).

[158] Spong, *supra* note 155, at 827-33. *Compare* S. 440, 93d Cong., 1st Sess. §§ 2-5 (1973) (Senate attempt to avoid unauthorized presidential wars by defining scope of unilateral executive authority) *and* S. Rep. No. 220, 93d Cong., 1st Sess. 2-4, 21-27 (1973) (report on proposed bill attempting to delineate the circumstances for unilateral presidential war power) *with* H.R.J. Res. 542, 93d Cong., 1st Sess. § 4 (1973) (House proposal allotting President greater authority than Senate proposal, subject to subsequent congressional approval) *and* H.R. Rep. No. 287, 93d Cong., 1st Sess. 5-7, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2346, 2349-51 (providing for consultation between Congress and the President prior to war); *see infra* notes 159-63 and accompanying text.

[159] H.R.J. Res. 542, 93d Cong., 1st Sess. § 4b (1973); *see* Spong, *supra* note 155, at 829.

time if a majority of the members in each house voted by concurrent resolution to end the war.[160]

In contrast to this "performance" test of the House, the Senate adopted an "authority" approach.[161] The Senate war power proposals sought to define the circumstances, such as attack against American territory, armed forces, or citizens, under which the President could commit the military to hostilities.[162] In all other circumstances, the President could not initiate war on his own authority.[163]

Essentially the compromise bill which emerged from the joint House-Senate conference committee embraces the House "performance" test.[164] The resolution does not confine presidential

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[160] H.R.J. Res. 542, 93d Cong., 1st Sess. § 4c (1973). Concurrent resolutions neither require the President's signature nor are affected by his veto. Spong, *supra* note 155, at 829 n.43. Such resolutions have been used to terminate hostilities in the past. Additionally, Congress has incorporated these resolutions in subsequent legislation. *See, e.g.*, Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 617, 75 Stat. 424, 444; The Lend Lease Act, ch. 11, § 3 (c), 55 Stat. 31, 32 (1941); Reorganization Act of 1939, ch. 36, § 5 (a), 53 Stat. 561, 562.

[161] Spong, *supra* note 155, at 832-33. The characterization of the House approach as "performance test" and the Senate approach as "authority" is Senator Spong's. *Id.* It is suggested that these labels are derived from the actual nature of the rights afforded the President under the different bills. In the Senate bill the President is given specific situations under which he will have unilateral "authority" to commence war. *See infra* note 162 and accompanying text. In the House bill, the President is given unilateral authority to initiate or to "perform" the initiation of war in almost every situation and executive power is merely subject to later ratification or approval by Congress. *See* H.R.J. Res. 542, 93d Cong., 1st Sess. § 4b (1973).

[162] S. 440, 93d Cong., 1st Sess. § 3(1)-(4) (1973). Section 3 provides in pertinent part:

> [T]he Armed Forces of the United States may be introduced in hostilities . . . only—(1) to repel an armed attack upon the United States . . .; (2) to repel an armed attack against the Armed Forces of the United States . . .; (3) to protect . . . citizens and nationals from . . . any situation . . . involving a direct and imminent threat to [their] lives . . .; or (4) pursuant to specific statutory authorization.

Id.

[163] *Id.* § 3. The Bill limited the conditions under which the President has unilateral authority to initiate war and reserved all other situations for congressional approval through the use of the introductory phrase: "In the absence of a declaration of war by Congress." *Id.*

[164] T. EAGLETON, *supra* note 1, at 206-25; T. FRANCK & E. WEISBAND, *supra* note 52, at 68-71; *see supra* note 161 and accompanying text. The Senate approach of defining the circumstances under which the President possesses the legal authority to commence military operations was rejected by the conference committee. Spong, *supra* note 155, at 833. Although the Representatives in the conference committee who rejected the Senate approach permitted the language of the authority approach to remain in the bill, the authority language was no longer in the legally binding portion of the bill. Thus, the authority section of the law, section 2(c), places no legal limits on the President's power to commence war. *Id.* at 834-35, 837-41; T. EAGLETON, *supra* note 1, at 202-05.

The War Powers Resolution produced by the conference committee was approved by warmaking to the circumstances under which the Chief Executive has authority under the Constitution,[165] but instead, effectively permits Presidents to continue to claim and exercise an unlimited warmaking power.[166] The only limit placed upon the presidential power is durational—the President must receive congressional authorization within 60 days after the war begins[167] and he is obli-

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the Senate by a majority of 75 to 20. 119 Cong. Rec. 33, 569-70 (1973). The conference report was approved in the House by a 238 to 123 vote. *Id.* at 873-74. Although President Nixon vetoed the War Powers Resolution, H.R. Doc. No. 171, 93d Cong., 1st Sess. 1-2 (1973), Congress subsequently overrode the President's veto, Spong, *supra* note 155, at 836-37. At least one commentator has noted that despite general congressional opposition to the conference committee bill, many members voted to override the presidential veto because of transient political considerations. *Id.* at 836; T. Eagleton, *supra* note 1, at 214-15. The Indo-China war, Watergate, and partisan politics influenced legislators more than the merits of the law. *Id.*; T. Franck & E. Weisband, *supra* note 52, at 70.

[165] *See* T. Eagleton, *supra* note 1, at 203-05. Senator Eagleton voiced his views on the possible results of congressional failure to adopt the "authority" approach. *Id.* The result of this omission, Eagleton concluded, was that the War Powers Resolution would provide "a legal basis for the President's broad claims of inherent power to initiate war." *Id.* at 203. Moreover, Eagleton cautioned, the War Powers Resolution is a dangerous piece of legislation which could "effectively eliminate Congress' constitutional power to authorize war." *Id.* at 204. Others have joined Eagleton's philosophy, attempting to restore constitutionalism to the war-decision procedure by suggesting amendment of the War Powers Resolution. *See, e.g.*, *Byrd Seeking to Bar U.S. Troops From Salvadoran War*, *supra* note 154, at 17, col. 1.

[166] *See* T. Eagleton, *supra* note 1, at 213; Spong, *supra* note 155, at 841; *supra* note 165. Senator Eagleton stated: "What this bill says is that the President can send us to war wherever and whenever he wants to. . . . Despite what has been written and said about it, it does not limit the power of the President of the United States to wage war by himself. Quite to the contrary. It attempts to emblazon into law, that unilateral decisionmaking process." 119 Cong. Rec. 36,177 (1973).

During the floor debate in the House, many representatives stated that the War Powers Resolution failed to deprive the executive branch of the power it seized during the cold war, and that the bill's failure to undo the usurpation permitted Presidents to continue to perpetuate the unconstitutional practice. For example, Representative Green stated that "a careful reading of the bill indicates . . . an expansion of Presidential warmaking power . . . . Thus, the net result could be absolutely no legislative constraint on the President's claims to constitutional warmaking authority." 119 Cong. Rec. 36,204 (1973). Further, Representative Abzug said that the War Powers Resolution gives the President power that he did not already have under the Constitution. *Id.* at 36,221. She stressed that the resolution gives the President "90 days in which to commit our forces anywhere in the world, only requiring that he report to the Congress within 48 hours on what he has done." *Id.* Representative Culver rebuked his colleagues of the 93d Congress for failing to annul the constitutional procedure and to restore checks and balances, stressing that the resolution "[gives] the President a blank check to wage war anywhere in the world for any reason of his choosing for a period of 60 to 90 days." *Id.* Similarly, Representative Dellums observed that "many Congressmen will live to see the mistake they made in allowing any President . . . [this type of power]." *Id.* at 36,220.

[167] 50 U.S.C. § 1544(b) (1976). Section 1544(b) provides:

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President

gated to end the war before the 60-day grace period expires in the event that Congress passes a concurrent resolution ordering the President to end hostilities.[168] Thus, there is no restraint on the initial presidential exercise of war power, and the War Powers Resolution does nothing to reverse the usurpation.[169] The failure of Congress to reclaim its rightful authority has left the unconstitutional practice intact to the present day.[170]

> shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Id.

[168] *Id.* § 1544(c). Subsection (c) states:

> Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id.

[169] *Id.* § 1541(c) (1976). Section 1541(c) provides:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Id. The conference committee did not intend section 1541(c) to be mandatory, but only precatory. T. EAGLETON, *supra* note 1, at 202-03; Spong, *supra* note 155, at 837-41. This conclusion is derived from the conference report wherein it was stated that "[s]ubsequent sections of the joint resolution are not dependent upon the language of [section 1541(c)]." H.R. REP. No. 547, 93d Cong., 1st Sess. 8 (1973). The effect of this statement, Senator Eagleton claims, not only diminishes the authority of section 1541(c), but "now even its value as a statement of policy . . . [is] questionable." T. EAGLETON, *supra* note 1, at 203. After carefully analyzing the language of the law, the language in the House and Senate bills, the legislative history, and principles of statutory construction, Senator Spong concluded that section 2(c) is not mandatory and thus places no legal limits on the President's power to commence war. Spong, *supra* note 155, at 840.

[170] *See* 50 U.S.C. § 1547(d) (1976). Section 1547(d) states:

> Nothing in this chapter—(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.

B. *Checks and Balances and Modern International Exigency*

As this Article has demonstrated, the legitimate scope of independent executive authority is quite narrow. At most, the President can act when American territory or American citizens are in danger of attack.[171] In all other circumstances the Constitution does not permit a unilateral executive power and therefore prohibits the President from acting in these circumstances absent congressional authorization. It has been argued that the application of checks and balances to the war-commencing decision, although indisputably required by the Constitution, is misplaced in the post-World War II world of highly destructive and swiftly moving conventional and nuclear weapons. It is submitted, however, that the restoration of checks and balances will not impair the ability of the United States Government to protect itself or its vital interests. Three factors—the development of a means of immediate mass destruction;[172] a vehicle that can deliver this weapon between continents in a matter of minutes;[173] and the absence of effective defenses[174]—all of which are fundamental changes in the technology

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Id. Since Presidents had claimed broad power to make war for any reason of national interest before the bill became law, section 1547(d) has been interpreted as permitting the continuation of that claim. *See* 119 CONG. REC. 36,204 (1973) (remarks of Rep. Green); *id.* at 36,189 (remarks of Sen. Eagleton); T. EAGLETON, *supra* note 1, at 202-03.

[171] *See supra* notes 40-42 and accompanying text. During the pre-Korean war period, Presidents acquired the unilateral power to rescue American citizens who were in danger in stateless territories and weak states. In the modern world, however, it appears that the President can never exercise the power to protect citizens in foreign territories, since there are no longer any stateless territories or weak states. Whereas nations in which our citizens were endangered in the past were too weak to inflict anything more than minimum casualties, now, even the smaller nations of the world possess the military capability to inflict massive casualties on American troops which land on their soil. *See* J. SPANIER, *supra* note 73, at 267-68. Second, in the past, nationalistic feelings were not as pronounced as they are today. Currently, nation-states so value their sovereignty that they would regard the landing of American troops to rescue American citizens as an invasion of their sovereign territory. *See id.* at 114-15.

[172] J. SPANIER, *supra* note 73, at 70-72; D. ZIEGLER, WAR, PEACE AND INTERNATIONAL RELATIONS 343-44 (2d ed. 1981).

[173] Turner & Challener, *Strategic and Political Implications of Missiles*, in NATIONAL SECURITY IN THE NUCLEAR AGE 83-87 (1960). Professors Challener and Turner observed that the

> sharply increased velocity of . . . missiles . . . [is] causing military experts to recast some of their most modern concepts of military policy and strategy. . . . The advent of missiles has greatly intensified the compression of the time scale for modern warfare. . . . [T]he United States, protected by oceans . . . [has] had to adjust radically to the new situation.

Id. at 83-84.

[174] Despite extensive research and development by both the United States and the So-

of war, have led military strategists to conclude that since the United States is vulnerable to complete destruction[175] American strategy should not be to fight a nuclear war but to deter it.[176]

The strategy of deterrence requires the President to maintain American nuclear forces in a permanent state of readiness so that American missiles and bombers can retaliate immediately in the event that the Soviets would launch a surprise nuclear attack.[177] According to deterrence strategy, if the President were able to order an immediate, devastating retaliatory strike, then the Soviet Union could be totally and assuredly destroyed. With this in mind Soviet leaders will refrain from launching a nuclear attack against the United States.

Conversely, if the President lacked the authority to order an immediate retaliatory strike, the Soviet leaders might question the ability and the willingness of the United States to retaliate efficaciously, and thus might be tempted to launch a first strike.[178] The President, however, can order an immediate retaliatory strike without exceeding the authority granted him under the Constitution. It is clear that the President has always possessed the authority to protect the territorial integrity and political independence of the United States from armed attack.[179] Thus, the invention of nuclear weapons and the changed strategic requirements of protecting United States territory do not in fact require any modification of traditional war-commencing procedure.

Opponents of a restoration of the checks-and-balances system

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viet Union, neither nation has yet developed an effective antiballistic missile (ABM) system. B. Brodie, *supra* note 8, at 379; D. Gompert, M. Mandelbaum, R. Garwin & J. Barton, Nuclear Weapons and World Politics 34, 91 (1977); J. Kahan, *supra* note 129, at 257-59. "Knocking down an incoming missile with an interceptor vehicle is a complicated undertaking. . . . President Kennedy described it as tantamount to hitting a bullet with another bullet." D. Gompert, M. Mandelbaum, R. Garwin & J. Barton, *supra*, at 34.

[175] J. Spanier, *supra* note 73, at 124. With the advent of nuclear technology, "[n]uclear weapons now ensure that any total war will risk the very substance of national life." *Id.*

[176] *See* J. Spanier, *supra* note 73, at 124-30. *See generally* B. Brodie, *supra* note 8, at 375-432; R. Gilpin, *supra* note 18, at 213-30.

[177] *See, e.g.*, J. Kahan, *supra* note 129, at 35-47.

[178] *See* J. Spanier, *supra* note 73, at 124. It has been stated that "[t]he actual application of force to beat the enemy [has been] replaced by the *exploitation of potential* force to dissuade the potential aggressor from striking." *Id.* at 130 (emphasis in original).

[179] *See supra* notes 14-24 and accompanying text. Professor Henkin, an eminent authority on the war powers, states: "In our day of instant war, all assume that the President would have the power to retaliate against a nuclear attack, if only on the theory that retaliation was a form of defense and might prevent or deter a . . . strike." L. Henkin, *supra* note 1, at 52.

to presidential war power also argue that improvements in conventional weapon systems require the President to rely on a response system which is speedier than legislative authorization in order to mount an effective defense of an ally nation. An aggressor nation, the argument is made, could conquer another nation with a devastatingly swift attack.[180] Once again, history belies this assertion. While it is true that the development of artillery, tanks, and aircraft has given an aggressor nation the capability to inflict the same number of casualties in a week that would have taken a year in 1787,[181] it is also true that these weapons were invented and utilized long before the cold war era.[182] Yet, in the pre-cold war era, no President ever claimed that the increased fire power and mobility of foreign armies justified a commensurate increase in presidential power. Again, reference is made to when Nazi Germany launched a devastating blitzkrieg attack against France. Within 1 month, Hitler's forces had routed the French forces[183] and French Premier Reynaud appealed to President Roosevelt for assistance in defending against the most rapidly moving attack then known to mankind. President Roosevelt, however, regarded the mobility and firepower with which German Armed Forces could destroy the French as constitutionally immaterial, and refused to commence war in the absence of congressional authorization.[184]

Further, with respect to expeditious response, Congress presently can convene and legislate quite rapidly. Unlike Congresses of 50 or 150 years ago, the contemporary Congress is in session throughout the year, and, even if the members of Congress are in recess, modern transportation enables them to be present at the Capitol in a matter of hours.[185] Once assembled, Congress can authorize war as quickly as a rollcall vote can be completed. For example, after the Japanese attack on Pearl Harbor, President Roosevelt's request for a declaration of war was granted that same day.[186] Additionally, 1 day after President Eisenhower asked Congress for authority to use American Armed Forces to protect Taiwan from attack by mainland China,[187] the Chairman of the House Rules Committee called up the resolution under a closed rule permitting only 2 hours of debate and no amendments.[188] The House passed the resolution that same day.[189] Three days thereafter, the Senate approved what has become known as the Formosa resolution.[190] Furthermore, despite executive assertions to the contrary, there is abundant evidence that there was sufficient time for President Truman to seek congressional authorization before he unilaterally committed American forces to the defense of South Korea.[191] Thus, it is suggested, Congress can assemble and consider a war resolution with sufficient speed for the United States to respond to any attack anywhere in the world.[192]

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[180] Ratner, *supra* note 2, at 466-67.

[181] *See generally* R. Gilpin, *supra* note 18, at 62.

[182] *See generally id*. One commentator notes that the development of modern tank warfare and tactical aircraft permitted a nation to employ a highly effective offense strategy by 1939—more than a decade before the Korean war. *Id*. at 62. Therefore, neither the increase in our offensive capabilities nor those of our actual or potential foes should have an influence on the scope of unilateral executive power to initiate war. *See infra* notes 183-84 and accompanying text.

[183] *See* W. Shirer, *supra* note 48, at 738-39.

[184] *See supra* notes 49-51 and accompanying text.

[185] *See* W. Reveley, *supra* note 3, at 162-63. Professor Reveley observes that in the past there were many aspects of congressional procedure that prohibited speedy decisionmaking. *Id*. He concedes, however, that "[t]elephones and airplanes, in addition to briefer recesses, now ensure the physical possibility of congressional influence during most crises."

Id. at 163.

[186] R. Russell, *supra* note 40, at 370.

[187] 101 Cong. Rec. 600-01, 625-26 (1955). For the historical, political and military causes of the Taiwan Strait Crisis, see A. George & R. Smoke, *supra* note 65, at 266-92. For congressional debate on the Taiwan Strait Crisis, see 101 Cong. Rec. 735-69, 813-52 (1955).

[188] 101 Cong. Rec. 659 (1955).

[189] R. Russell, *supra* note 40, at 410-13.

[190] *Id.* at 680-81.

[191] Reveley, *supra* note 7, at 1294; Note, *supra* note 8, at 1791. Professor Reveley admits that "in the Korean situation, congressional authorization could have been obtained since Congress was in session and the legislators are capable of rapid action when confronted with an act such as the North Korean invasion." Reveley, *supra* note 7, at 1294.

[192] Historian Ruhl Bartlett contended:

> The world, it is said, has moved in the space age where the weapons of destruction are swifter and deadlier than ever before, where decisions on national defense may need to be so immediate that no time can be allowed for the slow and possibly faltering deliberations of democratic assemblies. This argument has been affirmed, and repeated and repeated until people are mesmerized by it, and it is fundamentally specious. The President has—and always had—the duty to use the armed forces at his disposal to repel sudden armed attacks on the United States, and there has never been a case in the whole history of the United States when the imminence of danger to the Nation was so great that the decision to do more than repel attacks could not be entrusted to the Congress.

Hearings on U.S. Commitments Abroad, *supra* note 109, at 20. Similarly, in 1971 Senator Fulbright asserted that the alleged need for urgent and immediate action is merely a false excuse for unilateral presidential war power. Sen. Fulbright Address, *supra* note 56, at 10,355. Professor Reveley described the claim that great speed is necessary in most decisions respecting war as dubious: "[The] necessity [of speed] during the last twenty-five years has been exaggerated." Reveley, *supra* note 7, at 1294. Reveley stated that since World War II, there are only two instances in which it plausibly can be argued that the process of requiring

Many military strategists have argued, however, that the United States Government should be capable of not merely defending an ally, but of deterring the aggressor from attacking the ally.[193] Since the success of deterrence strategy depends upon the credibility of the commitment to defend other states from aggression,[194] the President must have the power to respond to acts of aggression with certainty and promptness. Under a "new" constitutional system, the credibility of the American commitment might be diminished because the potential aggressor would regard a deterrent threat that was contingent upon the President seeking and receiving an after-the-attack statutory authorization as less credible than a deterrent threat that could be immediately and definitely executed by the President.

A threat issued under a restored constitutional system, however, could retain the same credibility as one issued under the present system, if the President and Congress were to make use of a statute authorizing the President to commence military operations in the event of an attack against an American ally. This before-the-attack resolution will have been considered by Congress before the enemy strikes his blow, and would grant the President the power to commence specified military operations without having to seek additional congressional authorization. Consequently, the President would possess the legal authority for immediate employment of American military capabilities.

Some might question whether the before-the-fact resolution is sufficient to protect the national interest in all circumstances.[195] As

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legislative authorization was too slow to protect national security. *Id.* Those two cases were the Korean conflict and the Cuban missile crisis. *Id.* He concluded, however, that there was, in fact, sufficient time available to the President to seek and to receive legislative authorization in both cases. *Id.*

[193] *See* J. Spanier, *supra* note 73, at 124. Recognizing how deterrence pervades American foreign policy, two commentators have concluded:

> The problem for American foreign policy has been that of "projecting" deterrence beyond her own borders to cover other parts of the world, seeking to protect some third party—an ally, or a neutral we wish to safeguard. Accordingly, theory about the deterrence of limited threats to the U.S. has focused almost exclusively upon a "three-nation problem" involving an aggressor nation, the U.S., and some smaller nation which is the object of the aggressor's designs and which the U.S. seeks to protect. The goal of this theory has been to discover how the U.S. can successfully project its deterrent power to protect a third nation or group of nations.

A. George & R. Smoke, *supra* note 65, at 58-59; *see* Snyder, *Deterrence and Defense*, in The Use of Force 56-76 (1971).

[194] A. George & R. Smoke, *supra* note 65, at 64-65.

[195] *See, e.g.*, Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 Cornell L.

Alexander Hamilton observed: "[T]he circumstances that endanger the safety of nations are infinite."[196] It is true that not every specific threat can be anticipated by Congress.[197] Congress, however, can determine the scope of national interest in advance of the particular threat, and can foresee the general category of threat. For example, the United States has important economic and security interests in the Middle East.[198] In addition, the identity of potential aggressors is known in advance of the attack.[199] Thus, even though one factor, the specific nature of the threat, may not be known to the Congress at the time it is considering a before-the-fact resolution, all other considerations can be foreseen and contemplated by Congress: the nations to be protected, the identity of the enemy, and the type of aggression.[200] If, for example, Congress determines that the United States needs to protect a large number of Middle Eastern nations from a wide variety of enemies and types of aggression, the Congress could pass a resolution akin to the following:

> The President of the United States is hereby authorized to employ the armed forces of the United States for the purpose of protecting American allies and friendly nations in the region of

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REV. 719, 759 (1972). While all conceivable relevant factors cannot be foreseen by Congress, a before-the-attack resolution can be used by the President and Congress to protect effectively the national security. *See infra* notes 197-201 and accompanying text.

[196] THE FEDERALIST, *supra* note 1, No. 23, at 200 (A. Hamilton).

[197] *See* Wallace, *supra* note 195, at 759. There are some specific threats that cannot be anticipated. For example, on July 14, 1958, Iraqi General Abdul Karim Qassim overthrew the government of King Faisal and Prime Minister Nuri Es-Said. A. GEORGE & R. SMOKE, *supra* note 65, at 347. Qassim's successful coup d'etat came as a complete surprise to the United States. *Id.* While Faisal and Es-Said governed Iraq, Iraq had adopted conservative domestic policies and a pro-United States foreign policy. *See id.* The Western leaders were unable to determine the political composition of the Qassim government and many American policymakers feared that the Iraqi coup would jeopardize American interests in the ongoing Lebanese civil war. *See id.* at 348-49; R. BARNET, *supra* note 75, at 144-46.

[198] *See* Campbell, *The Middle East: A House of Containment Built on Shifting Sands*, 60 FOREIGN AFF. 593, 598 (1981).

[199] Three potential aggressors threaten the Middle East: the Soviet Union, radical nations, and radical groups within conservative nations. Radical nations that threaten American interests include Iraq, Syria, Libya, and Iran. *See* MIDDLE EAST, *supra* note 122, at 143-69; *see also* A. GEORGE & R. SMOKE, *supra* note 65, at 328, 332. Radical groups include the Palestinians residing within Jordan and Lebanon. *See* MIDDLE EAST, *supra* note 122, at 31. *See generally* H. OWEN & C. SCHULTZE, *supra* note 117, at 17-23.

[200] It is submitted that "aggression," although variegated, consists of finite and forseeable types. "Aggression" may include the following forms: conventional invasion, guerrilla warfare, arms transfer, internal violence and instability, and nuclear attack and intimidation.

> the Middle East from international and internal aggression from any source.

This authorization is indeed broad. Congress, if it so desired, could narrow the scope of the authority by identifying the friends, foes, and type of aggression.

For example, the Congress could decide that American blood should be shed only if the Soviet Union invaded the territory of any nation in the Middle East, and could draft a resolution accordingly.[301] Pursuant to this resolution, intraregional wars and internal conflicts would be excluded and therefore the President would be without power to intervene unilaterally in these conflicts. Thus, this resolution would empower the President to interpose American forces to defend Iran from a Soviet invasion, but would leave the President without authority to intervene in an Iraq-Iran war, a Lebanese civil war or an Arab-Israeli war. Of course, after a war erupts in the Middle East the President is free to seek congressional authorization, and if Congress authorizes war the President can then act.

VII. CONCLUSION

The United States has possessed and continues to possess significant extraterritorial economic, political, and security interests. Admittedly, the variety and complexity of these interests have increased since World War II. A growth in overseas interests, however, does not compel the elimination of congressional participation in determining the scope of national interest and the threats that are important enough to justify commitment of American lives. Furthermore, the institution of Congress can move quickly enough and is flexible enough to foresee and respond to any threat to the national interest, and the members of Congress certainly are able to reduce the probability of fighting an unnecessary war. Therefore, it is urged that the practice of waging war in contravention of checks and balances be abruptly halted, and the constitutional procedure restored.

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[301] On January 23, 1980, during a State of the Union Address, President Carter warned that the United States would go to war, if necessary, to protect the Persian Gulf oil supply. *See* MIDDLE EAST, *supra* note 122, at 239. Similarly, on October 1, 1981, President Reagan announced in a news conference that the United States would not allow Saudi Arabia to become another Iran. *See id.* at 245. He pledged military action if the Persian Gulf oil supply were threatened. *Id.* While President Carter's threat was directed solely against the Soviet Union, President Reagan's threat was directed against radical Arab or Persian nations or radical Arab forces within Saudi Arabia who were considering invading Saudi Arabia or overthrowing the Saudi monarchy.

PREPARED STATEMENT OF PETER WEISS

Mr. Chairman, Members of the Panel: I appreciate this opportunity to appear before you on behalf of the Center for Constitutional Rights (CCR).

CCR is a public interest law firm which has, for the past twenty years, sought to advance, through litigation and education, the cause of constitutional government in this country. To this end it has, inter alia, represented members of Congress and religious and civic groups in cases involving separation of powers questions concerning foreign affairs, as well as the duty of the executive and legislative branches to observe, and of the courts to enforce, the mandates of the constitution in the conduct of foreign affairs.

CCR litigated two of the only three cases brought under the War Powers Resolution (WPR) so far, Crockett v. Reagan, 558 Fed. Supp. 893 (D.D.C. 1982), aff'd per curiam 720 F.2d 1355 (D.C. Cir. 1983), cert. denied 104 SC 3533 and Sanchez-Espinosa v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd 770 F.2d 202 (D.C. Cir. 1985, involving United States activities in El Salvador and Nicaragua, respectively. CCR also participated in Conyers v. Reagan, 578 F.Supp. 324 (D.D.C. 1984), appeal vacated as moot 765 F.2d 1124 (D.C.Cir. 1985), a case arising out of the invasion of Grenada but brought under the War Powers Clause of the Constitution rather than WPR.

For purposes of this presentation, I shall take the following propositions for granted, fully aware that there is a measure of disagreement in legal, academic and political circles on some if not all of them:

1. The Framers intended the War Powers Clause of the Constitution, Art. 1, Sec. 8, Cl. 11, to vest the power to commit the country to war solely in the Congress, leaving the President only the power to repel sudden attacks and to conduct wars as Commander-in-Chief once they

are declared or approved by Congress.

2. Neither the President's duty to conduct the foreign affairs of the United States, nor his responsibility as Commander-in-Chief of the armed forces, nor the relatively new, pernicious doctrine of "national security" give him the power to make war without the consent of Congress.

3. Over time, the war-making power has increasingly been seized by the executive and correspondingly relinquished by the legislative branch.

4. This unconstitutional shift reached its height during the Vietnam War, resulting in the passage of the WPR in 1973.

5. The WPR is not a constitutional amendment; it seeks to implement the War Powers Clause by providing a mechanism for reminding both Congress and the President of their constitutional roles and for terminating a Presidential war unless Congress expressly sanctions it.

6. The WPR has not worked.

For an extensive, documented exegesis of these points I respectfully refer the members of this Committee to the excellent article, "The Force of Law: Judicial Enforcement of the War Powers Resolution", by my CCR colleagues Michael Ratner and David Cole. It appears at 17 Loyola of Los Angeles Law Review 715.

There are a number of reasons why the WPR has not worked. They include the misguided notion, held by a succession of Presidents, that there are certain all-transcending powers "inherent in the Presidency" (sometimes this is put as "the constitution is not a suicide pact"); the reluctance of Congress to stay the hand of the President when American lives are, or are perceived to be, at risk ("the rally round the flag" syndrome); and the varieties of abdication to which courts have resorted when called upon to perform their power-balancing function, i.e. to correct the overzealousness of a President or the timidity of a Congress. In the remainder of this statement, I shall concentrate on the role of the courts.

The most recent example of the varieties of judicial abdication is the decision of the United States District Court for the District of Columbia in Lowry v. Reagan, 676 F.Supp. 333 (D.D.C. 1987). This case arose out of the President's failure to submit to Congress the report required by Section 4(a)(1) WPR once it had become clear that his decision to intervene actively in the Persian Gulf had introduced United States armed Forces "into hostilities or into [a situation] where imminent involvement in hostilities [was] clearly indicated by the circumstances". Plaintiffs, 110 members of the House of Representatives, sought a declaration that events in the Gulf had triggered the Presidential reporting requirement and, consequently, an order that the President submit the required report to Congress.

The President, without discussing the merits of the complaint or the constitutionality of the WPR, moved to dismiss the complaint on grounds of, inter alia, standing, equitable discretion and political question. Judge Revercomb, without deciding the question of standing, granted the motion on the second and third grounds. Equitable discretion is one aspect of the larger doctrine of remedial discretion, a relatively new doctrine favored by the District of Columbia Circuit, which holds that both declaratory and injunctive (equitable) relief should be denied where members of Congress seek the aid of the courts in a dispute with the executive branch with respect to which they have not exhausted their legislative remedies. The more ancient and more widely (i.e., in other circuits as well) followed political question doctrine counsels judicial abstinence in any of six circumstances described by Justice Brennan in the leading case of Baker v. Carr, 369 U.S. 186, 217 (1962).

In Lowry, Judge Revercomb based his reliance on the remedial discretion doctrine on the fact that, in the period preceding the filing of the suit, a number of resolutions seeking to compel the President to comply with the reporting requirement had been introduced in, but not acted on by the Congress. Similar results were reached by the Circuit in Sanchez and Conyers.

As to political question, Judge Revercomb held that a judicial holding that a situation of hostilities or imminent involvement in hostilities existed in the Gulf would risk "the potentiality of embarrassment ... from multifarious pronouncements by various departments on one question", one of the Baker v. Carr tests. He did, however, concede that if Congress had enacted a joint resolution stating that 'hostilities' existed in the Persian Gulf ... but if the President still refused to file a section 4(a)(1) report, this Court would have been presented with an issue ripe for judicial review." Similarly, in Crockett, Judge Green held that the fact-finding in which she was being asked to engage, as to whether U.S. military advisers in El Salvador were actually or imminently involved in hostilities, was precluded by "a lack of judicially discoverable and manageable standards for resolution", but that "a case could arise with facts less elusive than these". In such a case, she said, a court might well order the President to file a report, perhaps even without a Congressional finding that a report was required.

The appeal in the Lowry case has been pending in the D.C. Circuit since last February. When it is decided - on any basis other than mootness, which, despite the recent cease-fire, would probably not be appropriate as long as U.S. warships patrol the Gulf - it may shed additional light on the role of the judiciary in enforcing the WPR.

In the meantime, what are the lessons to be drawn from the relatively brief history of WPR litigation?

The principal lesson is that the courts, while recognizing the importance of the War Powers Clause, and of the WPR as reinforcing the War Powers Clause, have been disinclined to play their constitutionally mandated role in what they typically refer to as "this sensitive area." Furthermore, they have done so on grounds which sometimes strain credulity:

> Judges do not hesitate to find facts in the most prolix antitrust, tax or discrimination cases. Do they really lack the ability, or the standards, to decide,for instance, whether a marine receiving hostile fire pay is actually or imminently involved in hostilities?
>
> Every decision of the judiciary which is in conflict with a decision or position of one of the other two branches risks some "embarrassment from multifarious pronouncements". But the function of the courts, in the time-honored phrase of Chief Justice Marshall, is "to say what the law is", not to "avoid embarrassment". Besides, in the Lowry case, the embarrassment would have resulted, not from a "multifarious pronouncement", since the daily headlines hardly made it possible for the President to deny that hostilities were taking place in the Persian Gulf, but from ordering the President to comply with the consequences of the undeniable facts and make his report to Congress.

That is not the kind of "embarrassment" Justice Brennan had in mind in Baker v. Carr.

The application of the equitable discretion doctrine to the WPR would create a perpetual game of catchup, with Congress having to pass laws to remind the President what his duty is under previously passed laws and then passing additional laws to remind him to comply with what the second set of laws asked him to do, all of these second and third-phase laws being possibly subject to Presidential veto. That is not the way things are supposed to happen under a government of laws.

What does all this tell us about whether the WPR should be repealed, left alone or amended?

In an ideal society, one in which Presidents proceed strictly along constitutional paths and courts do not hesitate to bring them back when they have strayed from those paths, the WPR should be repealed. Its machinery is cumbersome, it gives the President greater leeway than he would have under the Constitution alone, it deflects attention from the central question - are we in, or about to enter, a shooting war? - to such ancillary questions as when and whether the President should file a report, how that report should be worded and whether Congress should pass a concurrent resolution. But since we live in the so-called real world - albeit one which, at times, seems to be made of the stuff of nightmares and hallucinations rather than reality - we need the WPR, or something like it, to close the gap between constitutional restraint and Presidential impulse.

For real world purposes, there is nothing intrinsically wrong with the WPR. What is wrong is Congress' failure to use it and the courts' failure to enforce it.

Could it be improved? Yes, probably, but the attempt to do so would also risk its weakening or demise, as shown by the variety of resolutions, both pro and con WPR, introduced following the President's Persian Gulf reflagging decision. Neither I nor the Center for Constitutional Rights have any special expertise in assessing those risks. However, if a decision were made at some point to try to strengthen the WPR, the following suggestions might be worth considering:

1. Provide for an expedited judicial review

procedure, along the lines of that contained in Gramm-Rudman, 2 USC 922. Subparagraph (a)(3) of that section reads as follows:

> Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory and injunctive relief on the ground that the terms of an order issued under section 252 [2 USC 902] do not comply with the requirements of this title.

The operative part of a similar clause in the WPR might read "... on the ground that the President has failed to submit a report or terminate the use of United States Armed Forces as required by this resolution." Provisions for the convening of a three-judge court, for direct appeal to the Supreme Court and for expedited consideration by both the District Court and the Supreme Court could also be adopted from 2 USC 922.

Such a clause would not of itself disentitle the courts from refusing to deal with WPR cases on equitable discretion or political question grounds, but it would dispose of the question of standing and would - one hopes - provide a powerful incentive to the courts to abstain from abstaining.

2. Provide that the awarding of hostile fire pay to members of the Armed Forces constitutes prima facie evidence of the existence of hostilities or immediate involvement in hostilities, within the meaning of section 4(a)(1) of the WPR. This would reduce the fact-finding difficulty advanced by some judges as a reason for abstaining. The weakness of any such provision would, of course, lie in its easy circumvention by the Armed Forces by simply failing to award hostile fire pay in circumstances where they would normally do so. However, spelling out this kind of criterion - along with others - for interpreting the term "hostilities" would probably be useful overall, subject to a proviso that ultimately the required determination is to rest on a consideration of all the circumstances and not the meeting of any mechanical test.

3. Provide for a funding cutoff coterminous with the date on which the President is required to terminate the presence of United Statess Armed Forces.

4. Substitute the Secretary of Defense for the President as the author of the reports. This would be a purely psychological ploy, based on the fact that courts are notoriously more reluctant to tangle with the President than with his deputies, even though whenever they order any member of the executive to do or omit something, that order is, in effect, addressed to the President.

Amendments such as these may marginally reinforce the constitutional war powers scheme. It goes without saying that such reinforcement is badly needed in this still very nuclear age, when every war threatens to be the last, because every war now is an incipient nuclear war. Ultimately, the framers' foresight in writing the War Powers Clause into the constitution will be vindicated only by a change in the attitude of all three branches: More restraint by the President, less waffling by the Congress, fewer copouts by the courts. We at the Center for Constitutional Rights believe that the Constitution belongs, first and foremost, to the people. Along with this priceless possession goes the people's duty to hold the government's nose to the constitutional grindstone. Another Grenada or Persian Gulf and you will probably hear from them, loud and clear.

PREPARED STATEMENT OF SENATOR MATHIAS

The Administration has stated that in its opinion the War Powers Act is unconstitutional. The President has resisted its invocation by raising serious political opposition to it. Given the extent of the powers delegated to the Congress to define policy in a whole spectrum of situations, it is hard to take these claims of unconstitutionality as serious.

It can be argued that the War Powers Act is unsound, that it is unworkable, that it is ineffective. I disagree with such arguments, but they are not irrational. When the Senate debated the War Powers Act at the time it was adopted by the Congress, vetoed by President Nixon and then passed over the President's veto, such arguments were made by serious, reasonable men and women. I do not think, however, that it is reasonable to argue that it is beyond the constitutional authority of the Congress to enact legislation of the nature of the War Powers Act. One of the arguments made against the Act is that it authorizes the President to act recklessly because it gives him an initial period in which he can act without further congressional authority. I would reject that as an argument because it is clear that any President must be expected to repel attack on the United States, or to repel attack on any serious United States' interest wherever located. Certainly, an attack on the soil of the United States itself must be repelled immediately. To argue that a President lacks that much discretion is to misread the whole purpose of the constitutional provisions for defense.

There are some who have questioned the value of the War Powers Act, but the experience in Lebanon is one of the examples which proves its usefulness. There was an adjustment of the time period for authorized activity as the Act was invoked in Lebanon. In fact, American forces withdrew within the time period originally contemplated by the War Powers Act, although the Administration had succeeded in getting authority to extend the time. But the important thing in the Lebanon experience was that the War Powers Act was an inhibition against escalation. There were periods during the Lebanese episode when the Administration seemed strongly tempted to increase the number of forces and the size of our commitment in

Lebanon. The fact that escalation was inhibited and restrained by the War Powers Act helped to keep that tragedy from being larger than it was.

The best confirmation of the effectiveness of the War Powers Act is the volume of loud complaints about it during the Lebanon action and the resistance to invoking it in the Persian Gulf. If the Act were the nullity that many people say it is, there would be little occasion to moan and groan about it. The fact that it has evoked such hostility from the Reagan Administration is the evidence that it has had an effect. It is always the shoe that binds that gets attention.

The War Powers Act is a proper exercise of legislative power; it is a constitutional enactment and it ought to be invoked at this time.

The words of the Constitution itself reveal how it was intended to operate on issues of foreign policy and national defense.

I am neither a strict constructionist nor doctrinaire about original intent, but I am still old-fashioned enough to think it is useful for lawyers to occasionally read the law.

Looking first at Article I, Section 8, we find the first grant of war power was given to the Congress, not to the President. Section 8 reads: "The Congress shall have power. . . to define and punish piracies and felonies committed on the high seas and offenses against the law of nations." These are interesting words that have not been given much attention in recent years. If we could look into the minds of the members of the Constitutional Convention in Philadelpia in 1787, we find that they were thinking about what we call acts of terrorism today. Secondly, there is the ultimate power in foreign policy, the power "To declare war"; but it goes beyond that. It is not just the power to proclaim that a state of war exists -- it is the power to also "grant letters of marque and reprisal and to make rules concerning capture on land and water." If that means anything at all, it means to me that the Constitutional Convention wanted the Congress not only to have jurisdiction over the subject of general war, and the existence of a state of war, but also over questions of limited war. It contemplated hostilities at a lower level than a general state of war; and therefore provided for granting letters of marque and reprisal.

Given the kind of operations contemplated in situations that justify invoking the War Powers Act, that provision standing alone would lend powerful support.

It is the Congress under Section 8 which has the power to raise and support armies, "but no appropriation of money for that use shall be for a longer term than two years." The Founders provided that the Congress should "provide and maintain a Navy"; not merely raise a navy. but provide and maintain a navy; and finally, that the Congress should make rules for the government and regulations of the land and naval forces. It was clearly more than merely passing a bill to authorize the recruitment of troops that was intended. The Congress was clearly envisioned as having a continuing relationship with the government and the regulation of the land and naval forces.

Section 9 of Article I of the Constitution guarantees the Congress a role, not only in foreign policy but in everything else that happens in government, because it is provided that no money shall be drawn from the Treasury but in consequence of appropriations made by law. Since everything the government does, or virtually everything, costs money in some amount, congressional approval of appropriations is an invitation to make a policy determination on whether the appropriation is justified, whether it is wise, whether it is prudent, whether it is in the best interest of the United States.

In Article II, the Constitution makes further provisions that affect the power to make foreign policy and the power to make war. Article II, Section 2, provides that "the President shall be Commanderin-Chief of the Army and Navy of the United States." That, following the provision in Article I that authorizes the Congress to make rules for the government and regulation of the land and forces, requires some interpretation. Further, Article II provides that the President "shall have power by and with the advice of the

Senate to make treaties." Read comprehensively, it becomes clear exactly what the Founders had in mind: coordinated policy.

That the President "shall have power by and with the advice of the Senate to make treaties" means that the President makes treaties, but not alone. The Senate is guaranteed a consultative and disposative position with respect to any treaties, with the additional provision that two-thirds of the Senate present must concur. The Constitution further includes one of the most extraordinary provisions in any constitution anywhere in the world, resulting in the dilution of the appointive power of the executive. It provides that "by and with the advice and consent of the Senate, the President shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States." The impact of this provision on foreign policy is incalculable. If the President can appoint ambassadors and military officers after consulting the Senate and also only with the concurrence of the Senate, the whole question of the policies those ambassadors and military officers execute becomes a matter of some discussion. By making the same provision with respect to all other officers of the United States, the Secretary of State and the Secretary of Defense are included in the perimeter of the Senate's jurisdiction to advise and consent. In confirmation proceedings, the question of policy does arise, and arises both properly and constitutionally. Nominees are questioned about their views. There is a clear implication in some cases that if the candidate's views are not in harmony with the majority of the Senate he or she is officially on notice if not at risk. The influence on policy as a result is very apparent to anyone who follows confirmation proceedings with care. Professor Edward S. Corwin wrote a book some years ago, which he entitled "The President: Office and Powers", in which he said that

> what the Constitution does and all that it does is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other such powers on Congress, but which of these organs shall have the decisive and

> final voice in determining the course of the American nation is left for events to resolve.

I am more positive than Professor Corwin: the Constitution mandates a coordinated policy in every conceivable situation. The President must give the command for armies to march; the President must give the command for ships to sail, and by implication for airplanes to fly and for missiles to launch. But the policy that justified the command clearly has to involve the Congress. Only the Congress can declare war and about that, there is no ambiguity. On the question of limited war and on the questions of terrorism, piracies and felonies on the high seas, it is equally clear that those subjects are within the ambit of congressional authority. Not only does the Congress have the right to act, it has the duty to act. The War Powers legislation addresses that obligation.

In the various experiences through which we have passed, without exception, the Congress has had a proper interest beyond the mere power of the purse, or control of appropriations. It is an interest which springs from a specific delegated power, and it validates the War Powers Act.

The issue before the Committee goes beyond a review of the history of the War Powers Act and a confirmation of its constitutionality. The Committee must express its views on proposed amendments to the Act that are patently genuine efforts to resolve some of the disputes that have risen concerning it and to lay to rest the constitutional objections raised against it.

As I read the amendments, however, the approach to the constitutional question is simply one of avoidance. By repealing crucial language in the War Powers Act it is possible to reduce the area of conflict between the Executive and the Legislative by failing to come to grips with the subject. This would abdicate a clear responsibility imposed by the Constitution on the Congress and would be wrong.

An alternative would be to merely reduce the time allowed for the President to act on his own initiative to thirty days, which incidentally, is the period originally approved by the Senate. That amendment does, I admit, then propel another vital question to the forefront of the debate; that is, thirty days from when? This gets to the heart of the problem with a recalcitrant president who will not voluntarily invoke the Act by submitting the report that it requires.

The answer to this question should be one of the primary goals that the Committee pursues in this series of hearings. The shaping of a solution that would gain presidential approval, or at least survive a presidential veto, is the greatest contribution that the Committee could make. I respectfully suggest that there is a duty as well as an opportunity to find the correct, coordinated constitutional balance that eluded us on our first attempt in drafting this complex legislation.

There is a caveat that must be added in addressing this whole subject. The questions that hedge the basic issues of war and peace are among the most painful and fateful of all the dilemmas that human beings must confront. They are the questions that try our souls and test our character. They inevitably touch the raw edge of human nature and stimulate pride, anger, envy and other less admirable emotions.

There is no guarantee that any totally painless, effortless formula can be devised to lift such a burden from the shoulders of mankind. I have personally been skeptical about the attempts to devise mathematical equations that would automatically produce balanced budgets without blame or sacrifice on the part of governors or governed. The essential ingredients to success in political affairs are courage and common sense on the part of men and women entrusted with power. If they are missing, no set of rules or guidelines, however clever and ingenious, will serve to save the state.

PREPARED STATEMENT OF ALBERT (PETER) LAKELAND

Mr. Chairman, I appreciate your invitation to testify before this special subcommittee charged with the task of reviewing the War Powers act. As you know, I was intimately involved in the enactment of this law, as the principal draftsman of the final legislation which emerged from the House-Senate conference on October 4, 1973 as well as of the precedent Senate bill. It is from this perspective of first-hand involvement in the shaping and passage of the War Powers act, as well as from the perspective of a twenty-five year government career in national security affairs, that I offer my comments today.

Mr. Chairman, it is clear that the War Powers act has not worked in the manner intended and expected by its architects, and this review is both timely and desirable. It is equally clear that the refusal, or inability, of the executive branch to comply with the law (rather than any inherent flaws in the law itself) is the reason for the disappointing result. It is a verity of our constitutional democracy that no President can succeed for long in his role as Commander-in-Chief when he is at loggerheads with the Congress. At the time the War Powers act was adopted, it was widely believed that the Presidency had acquired such overbearing strength in national security matters as to disrupt our constitutional system of checks and balances in a vital area, with dangerous consequences to our society. This problem - one of a Commander-in-Chief no longer accountable for his actions - was regarded as the root problem which needed correction. I must confess that I shared that view in 1973.

I have now come to a somewhat different conclusion which I believe is highly relevant to the inquiry being conducted by this subcommittee. Baldly stated, I think that the problem is one of weakness rather than strength. The Commander-in-Chief function is broken within the executive branch and it is this breakbown which incapacitates our Presidents from marshalling the great benefits which the War Powers act was intended to confer on the President in the difficult and awesome conduct of his special function as our nation's Commander-in-Chief. So far as the War Powers act itself is concerned, I believe that it remains eminently workable. However, until the problem of the broken Commander-in-Chiefship - which is rooted in conceptual and institutional incoherence within the executive branch - is repaired, the War Powers act will not work as intended.

Mr. Chairman, this is a thesis which I intend to develop in some detail during the course of my testimony. Before that, however, I think it would be useful, in my capacity as someone who was very much present at the creation of the War

Powers act, to relate some of the circumstances and thinking which went into its making. I have read most of the recent debate and listened to your earlier witnesses in these hearings and I fear that many misrepresentations and misapprehensions have crept into the current debate. First is the false idea that the War Powers act was some hasty and ill-conceived measure directed at the ongoing Vietnam War. This is wrong on all counts. The dwindling Vietnam war was specifically exempted from the act's provisions and many leading supporters of the Vietnam war, preeminently Armed Services Committee Chairman John Stennis, were staunch proponents of the War Powers act. Moreover, the charge of hastiness is blatantly false. The War Powers act was the reflection of a very broad national concensus worked out over a period of three and half years. There were exhaustive hearings and extensive floor debate. These facts cannot be glossed over: the Senate voted 72 to 18 for the original Senate bill, 75 to 20 for the House-Senate conference bill and 75 to 18 to override President Nixon's veto - the only law passed over Nixon's veto that year.

The principal sponsors of the War Powers act were Senator Javits and Senator Stennis, both men of judicious temperament, outstanding lawyers and brilliant legislators with decades of experience in the national security field. They were hardly members of the Woodstock generation as some would imply today but rather were unabashed patriots and lifelong proponents of American strength and world leadership. They had always in their minds the crucial importance to America of a strong and successful Presidency. At the same time, they were appalled by the quagmire of Vietnam, by the breakdown in relations between the President and the Congress and by the dangerous isolation of the Presidency - factors which collectively had precipitated the gravest national and constitutional crisis of this century. They were determined to enact a statutory framework to induce and facilitate a functioning partnership between the President and the Congress as the sine qua non of national effectiveness in a dangerous world.

The sponsors of the War Powers act had very much in mind this famous constitutional prescription set forth by Justice Jackson in the Steel Seizure case:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate ....
>
> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter.

The Senate Foreign Relations Committee in 1971 and 1972 held many months of landmark hearings on every aspect of the issues involved, beginning with the constitutional framework. The printed record of those hearings continues to be the great compendium on the subject. The War Powers act was drafted with close attention to the framework established in the Constitution itself. In fact, the easiest defense of the War Powers act is one argued solely in terms of "original intent", a doctrine much in vogue today. However, as I shall explain, while "original intent" was indeed the starting point for the drafting of the War Powers act, a conscious effort was made to translate that original intent into a legislative framework reflective of the exigencies and realities of America's current status as a twentieth century superpower and leader of a worldwide coalition of free nations.

To understand the War Powers act it is necessary to examine the Constitution itself and its "original intent" - what we call today "legislative history". It is clear from the actual wording of the Constitution, and from the contemporaneous explanations of the Framers themselves, that the Framers intended to vest the war power in the Congress. The Constitution is notably terse and sparse. Nonetheless, Article I, section 8 enumerates the war powers of the Congress in some detail: e.g. "provide for the common defense", "raise and support armies", "provide and maintain a navy", "make rules for the government and regulation of the land and naval forces", and, most importantly, "declare war". In addition, as Senator Mathias pointed out in his testimony, the Constitution also gives to Congress the power to respond to terrorism and irregular attacks short of war. This power, as expressed in the vocabulary of the time, is to: "define and punish piracies and felonies committed on the high seas and offenses against the law of nations", and to "grant letters of mark and reprisal".

Over against these plenary and cummulative war powers given to the Congress, Article II, section 2 of the Constitution states tersely: "The President shall be Commander in Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States."

In 1976, under a commission from the American Bar Association, Judge Sofaer, the current Legal Adviser of the State Department, published an historical study entitled War, Foreign Policy and Constitutional Power. Sofaer's conclusion with respect to the constitutional convention's decision to designate the President as Commander-in-chief is stated as follows:

> The Commander-in-Chief power received extraordinarily short treatment, considering its subsequent importance.

> What was said contained no hint of any authority based on this provision to use the armed forces without legislative approval.

While Sofaer is correct in this conclusion, contemporaneous records actually do shed more light of the question than he indicates. The historical record shows clearly that designation of the President as Commander-in-Chief was intended not to strengthen the President vis a vis the Congress (whose agent he was in these matters) but rather to strengthen him against the governors of the thirteen states who were the commanders-in-chief of the respective state militias, for it was those state militias which, when called to national service by the Congress, constituted the whole of the armed forces of the county at that time. A corollary reason for designating the President as Commander-in-Chief was, of course, to assure civilian supremacy over the military and thus to guard against the spectre of the proverbial 'man on horseback' who had overthrown the governments of so many European nations in preceding centuries.

The writings of Alexander Hamilton are particularly instructive on the question of the Commander-in-Chiefship. Everyone at the Constitutional Convention knew that George Washington would be elected as the first president and the Presidency was shaped with Washingtin very much in mind. Hamilton had been Washington's military aide during the Revolution. Moreover, early in the Convention Hamilton had put forth his own plan of government, one unabashedly built around an all-powerful President-for-life. Hamilton's plan was decisively rejected. Against this background of having personally fought for something much more but having lost decisively, what Hamilton has to say in the Federalist Papers, No. 69, carries special weight in explaining the meaning and scope of the commander-in-chief clause. Here is Hamilton's explanation:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies - all which, by the Constitution under consideration, would pertain to the legislature.

In addition, having been Washington's military assistant and close confidant during the Revolutionary War, Hamilton was very familiar with the wording of the actual written

Commander-in-Chief commission which Washington had received from the Continental Congress and under which he acted throughout that war. The final paragraph of that original Commander-in-Chief commission states:

> And, you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress ...

It is thus clear from the contemporary evidence that the Framers of the Constitution, in giving the Commander-in-Chiefship to the President, did not intend it as a grant of authority in diminution of the war powers they had granted so specifically and in so plenary fashion to the Congress. Rather, it was a measure to assure the supremacy of the federal authority over the authority of the constituent states and in this equation the President, as Commander-in-Chief, was to be the agent of the Congress and not its rival.

It is very important to understand an additional nuance of constitutional drafting that is often overlooked today. If we read carefully, we can see clearly that the designation of the President as Commander-in-Chief in section 2 of Article II is intended as an adjunct function of the Presidency - something not otherwise included in the broad "executive power" given to the President in the preceding section 1 of Article II. But this adjunct function as Commander-in-Chief was intended to be something quite limited, amounting, Hamilton assures us, to "nothing more" than being "first general and admiral of the Confederacy".

With this in mind, we can proceed to divining the meaning of the authority given to Congress to "declare war". (Some house lawyers of recent Presidents have tried to suggest that Congress was given the mere ceremonial role of "declaring" war after the President has made a decision to initiate one). Our previous discussion as well as some additional legislative history effectively refutes this canard.

The penultimate draft of the Constitution gave Congress the power to "make war". The change in final wording resulted from an amendment offered by James Madison. Madison explained this amendment in the record he kept, and later published, of the procedings of the Constitutional Convention. Madison's verbatim explanation is as follows:

> "Madison then moved to insert "declare", striking out "make"; leaving to the Executive the power to repel sudden attacks."

This terse sentence is of great importance to understanding constitutional intent and thus to understanding the rationale of the War Powers act, which flows directly from this road map provided to us by Madison in his explanation of his amendment. First, it is clear that "declare" in the parlance of the day meant "decide": Congress has the power to decide the question of war or no war. Second, Madison's explanation spells out, albeit cryptically, the crucial nature of the interface intended between the President, in his limited, adjunct role as Commander-in-Chief, and the Congress as the decider of war.

What Madison tells us with his amendment is that while the Commander-in-Chie normally was an authority only to carry into execution a prior Congressional decision to make war, he was intended also to be "free to repel sudden attacks". 'Free' from what? Free from the requirement of a prior Congressional decision. 'Free' to do what? Free to "repel sudden attacks".

What we have here, buried cryptically within the words of the Constitution itself, is the vesting in the Commander-in-Chief of a limited but essential power to undertake emergency defensive actions on his own authority. This provided the key to the drafting of a twentieth century War Powers act that would be in literal and spiritual consonance with our eighteenth century Constitution.

Accordingly, the sponsors of the War Powers act started from the premise that the "original intent" of the Constitution was to vest in the President, as Commander-in-Chief, the authority and indeed the responsibility to take emergency defensive action to safeguard the nation, pending a considered decision by the Congress (doubtlessly influenced heavily by the President's own recommendation) to go to war if so required by duration and gravity of the circumstances.

The whole essence of the War Powers act was to delineate in clear statutory language the procedures and institutional mechanisms to be followed in circumstances where the Commander-in-Chief undertakes emergency defensive action without prior congressional authorization. Having such arrangements in place is absolutely essential. Not only the Constitution but bitter experience has taught us that the cojoining of the powers and responsibilities of the Congress with those of the President is a prerequisite to success - however much of a pain in the neck it may be considered by the unelected national security bureaucracy in the executive branch. The War Powers act states, quite reasonably in my judgment, that this cojoining must be accomplished within sixty days or the President would be left naked of constitutional authority to continue. He would no longer be taking emergency defensive action as permitted by the Constitution and the War Powers act.

Even putting aside the constitutional niceties, it is politically untenable for a President unilaterally to wage a sustained war. Both Lyndon Johnson and Richard Nixon were driven from office for trying - not by the Congress but by the American people.

Great care was taken in drafting the War Powers act to give ample leeway to the President to take emergency defensive action within the underlying consitutional framework. The original Senate bill set the duration of such an "emergency" situation at thirty days. This was lengthened in the final bill to sixty days. Hostilities lasting more than sixty days are presumed to have crossed over from the category of "emergency defensive action" (which Madison's amendment left the President "free" to undertake) and into the realm of "war" which is to be decided by Congress. On this very point I commend to you the lucid testimony of Congressman Phil Crane before this very subcommittee a few weeks back.

It is useful at this point to make one more reference to the wording of the Constitution itself - wording which unequivocally empowers the Congress to legislate the War Powers act. I refer here to the final clause of section 8 of Article I. After the long list of specific powers given to Congress we find the ultimate, summary power:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

I will not take the subcommittee's time to go through all the provisions of the War Powers act. Indeed, the drafting may not be perfect but certainly it is an eminently workable law, if the disposition to be law abiding is there. The law has not worked because of defects in the War Powers act but because the executive branch has refused to comply with the law, in direct violation of the Constitution's injunction that the President "shall take care that the laws be faithfully executed".

Mr. Chairman, I stated at the outset that a primary motivation for enactment of the War Powers act was a perception of dangerous and overweening strength in the Presidency as regards matters of war, resulting in a profoundly disruptive constitutional imbalance. Certainly our nation witnessed, within one six-year period, the painful spectacle of two exceptionally "strong" Presidents (Lyndon Johnson and Richard Nixon) being driven from office on the very issue of attempted unilateral Presidential war making.

During the Constitutional Convention, Madison anticipated that there might be a future problem in this direction. He offered a drafting amendment to the treaty clause, which he later withdrew. It is instructive to read Madison's own account of the matter, recorded in his notes of the procedings as follows:

> Mr. Madison then moved to authorize a concurrence of two-thirds of the Senate to make treaties of peace, without concurrence of the President. The President, he said, would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace.

Madison proved to be prophetic. Let me quote from a toast which President Nixon made to Lyndon Johnson in April of 1972:

> Each of us in his way tries to leave (the Presidency) with as much respect and as much strength in the world as he possibly can - that is his responsibility - and to do it the best way he can... But if the United States at this time leaves Vietnam and allows a Communist takeover, the office of the President of the United States will lose respect and I am not going to let that happen.

For all the bravado of Presidents Nixon and Johnson about Vietnam and their Commander-in-Chief powers, they both failed miserably and tragically and at great cost to our nation. And, not incidentally, our country lost the only war in its history - a defeat attributable not to inferior military power but to leadership failure. The War Powers act is designed to make it mandatory, and as easy as possible, for the President to marshal congressional legitimation and support for a united national effort. Success for him and success for the country is otherwise impossible.

Some critics on the left have criticised the War Powers act on the grounds that it is too much of a homerun ball served up to the President. Taken as a whole, the War Powers act is a good deal for the President and was intended as such. I have long been puzzled as to why Presidents have shied away from exploiting in manifestly pro-President features.

In retrospect, the spectre of an 'Imperial Presidency' has proven to be a mirage. The root problem lies elsewhere in my judgment. The President has become too weak a figure within our nation's sprawling national security establishment. Under present circumstances it is the profound disorder in his own house that disables the President from effective performance of his special constitutional Commander-in-Chiefship function.

The Commander-in-Chiefship today lacks conceptual and institutional coherence within the Executive Branch. The breakdown is so severe that Presidents have been deterred from using the War Powers act because they are unable to provide the information required of him in the mandatory, initial War Powers act report, i.e., "the circumstances necessitating the introduction of United States Armed Forces; the constitutional and legislative authority under which such introduction took place; and the estimated scope and duration of the hostilities or involement."

Presidents cannot provide this information because the executive branch is not organized to think and function in such terms and because the Presidency itself is not organized to command the requisite agreement and cooperation from the executive branch departments and agencies concerned. The President needs someone specifically charged with the authority and responsibility to assure that Commander-in-Chiefship actions are performed in conformity with the constitutional and statutory parameters of that office.

The conceptual and institutional incoherence within the executive branch - which is the nub of the problem - was most graphically illustrated by the Iran-Contra affair. A small coterie of NSC staff, acting perhaps in league with the Director of Central Intelligence, initiated extremely far-reaching activities which were intentionally kept secret not only from the Congress but also from the Secretary of State and the Secretary of Defense - and, can you believe it, secret from the Commander-in-Chief himself! Those activities were, of course, at cross purposes with the stated policies of the President.

The acute embarassment caused by the Iran-Contra affair revelations was the immediate proximate cause of the hasty subsequent decision to assign the U.S. Navy to escort duty for Kuwaiti oil tankers in the Persian Gulf, where involvement in military hostilities was inevitable. The escort decision was deemed necessary by the State Department because Kuwait, alienated by revelations of U.S. arms shipments to Iran, had threatened to enlist Soviet naval protection. Of course, the Joint Chiefs of Staff were not consulted about this portentious military decision and the civilian leadership of the Pentagon, as well as the CIA, were reported to have had a view of the strategic situation significantly different from that of the State Department, which was narrowly focussed on mollifying the Arab states offended by the clandestine sale of U.S. arms to Iran.

After a period of initial consternation, the Congress was soon dying for an opportunity to endorse the Persian Gulf naval deployment decision and virtually begged the President to let it do so by sending up a report under the War Powers act. But nobody in the executive branch was in a position to get interdepartmental agreement on the answers to the questions required by a War Powers act report. It was this chain of events that led directly to the War Powers act review being conducted by this subcommittee.

Mr. Chairman, there is an underlying systemic problem which is not new or unique to the Reagan adminstration. The problem is there and needs to be fixed. The President, as Commander-in-Chief, is not the master of his own vast national security establishment and this, more than anything, disables him from interfacing constructively with the Congress, as mandated by the Constitution and blue-printed by the War Powers act.

The problem has had obvious military consequences as well as political consequences. Despite our awesome military power we have witnessed defeat in Vietnam; the failed Carter adminstration Iran hostage rescue mission; had our Marines blasted out of Lebanon; had difficulty occupying tiny Grenada; and, most recently, experienced the chagrin of the embarassing performances of the U.S. Stark and the U.S.S. Vincennes in Persian Gulf combat.

Mr. Chairman, I suggest that, as a matter of highest priority, this Committee invite our next President to join with the Congress to enact legislation that will establish conceptual and institutional coherence within the executive branch in national security matters. Until this happens, we cannot expect our President to be a successful and effective Commander-in-Chief, nor is there much prospect of him being capable of clasping the helping hand of Congress extended to him by the War Powers act.

What needs revision is not the War Powers act but the National Security Act of 1947. I think consideration should be given to redefining the position of National Security Advisor. It could be upgraded and transformed by statute into a position that might be called Deputy to the President for Commander-in-Chief Affairs. Such a position could help bring a conceptual focus and a constitutional coherence to the Presidency in a vital area where focus and coherence are now lacking. It should be a civilian position, subject to confirmation and located in the White House in close proximity to the Oval Office.

In closing, Mr. Chairman, let me state what must by now be obvious. I oppose the proposed Byrd-Warner amendment to the War Powers act. That amendment, in my judgment, would exacerbate each of the problems it professes to alleviate. And, it would create a number of serious new problems. The most fundamental flaw of the Byrd-Warner amendment is that it would stand the Constitution on its head by empowering the President to wage war unilaterally. Instead of congressional concurrence he would need only the support of one-third plus one member of either house needed to sustain a veto.

The new consultation provisions of the Byrd-Warner amendment offer little promise of working and create a hierarchy of three classes of Senators in matters in which all Senators share the same constitutional responsibilities. Moreover, the amendment would seriously undermine the established committee system of the Senate and the House. The leadership group, already overburdened with political and administrative responsibilities and lacking substantive expertise, is exactly the wrong group to judge such matters on their merits - especially with no provision for staff, for record-keeping, and for consultation with and disemmination of sensitive information to other Senators, among other things. Moreover, the proposed special legislative powers of the leadership group are discriminatory and perhaps unconstitutional. My high regard for Senators Byrd and Warner notwithstanding, their proposed amendment to the War Powers act is an invitition to mischief and danger, in my judgment.

PREPARED STATEMENT OF CYRUS VANCE

Fifteen years after the War Powers Resolution was passed, it continues to influence our government's policy-making processes. Some of its effects were intended; others were not. Some of its goals have been achieved; others have not. Wary of the time limit on the commitment of troops unauthorized by Congress and of the congressional veto provisions of section 5(c), a President contemplating armed action must weigh in advance the likely political reaction. The Resolution reinforces presidential self-restraint and serves as a constant reminder that policies involving the use of force overseas must garner support beyond the short-term.

There is one important aim, however, that the War Powers Resolution has singularly failed to achieve. That aim is to require the President to consult with Congress "in every possible instance" before introducing forces into hositlities or into situations where hostilities are imminent. History demonstrates that Presidents have repeatedly failed to consult meaningfully with Congress or the congressional leadership about actions that could lead to involvement in hostilities abroad. In short, the goal that the President and Congress should form a "collective judgment" about the wisdom of such actions has not been realized.

That goal, it seems to me, is a contemporary reaffirmation of the Framers' conviction that, while sometimes awkward and inconvenient, a system of political principles including especially effective "checks and balances" is a necessary precaution against the abuse of unfettered power in the hands of any one individual.

I believe that the "consultation" required by the War Powers Resolution means, first, that the congressional leadership should be given all information about a planned action that is material to a judgment about its advisability; second, that the congressional leadership should receive that information sufficiently in advance of the planned action to permit a reasonable opportunity to absorb the information, consider its implications, and form a judgment before irrevocable decisions are made by the President; and third, that the congressional leadership should have a real opportunity to communicate its views to the President or at least to his closest advisors.

Presidents are served by officials who, for a variety of understandable reasons, sometimes find it difficult to express frank and forceful disagreement with the President's views. Presidents, despite themselves, sometimes have difficulty separating national security considerations from domestic political considerations in assessing proposed military actions. And Presidents, mired in the executive responsibilities of government, sometimes lose touch with the tide of domestic political opinion. The unadorned views of wise individuals outside the executive branch can play an important and useful role.

In my view, the War Powers Resolution is sound in concept. With minor modification, it could more effectively achieve its goal of requiring genuine consultation between the President and Congress. I have four specific recommendations.

First, I would add a statutory definition of the term "consult" as it is used in section 3 of the Resolution. The definition would make clear that what is required is the timely sharing of information and views among the President and the congressional leadership concerning a proposed deployment. I favor a definition along the lines originally proposed by Senator Eagleton, which would require the President to "discuss fully and seek the advice and counsel" of a defined group of congressional leaders. In my opinion, the group of congressional leaders to be consulted should be composed of the Speaker of the House of Representatives, the President Pro-Tem of the Senate, the Majority and Minority Leaders of both houses, and the Chairpersons and ranking minority members of the Armed Forces, Foreign Relations and Intelligence committees of both houses.

I do not share the judgment of those who argue that genuine consultation is not feasible because congressional leaders may be unavailable during a crisis, because they will breach the secrecy on which an operation's success may depend, or because they will merely respond to the President's plans in terms of partisan politics. My experience has persuaded me that such fears are unfounded. A group of leaders such as I have mentioned, or a meaningful number of them, will almost always be within reach of the President and will keep confidences. Moreover, in my experience partisanship is not the characteristic response of congressional leaders whom the President takes into his or her confidence on high matters of state. As I have observed it, on those occasions each leader thinks for himself or herself with the best interests of our nation in mind and responds accordingly.

In addition to defining "consultation," I would make two further amendments to the Resolution, both designed to broaden the category of cases in which the President is required to consult. Presidents have often avoided the prior consultation obligation of section 3 by construing planned military actions as not involving "hostilities" or as not being "situations where imminent involvement in hostilities is clearly indicated by the circumstances." The Danang, Phnom Pehn, and Saigon evacuations and the Grenada invasion, for example, were all styled as humanitarian rescue or evacuation operations rather than as the introduction of troops into potentially "hostile" situations.

I would make the section 3 consultation obligation applicable to all of the actions now listed as reportable events under section 4(a)(1), namely, (1) the introduction of forces into hostilities or imminent hostilities, (2) the introduction of forces into foreign territory, air space, or waters when such forces are equipped for combat, and (3) the introduction of forces in numbers that substantially enlarge US forces equipped for combat that are already in a foreign country.

I also support the suggestion others have made that section 4(a)(1)'s recitation of reportable events be amended to add the requirement that the President consult before and report after introducing US forces "into any situation in which there is armed conflict." Whether an action is subject to consultation and reporting should not turn on whether other parties to an existing conflict take it on themselves to attack US forces when our forces are placed in their midst. No narrow interpretation of our forces' mission should disguise the fact that there are hostilities and that our forces have been introduced into those hostilities, if only by physical proximity.

Finally, I recommend an amendment designed to withhold funds that have already been appropriated from any presidential use of force that lacks congressional authorization under the War Powers Resolution. Funds could be used, however, to remove forces already deployed in such a situation.

PREPARED STATEMENT OF ELLIOT L. RICHARDSON

I. INTRODUCTION.

It has been 15 years since the War Powers Resolution [1] was enacted over a Presidential veto. [2] Since then, the United States' foreign policy has grappled -- with varying degrees of success -- with this unique law, which seeks to legislate the processes and relationships between the President and the Congress with respect to the use of armed force in situations short of war. The effectiveness of the War Powers Resolution has been problematic at best, [3] and its future remains clouded by lingering questions as to its constitutionality. And I hasten to add that these are not partisan concerns, nor are they confined to any single branch of the government. At its core, the concern is how the President and the Congress can cooperate with respect to the use of armed force abroad.

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[1] Pub. L. 93-148, § 2, 87 Stat. 555, (codified as 50 U.S.C. § 1541, *et seq*. (1973)).

[2] H.R.J. Res. 542, 93d Cong., 1st Sess., 119 Cong. Rec. 24,707-708 (1973). President Nixon vetoed the bill Oct. 24. "Veto of War Powers Resolution," 9 Weekly Comp. Pres. Doc. 1285 (Oct. 29, 1973). The House overrode the veto (284-135), 119 Cong Rec. 36,202, 36,221 (1973) as did the Senate (75-18), 119 Cong. Rec. 36,198 (1973).

[3] Turner, "The War Powers Resolution: Unconstitutional, Unnecessary and Unhelpful," 17 Loyola L.A. L. Rev. 683 (1984).

Profoundly important issues of public policy like those surrounding the War Powers Resolution commonly provoke attempts to attribute clearcut differences of kind to situations involving only shadings of degree. In the real world there are no bright lines between acts short of war and acts amounting to war. There are no sharp constitutional distinctions, therefore, between what the Congress can do and what the President can do. The real questions are (1) what should the President, as a practical matter, be able to do without having to seek Congressional authorization and (2) to what extent and in what ways should he, where such authorization is not required, consult with Congress.

There comes a point at which the intensity of our engagement with an enemy calls for invoking the full weight of the nation under constitutional and international law as well as the full-scale mobilization of resources backed up by solid public support. The juridical step called a "declaration of war," which only Congress can take, is then appropriate.

Congress is not helpless, of course, even in situations short of war. It has many powers to influence the use of the armed forces. Accommodation and cooperation between the Executive and Legislative Branches is thus a practical necessity. It demands a spirit of comity. Indeed, one way to look at the War Powers Resolution is as a powerful hint to the Presidency that more cooperation is in order. There has been a failure of leadership on the part of the President or the Congress -- or both -- when cooperation gives way to a wrangle over their respective constitutional powers.

However that may be, Mr. Chairman, the War Powers Resolution is on the books, and I understand that we have been invited to give you and your colleagues our views with regard to its constitutionality as well as its wisdom. My testimony is divided into three parts. The first will briefly explore the constitutionality of the War Powers Resolution. The second will deal somewhat more fully with the constitutional division of powers between the Legislative and Executive Branches concerning the use of armed force. The last will outline my thoughts on how to address Congress' legitimate concerns in this very sensitive area of government power and public policy.

II. CONSTITUTIONALITY OF THE WAR POWERS RESOLUTION.

A. Background of the War Powers Resolution.

The War Powers Resolution was born of Congressional frustration over the United States' prolonged military involvement in Vietnam, 4/ the second most divisive conflict in our history. The Resolution was the culmination of Congressional efforts to curtail Presidential authority to commit American troops to combat, beginning with the 1967 Senate Foreign Relations Committee Hearings 5/ and Report. 6/ Under the stewardship of Senator J. William Fulbright, then Chairman of this Committee, a sense of the Senate Resolution was adopted in June 1969 proclaiming that "a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty, statute, or

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4/ J. Javits, Who Makes War: The President Versus The Congress 268-71 (1973).

5/ U.S. Commitments to Foreign Powers: Hearings before the Senate Comm. on Foreign Relations on S. Res. 151, 90th Cong., 1st Sess. (1967).

6/ See Senate Comm. on Foreign Relations, National Commitments, S. Rep. No. 797, 90th Cong., 1st Sess. (1967).

concurrent resolution of both Houses of Congress, specifically providing for such commitment." 7/

This country's involvement in Vietnam continued, however, as did Congressional attempts to control the President's discretion to commit U.S. forces in Southeast Asia. 8/ Following the announcement of the 1973 ceasefire agreement, Congress passed the Cooper-Church amendments 9/ and the Mansfield amendment. 10/ These amendments forbade use of government funds for American military activities in Indochina "unless specifically authorized" by Congress. The Congress then approved a measure to cut off all funds for U.S. combat activities in Cambodia and Laos. This measure, however, was

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7/ On the effects of a concurrent resolution, see infra notes 19-29.

8/ See A. Thomas & A. Thomas Jr., The War-Making Powers of the President 119-28 (1982).

9/ The Cooper-Church amendment to the Department of Defense Appropriations Act of 1970, § 643, 83 Stat. 469, provides that "none of the funds appropriated by this Act shall be used to finance the introduction of American combat troops into Laos or Thailand." See also The Cooper-Church amendment to the Special Foreign Assistance Act of 1971, § 7, 84 Stat. 1942.

10/ See also The Mansfield amendment to the Military Procurement Act of 1972, § 601(a), 85 Stat. 430.

vetoed by President Nixon and an attempt to override the veto failed. 11/ President Nixon was compelled, for political reasons, to agree to a "compromise" on July 1, 1973 in which funds for military activities in Laos and Cambodia were cut off on August 15, 1973. 12/ The President agreed thereafter to seek congressional authorization for further military activities in Indochina. 13/

During this period, a more subtle and yet infinitely more important struggle was taking place -- a struggle for control of U.S. foreign policy. A waning Presidency was under siege by an assertive and powerful Congress. During Franklin Roosevelt's Presidency, the American Chief Executive's powers swelled on all things touching foreign policy. The United

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11/ The Constitution provides for an override of a Presidential veto by a two-thirds vote of the Members present in each house, U.S. Const. art. I, § 7, cl. 2, provided there is a quorum. Missouri Pacific Railway Co. v. Kansas, 248 U.S. 276 (1919).

12/ Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973). The Act provided:

> None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by the United States forces, and after August 15, 1987, no other such funds heretofore appropriated under any other Act may be expended for such purposes.

13/ See 87 Stat. 99.

States had emerged as the first Superpower. Moreover, it was the only Western democracy in a position to halt Soviet expansionism in what remained of war-torn Europe and in other areas of the globe. Of the two political branches of government, it was the Presidency that was best equipped to meet the challenge of and to respond quickly to political and military crises. Congress watched from the sidelines as the Presidency grew increasingly independent of the Legislative Branch on matters affecting foreign policy.

Prior to Watergate, it was not the Congress but the Supreme Court that checked the growth of presidential power over foreign affairs. 14/ The Congress became frustrated as Presidents committed this country to a series of controversial policies, including the Berlin airlift, Korea, NATO, the Bay of Pigs, the Congo rescue operation, intervention in the Dominican Republic, and the Cuban missile crisis. It was not until the Nixon Presidency was confronted with the dual political crises of Watergate and Vietnam that the Congress was able to reassert itself. Thus was the stage set -- with an active and increasingly powerful Congress confronting a President whose personal and political powers were waning.

14/ See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) [hereinafter cited as Steel Seizure Case].

B. Operative Provisions of the War Powers Resolution.

The heart of the War Powers Resolution, 15/ which Professor Gerald Gunther characterized as "an unusual, quasi-constitutional variety of congressional action, delineating not substantive policy but processes and relationships," 16/ is contained in two provisions. Section 5(b) requires the President to withdraw U.S. forces from hostilities or situations of imminent hostilities within 60 or 90 days, unless Congress either declares war or specifically authorizes continued military activities. Section 5(c) requires the President to withdraw U.S. forces if so directed by a concurrent resolution. 17/ It should be emphasized that the drafters deliberately chose the device of a concurrent resolution in order to get around the presentment process and thus avoid having to muster the two-thirds vote of each house

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15/ The War Powers Resolution is generally considered to have been conceived by Senator Jacob K. Javits, who wrote extensively on the subject. See, e.g., J. Javits, Who Makes War, supra note 4.

16/ G. Gunther, Constitutional Law 371, n. 4 (11th ed. 1985).

17/ A concurrent resolution is to be distinguished from a joint resolution in that the former is intended to become operative after it is approved by each house of Congress while the latter is subject to Presidential disapproval and Congressional override. See generally Jefferson's Manual and Rules of the House of Representatives §§ 396-97, H.R. Doc. 403, 96th Cong., 2d Sess. (1979).

required to override the Presidential veto that any such directive would otherwise certainly draw. 18/

C. The War Powers Resolution Is Unconstitutional.

1. Section 5(c).

a. Section 5(c) violates the Presentment Clause.

Section 5(c), which has never been invoked by Congress, is clearly unconstitutional. 19/ Article I, § 7, cl. 2 of the Constitution requires that every bill passed by the Congress "shall, before it become a Law, be presented to the President of the United States." 20/ Since a concurrent

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18/ See Spong, "The War Powers Resolution Revisited: Historic Accomplishment or Surrender?," 16 Wm. & Mary L. Rev. 823, 844-49 (1975). During the debate on the War Powers Resolution, Rep. Zablocki observed that, were it otherwise, "[o]ne-third of either body will thwart the will of the majority." 119 Cong. Rec. 24,689 (1973). See also War Powers Resolution of 1973, H.R. Rep. No. 287, 93d Cong., 1st Sess. 11 (1973).

19/ See infra text accompanying notes 21-34. See also Lungren & Krotoski, "The War Powers Resolution After the Chadha Decision," 17 Loyola L.A. L. Rev. 767, 777 (1984); Turner, "The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful," supra note 3, at 684; Glennon, "The War Powers Resolution Ten Years Later: More Politics Than Law," 78 Am. J. Int'l L. 571, 577 (1984).

20/ A concurrent resolution, for purposes of constitutional analysis, would be considered a bill. But even if it weren't so considered, clause 3 provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary

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resolution purporting to have the force of law is a unilateral congressional action, not presented to the President, it violates the Presentment Clause. 21/ Of

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> (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Clause 3 was inserted precisely to prevent a measure from being enacted by Congress without Presentment to the President. See infra text accompanying notes 25-27. The process of law creation was intended to be cumbersome, with certain built-in time constraints, to prevent Congress from encroaching upon the President's powers. See, e.g., 2 The Records of the Federal Convention of 1787 301-02 (M. Farrand ed. 1911). Presentment is also more than a procedural nuisance, since the Framers wanted the Congress to be apprised of the President's reasons for a veto and then to reconsider their actions in this light.

21/ The Supreme Court noted in Chadha that

> [n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative powers depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in character and effect.

Chadha, 462 U.S. at 952. Any action legislative in character must be performed by passage in both houses and presentment to the President. E.E.O.C. v. Ingersoll Johnson Steel Co., 583 F. Supp. 883 (S.D. Ind. 1984).

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course, the War Powers Resolution itself, having been enacted over the President's veto, met the requirements

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In Chadha, the Court relied on an 1897 Senate Committee report to determine what action constitutes an exercise of legislative power thereby necessitating that a bill be presented to the President. 462 U.S. at 952. In the report, the Senate Committee on the Judiciary had been directed by the Senate to, among other things, report whether concurrent resolutions must be submitted to the President. "The Constitution," the report notes, "looks beyond the mere form of a resolution . . . and looks rather to the subject matter." S. Rep. No. 1335, 54th Cong., 2d Sess. 1 (1897). Thus, it is the legislative substance of the resolution, not necessarily the legal form, which is controlling. The report continued, "every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not . . . involving the exercise of legislative powers, need not be presented to the President." Id. at 8.

The Senate Committee found that, for an action to be an exercise of legislative power, the measure must "contain matter" which would be properly "regarded as legislative in its character and effect." Id. Chadha found that the immigration statute had a legislative effect because it altered the "legal rights, duties, and relations of persons, including [executive branch officials and others], all outside the legislative branch." 462 U.S. at 952. Utilizing this standard, § 5(c) has undoubted significance in altering the legal rights, duties, and relations of persons" outside the legislative branch.

It must next be shown that § 5(c) can be regarded as legislative in character. According to Chadha, "the legislative character of the . . . veto . . . is confirmed by the character of the Congressional action it supplants." 462 U.S. at 954. It is clear that § 5(c) is legislative in character because in the absence of § 5(b), a congressional order to the

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of the Presentment Clause. But § 5(c), if given effect, would amend the Presentment Clause 22/ by granting to Congress the power to decide, by simple majority, without presentation to the President, that he must withdraw U.S.

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President to terminate use of United States Armed Forces could only be accomplished through a proper exercise of legislative power. Therefore, since the concurrent resolution in § 5(c) is of legislative effect and character, it is an exercise of legislative power which is subject to the Article I requirement of Presentment.

It should also be noted that § 5(c) does not fall "within any of the express constitutional exceptions authorizing one house to act alone"; actions concerning impeachment, presidential appointments, consent to a treaty, or a constitutional amendment. Chadha, 462 U.S. at 955; U.S. Const. Art. II, § 1 & Amdt. 12.

22/ Although only recently addressed by the Supreme Court, the debate surrounding the Presentment Clause has been with us for some time.

> The issue was raised in connection with a proposed reservation to the Treaty of Versailles authorizing American withdrawal from the League of Nations by "concurrent resolution." Although the proposal was accepted by a majority of the Senate, several senators expressed the view that it was unconstitutional, and President Wilson wrote in a letter to Senator Hitchcock, "I doubt whether the President can be deprived of his veto power under the Constitution even with his own consent." Clearly, neither a treaty nor an Act of Congress can amend the Constitution, and an alteration of the procedure provided in the Constitution for making any "order, resolution or vote" effective, would be such an amendment.

Wright, "The Power To Declare Neutrality Under American Law," 34 Am. J. Int'l L. 302, 307-08 (1940).

armed forces upon demand. 23/ Thus, § 5(c) is unconstitutional on its face.

b. Section 5(c) violates the separation of powers and institutions.

Equally important, § 5(c) subverts the balance between the Executive and Legislative Branches. 24/ The Presentment Clause plays a key role in maintaining this balance. As the Supreme Court has noted, "[t]he records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers." 25/ The Court then observed:

> Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern

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23/ It might be argued that Congress has the power without § 5(c), based on its constitutional mandate, to require the withdrawal of U.S. forces. But if this were true, why did Congress believe it necessary to promulgate § 5(c) to begin with? Why not simply pass a resolution mandating withdrawal? And why was it viewed as necessary to circumvent the Presentment Clause?

24/ See infra notes and text accompanying notes 86-96.

25/ Chadha, 462 U.S. at 946, citing 1 J. Story, Commentaries on the Constitution of the United States 611 (3d ed. 1858); The Records of the Federal Convention of 1787, supra note 20, at 21, 73-74, 97-104, 138-40, 181, 301-05.

> that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." As a consequence, Art. I, § 7, cl. 3 . . . was added. 26/

Writing in The Federalist No. 73, Alexander Hamilton pointed out that the President's veto power

> establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body . . .. The primary inducement to conferring the power in question upon the executive, is to enable him to defend himself; the secondary one is to increase the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design. 27/

26/ Chadha, 462 U.S. at 946 (citations omitted).

27/ The Federalist No. 73 (A. Hamilton), in The Federalist Papers 372-73 (Bantam Classic ed. 1982), quoted in Chadha. Of the 85 Federalist Papers, which first appeared on October 27, 1787, 26 discussed defense or foreign policy. Alexander Hamilton wrote 51 papers, James Madison 29, and John Jay 5. For a fascinating and well written account of the events leading to the publication of The Federal Papers, see R. Morris, Witnesses at the Creation: Hamilton, Madison, Jay, and the Constitution (1985).

The Federalist Papers were written to persuade the people of New York State to ratify the Constitution. One observer has noted that

> [t]heir practical wisdom stands pre-eminent amid the stream of controversial writing at the time. Their authors were concerned, not with abstract arguments about political theory, but with the real dangers threatening America, the evident weakness of the existing Confederation, and the debatable advantages of the various provisions of the new Constitution.

3 W. Churchill, A History of the English-Speaking Peoples: The Age of Revolution 258 (1957).

During the constitutional debates, James Wilson stated that "[w]ithout such a self-defence, the legislature can at any moment sink [the Executive] into non-existence." 28/ The Presentment Clause was thus central to the Supreme Court's decision holding the legislative veto unconstitutional. In Chadha, the Court said that "[t]he decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed." 29/

28/ 5 Debates in the Several State Conventions on the Adoption of The Federal Constitution 151 (J. Elliot ed. 1845). Accord id. at 347 (Mason); id. at 344 (Ellsworth); id. at 345 (Madison).

29/ Chadha, 462 U.S. at 947 (citations omitted). The Court went on to observe that "[i]t is beyond doubt that lawmaking was a power to be shared by both Houses and the President." Id. (citations omitted).

The Founding Fathers assumed that the Congress would become the "first among equals" in the federal government. For instance, based upon his experience, Madison believed there was "a tendency in our governments to throw all power into the Legislative vortex." He observed that legislative encroachment "was the real source of danger to the American constitutions," and suggested that this justified "the necessity of giving every defensive authority to the other departments that was consistent with republican principles." 5 Elliot, supra note 28, at 345. See also L. Fisher, President and Congress: Power and Policy 21-22 (1972). Of course, it is the Presidency which has emerged as the single most powerful institution of the federal goverment.

Of course, Chadha dealt specifically with the one-house veto, 30/ while § 5(c) may be seen as a two-house veto. 31/ The fundamental ground upon which Chadha was based, however, was that there must be a clear division

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30/ Therefore, the issue of bicameralism was also presented in Chadha. However, the issue in Chadha revolved around the legislative veto of a certain express delegation of congressional authority to an administrative agency. See generally Ratner & Cole, "The Force of Law: Judicial Enforcement of the War Powers Resolution," 17 Loyola L.A. L. Rev. 715, 738, n. 99 (1984).

31/ Sec. 5(c) requires the President to withdraw troops if so directed by a concurrent resolution of the Congress. This clearly is a two-house veto. It is not clear, however, whether § 5(b) is a one- or two-house veto. Sec. 5(b) requires the President to withdraw troops after 60 days, subject to a 30-day extension, unless Congress (1) has declared war, (2) passed a concurrent resolution authorizing continued activities or (3) is physically unable to meet as a result of armed attack upon the country. Thus, joint action is required by the Congress.

It should be noted, however, that § 5(b) also may be a one-house veto. For instance, if the Senate approved Presidential action and the House rejected it, the President would be required (under § 5(b)) to withdraw U.S. forces by virtue of the action (or inaction) of one house of Congress. Lungren & Krotoski found that

> Section 5(b) has a significant effect because the action or inaction of one House can terminate the use of armed forces abroad. While it is true that section 5(b) does not contain express language providing for a one House legislative veto, this is irrelevant since the operational force of the section is the fundamental equivlent [sic] of a one House legislative veto.

Lungren & Krotoski, supra note 19, at 785-86.

in functions between branches, even though powers may be shared. On this basis a two-house veto was held unconstitutional in _Consumers Union, Inc. v. FTC_. _32_/ In a _per curiam_ order affirmed without opinion by the Supreme Court, _33_/ the District of Columbia appeals court, _en banc_, held unconstitutional § 21(a) of the Federal Trade Commission Improvements Act of 1980, which provided that an FTC regulation would become effective unless disapproved by concurrent resolution of both houses of Congress. The court found that § 21(a) violated both the separation of powers and "the procedures established by Article I for the exercise of legislative powers." _34_/ Section 5(c) is a legislative veto, since its only effect as a _legislative_ act is to override executive action.

_32_/ _Consumers Union_, 691 F.2d 575.

_33_/ _United States House of Representatives v. FTC_, 463 U.S. 1216 (1982).

_34_/ _Consumers Union_, 691 F.2d at 578.

2. Section 5(b).

A more detailed analysis is required to demonstrate that § 5(b) violates the doctrine of the separation of powers and institutions. 35/

Section 5(b) requires the President to withdraw U.S. armed forces engaged in hostilities or imminent hostilities within 60 days, subject to a 30-day extension, unless war has been declared or both houses of Congress specifically authorize an extension. Thus, both houses of Congress must take affirmative action, by a simple majority vote on a concurrent resolution, to authorize the continued deployment of U.S. armed forces. Or, to put it the other way, the President is required to withdraw American forces if Congress fails to act. 36/ Moreover, either house may block the use of American troops by a simple majority

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35/ *But see* Lungren & Krotoski, "The War Powers Resolution After the *Chadha* Decision," *supra* note 19, at 782-83 (arguing that *Chadha* has rendered § 5(b) unconstitutional *per se*).

36/ Unless Congress is physically unable to meet, in which case the President may continue to act.

vote or by failing to address the issue. 37/

In Chadha, the Court found the legislative veto unconstitutional because it has "the purpose and effect of altering the legal rights, duties, and relations of persons, including [executive branch officials], all outside the

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37/ Arthur Schlesinger asks: "If one house of Congress could prevent the declaration or authorization of war, why should not a single house be able to prevent the continuation of undeclared or unauthorized war?" A. Schlesinger, The Imperial Presidency 306 (1973). This presupposes, of course, that the President did not have the original authority to commit U.S. armed forces to combat -- a thesis with which I disagree as a matter of constitutional delegation of powers, and to which two centuries of practice stands in opposition. Moreover, the termination of hostilities is distinctly different, from a constitutional law perspective, from a declaration of war. Cf. 2 J. Story, Commentaries on the Constitution of the United States, supra note 25, at § 1171 ("It should therefore be difficult in a republic to declare war; but not to make peace.").

It is widely accepted that the President, as Commander in Chief, has the power to negotiate and enter into armistice agreement without Congress' consent. See L. Henkin, Foreign Affairs and the Constitution 52 (1975). Similarly, the President has the constitutional authority to make executive agreements, while treaties require consent of the Senate. See, e.g., United States v. Belmont, 301 U.S. 324 (1937). Finally, the Constitution is quite precise as to the law-making process, a fact Prof. Schlesinger's reasoning overlooks.

legislative branch." 38/ The legislative effect of § 5(b) is to terminate the use of armed forces in the absence of express approval by both houses within a short time frame. This can be done through Congressional inaction or by the "veto" of one house.

Perhaps the only way to interpret § 5(b) consistent with the prohibition against the legislative veto is to assume that the decision to use American troops is assigned by the Constitution solely to the Congress. 39/ As one former chief counsel of this Committee put it, under § 5(b) "the president's authority to act in emergencies simply runs out in 60 days if Congress does nothing." 40/ Under this

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38/ 462 U.S. at 952. The Court went on to state that "[t]he one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has altered Chadha's status." Id. The same may be said of the effect of one house voting against continued use of force, or inaction by either or both houses, under § 5(b).

39/ See, e.g., the comment of Representative Clement Zablocki that "under the Constitution, Congress is given the exclusive power to commit troops into hostilities. Congress does not delegate this power to the President in the War Powers Resolution." Zablocki, "War Powers Resolution: Its Past Record and Future Promise," 17 Loy. L.A. L. Rev. 579, 590 (1984).

40/ Tipson, "The War Powers Resolution Is Constitutional and Enforceable," A.B.A.J., Mar. 1984, at 10, 14.

view, the Constitution vests the Congress with the requisite War Powers; the Congress has delegated to the President only a portion of these powers to do with as he wishes for 60 days and for whatever additional period the Congress may authorize. This construction of the War Powers is premised upon the assumption that the separation of powers accords the Congress, rather than the Executive, the preponderance of those powers.

To put it mildly, this is implausible. Once Congress has raised an army, appropriated funds for its support, approved pay scales and appointments, and promulgated rules for military conduct, it then falls to the President to use the armed forces in the exercise of his capacity to conduct foreign policy in situations short of war. Because the War Powers Resolution is based upon a constitutional interpretation under which the President's function is deemed to derive from this legislation, it entails a usurpation by the Congress of the President's power.

III. THE CONSTITUTIONAL ASSIGNMENT OF THE USE OF FORCE IN SITUATIONS SHORT OF WAR.

In domestic affairs, the Constitution's provisions for the sharing of power and responsibility are reasonably clear. "In foreign affairs, [the Constitution] was often cryptic, ambiguous and incomplete." 41/ Like the other principal functions of national government, the War Powers 42/ comprise a "pattern of shared constitutional

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41/ A. Schlesinger, supra note 37, at 2.

42/ War has been defined as an international legal "state of armed hostility between sovereign nations or governments." 7 J.B. Moore, Digest of International Law 154 (1906). The War Power of the federal government is more difficult to define. "This power is tremendous," said John Quincy Adams; "it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." Quoted in United States v. Macintosh, 283 U.S. 605, 622 (1931).

> The war power of the national government is "the power to wage war successfully." It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of the war.

Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

> [T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426 (1934).

authority . . . not an hermetic separation of powers, but a scheme of divided power -- what Hamilton called an intermixture of powers, the only effective way to prevent a monopoly of power in any one branch of government." 43/

It is axiomatic that the Constitution divides the War Powers between the Executive and the Congress. 44/ The Constitution does not address explicitly the issue of which branch of government has the power to decide to deploy U.S. armed forces in situations of hostilities or imminent hostilities. The Congress' War Powers are specifically enumerated in the Constitution. With respect to the use of force, Congress has the power to declare war, 45/ to raise and support armies, 46/ to provide and maintain a navy, 47/ to make laws regulating the armed forces, 48/ and to support the militia of the several states. 49/

43/ Rostow, "Great Cases Make Bad Law: The War Powers Act," 50 Tex. L. Rev. 833, 847 (1972). See also Buckley v. Valeo, 424 U.S. 1, 121 (1976).

44/ Hirabayashi v. United States, 320 U.S. at 93 ("The Constitution commits to the Executive and the Congress the exercise of the war power").

45/ U.S. Const. art. I, § 8, cl. 11.

46/ Id. at cl. 12.

47/ Id. at cl. 13.

48/ Id. at cl. 14.

49/ Id. at cls. 15 & 16.

The President's powers, by comparison, are described vaguely but are hardly less important. The "executive power" is vested in the President. 50/ He is the Commander in Chief of U.S. armed forces, 51/ as well as the militia when called into federal service. 52/ The President has "declared peace" 53/ and proclaimed neutrality. 54/

50/ *Id*. at art II, § 1, cl. 1.

51/ Art. II, § II, cl. 1. *See infra* notes and text accompanying notes 112, 115-127.

52/ *Id*.

53/ This is a non-exclusive power which has been exercised unilaterally by the executive. The Supreme Court observed that "'[t]he state of war' may be terminated by treaty or legislation or Presidential proclamation." *Ludecke v. Watkins*, 335 U.S. 160, 168 (1948). *See also Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 161 (1919); *McElrath v. United States*, 102 U.S. 426, 438 (1880); *The Protector*, 79 U.S. (12 Wall.) 700 (1871); *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70 (1870).

54/ In 1793, when revolutionary France declared war on England, President Washington proclaimed U.S. "impartiality." (The international law term "neutrality" was avoided, Letter of Jefferson to Monroe, July 14, 1793, *in* 7 J.B. Moore, *supra* note 42, at 1004, just as the international law term "blockade" was avoided in President Kennedy's "quarantine" of Cuba during the missile crisis. Address of October 22, 1962 of Pres. Kennedy, 47 Dep't State Bull. 715 (Nov. 12, 1962); *Public Papers of the Presidents of the United States: John F. Kennedy, 1962* 806 (1963).) Several pro-French members of Congress vehemently denounced the action as infringing Congressional power. However, President Washington -- outraged by the conduct of the French minister, the notorious Citizen Genet, who sought to entangle the fledgling nation in the European war and, among other things, issued letters of marque and reprisal from his American legation to U.S. merchantmen

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And, very early in our history, John Marshall observed that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 55/ Indeed, the President may obligate the

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and established Prize courts in French consulates, B. Ziegler, The International Law of John Marshall 183 (1939) -- believed the power was at least in part vested in the President. See H. Lodge, Alexander Hamilton 172-74 (1882). This dispute sparked the well-known Pacificus-Helvidius letters initiated by Alexander Hamilton and acrimoniously replied to by James Madison. See generally Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793 (1845, reprinted in 1976). Similarly, following the outbreak of the First World War in August 1914, President Woodrow Wilson issued a proclamation of neutrality.

55/ The statement was made in the House of Representatives when Marshall was a Congressman debating the Jonathan Robbins affair. 10 Annals of Cong. 613 (1800), reprinted in 18 U.S. (5 Wheat.), App. 1, at 26 (1820). This phrase has been invoked repeatedly by the Supreme Court. See, e.g., First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766-68 (1972); Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103, 109 (1948) (paraphrased); Hirota v. MacArthur, 338 U.S. 197, 208 (1948) (per curiam) (Douglas, J., concurring); United States v. Pink, 315 U.S. 203, 229 (1942); Ludecke v. Watkins, 335 U.S. at 173 (paraphrased) (Black, J., dissenting); United States v. Belmont, 301 U.S. at 330; United States v. Curtiss-Wright Export Corp., 229 U.S. 304, 319-320 (1936); Goldwater v. Carter, 617 F.2d 697, 707 (D.C. Cir. 1979), rev'd on other grounds, 444 U.S. 996 (1979). See also Rep. of the Sen. Comm. on Foreign Relations, Feb. 15, 1816, Compilation of Reports, 1901, 56th Cong., 2d Sess., Sen. Doc. 231, Vol. 8, p. 24 ("The President is the constitutional representative of the United States with regard to foreign nations."), quoted in Curtiss-Wright, supra, at 319.

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United States to other States through executive agreement, including certain military agreements, without the advice and consent of the Senate. 56/

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Hamilton characterized this power as "the constitutional agency of the president[] in the conduct of foreign negotiations." The Federalist No. 75 (A. Hamilton), supra note 27, at 381. But see L. Tribe, American Constitutional Law 164-65 (1978); L. Henkin, supra note 37, at 45-50, criticizing this characterization of the President's powers as too sweeping and without constitutional foundation. Cf. Dames & Moore v. Regan, 453 U.S. 654, 661, et seq. (1981); Levitan, "The Foreign Relations Power: An analysis of Mr. Justice Sutherland's Theory," 55 Yale L.J. 467 (1946); Lofgren, "United States v. Curtiss-Wright Export Corporation: An Historical Assessment," 83 Yale L.J. 1 (1977); Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1, 26-33 (1972).

56/ Under the Constitution, of course, the Senate must "advise and consent" to a treaty before the President may ratify it. U.S. Const. art. II, § 2. The Supreme Court has held that a treaty must involve an issue "properly the subject of negotiations with a foreign country." Geofroy v. Riggs, 133 U.S. 258, 267 (1890). See also Weinberger v. Rossi, 456 U.S. 25 (YEAR). However, all international compacts are not treaties which require the "participation" of the Senate. United States v. Belmont, 301 U.S. at 330-31. See also United States v. Pink, 315 U.S. at 230. The parameters of the Executive's power to make international agreements are unresolved. L. Tribe, supra note 55, at 170. See also State Dep't Circular No. 175, Dec. 13, 1955, reprinted in 50 Am. J. Int'l L. 784 (1956); Restatement (Second) of the Foreign Relations Law of the United States § 119, Comment (1965).

One of the most important executive agreements was the "Destroyers for Bases" arrangement of Sept. 9, 1940, between the United States and Great Britain, prior to

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It is clear that the Congress may prohibit the use of U.S. armed forces in certain areas by statute through its spending power. It is also clear that it is the President who orders deployment of troops. Nowhere, however, does the Constitution specifically set forth which branch of the government has the power to decide to deploy American forces in situations of hostilities or imminent hostilities. We must, therefore, indulge in constitutional interpretation. There are two methods of inquiry: first, to analyze the intent of the Founding Fathers; second, to examine the theoretical structure of the government -- the separation of powers and institutions -- to determine where the power should repose.

A. Original Intent.

Any attempt to discern the original intent 57/ of the Founding Fathers as a method of constitutional interpretation

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the U.S. entry into the Second World War. E.A.S. No. 181 (1940). See 39 Op. Atty. Gen. 484 (Aug. 27, 1940). The U.S. traded 50 destroyers for 99-year leases on military bases in eight British possessions from Newfoundland to the Carribean. In his memoirs on the war, Winston Churchill characterized the arrangement as a "decidedly unneutral act by the United States. It would, according to all the standards of history, have justified the German Government in declaring war upon them." 2. W. Churchill, The Second World War: Their Finest Hour 404 (1949).

57/ Reference to original intent is instructive on the broad structure of the government. On issues of detail, however, original intent is as often misleading as it is informative.

is, at best, a dubious affair. The futility of discerning original intent is exemplified by the continuing debate over the substitution of the phrase "declare war" for "make war" during the drafting of Article I. 58/ The debate usually starts like this: under the Articles of Confederation, Congress had the power to declare and make war. 59/ The original draft of the Constitution gave Congress the power to "make war," which was changed during the Constitutional Convention to "declare war." This is significant because "one of the chief purposes of the Convention was to separate the legislative from the executive functions." 60/ The inference is that the power to declare war -- that is, to mobilize the country and to alter the United States' international legal

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58/ Changes in language between the Articles of Confederation and the Constitution may be significant. In McCulloch v. Maryland, for example, Chief Justice Marshall noted that the word "expressly" does not appear in the Tenth Amendment, although it was contained in the Articles of Confederation. "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it, to avoid those embarrassments." 17 U.S. (4 Wheat.) 316, 406-07 (1819). See also Knowlton v. Moore, 178 U.S. 41, 85 (1900) (recognizing the "distinction between the Articles of Confederation and the present Constitution" for purposes of discerning the meaning of words within the Constitution).

59/ Articles of Confederation art. 9.

60/ Myers v. United States, 272 U.S. 52, 115-16 (1926) (Taft, C.J.). The Court did not alter its reasoning on the separation of powers as it relates to this argument in Humphrey's Executor v. United States, 295 U.S. 602 (1935) and Weiner v. United States, 357 U.S. 349 (1958).

status (with its many ramifications), in itself a constitutional law issue -- was of a clearly legislative character and, thus, belonged to the Congress. The power to "make war," however, was considered an executive function and, thus, belonged to the President. 61/

Another view is that the Founding Fathers themselves intended a more narrow meaning. Of late, one of the most often-quoted 62/ treatments of the debate on the War Powers during the Constitutional Convention is by Judge Abraham Sofaer, now Legal Adviser to the Department of State, who observed:

> The draft Constitution assigned Congress the power to "make" war. Charles Pinckney sought on August 17 to vest the power in the Senate alone; the Senate would be familiar with foreign affairs, it already had the power to make treaties of peace, and action by both houses would take too long. Pierce Butler responded that, if informed judgment and efficiency were the relevant criteria, he was "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support

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61/ The traditional view is that the change from "make" to "declare" war was intended to give the President significantly greater powers. See, e.g., Emerson, "The War Powers Resolution Tested: The President's Independent Defense Power," 51 Notre Dame Law. 187, 209 (1975). See also Lungren & Krotoski, "The War Powers Resolution After the Chadha Decision," supra note 19, at 769-72. But see Lofgren, "War-Making Under the Constitution: The Original Understanding," 81 Yale L. J. 672 (1972).

62/ See, e.g., Lakeland, "The War Powers Resolution: Necessary and Legal Remedy to Prevent Future Vietnams," in Congress, the President, and Foreign Policy 153, 153-54 (S. Soper ed. 1984).

it." Madison then "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Sherman apparently assumed the President already had power to repel attacks. He thought the clause "stood very well. The Executive shd. be able to repel and not to commence war. 'Make' better than 'declare' the latter narrowing the power too much."

Elbridge Gerry from Massachusetts, who seconded Madison's motion to substitute "declare" for "make," attacked Butler's suggestion: he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Ellsworth then spoke against Pinckney's notion to give the power of war to the Senate. "[T]here is a material difference," he said, "between the cases of making war, and making peace. It shd. be more easy to get out of war, then into it. War also is a simple and overt declaration. Peace attended with intricate & secret negotiations." George Mason of Virginia also was for clogging war and facilitating peace, and therefore "was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it." He added that "he preferred 'declare' to 'make,'" and Rufus King concurred because "'make' war might be understood to 'conduct' it which was an Executive function."

Pinckney's suggestion that the Senate be given the power to make war was rejected overwhelmingly, but Madison's motion to change "make" for "declare" was approved. The change was intended by Madison and Gerry to enable the President to respond to "sudden attacks" without a declaration of war, and by King and others to leave the conduct of war in executive hands. They therefore appear to have intended the clause to authorize the President to defend the United States from attack without consulting the legislature, at least where the attack is so "sudden" that consultation might jeopardize the nation. But nothing in the change signifies an intent to allow the President a general authority to "make" war in the absence of a declaration; indeed, granting the exceptional power

> suggests that the general power over war was left in the legislative branch. 63/

Judge Sofaer suggests that the Founding Fathers intended by "make war" only to give the President power enough to repel sudden attacks.

Now that is a powerful argument to draw an opposite inference. But this conclusion is historically incorrect and raises more questions than it answers. For one thing, it does not consider what the Founding Fathers meant by "war." There is some reason to believe that the Founding Fathers had in mind something more akin to the international law 64/ distinction 65/ between "war" and "peace" 66/ than to the

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63/ A. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 31-32 (1976) (citations omitted).

64/ "International law had unobtrusively been woven into the fabric of our national existence." Raymond & Frischholz, "Lawyers Who Established International Law in the United States, 1776-1914," 76 Am. J. Int'l L. 802, 803 (1982).

65/ "War is an aspect of a nation's international relations and must therefore be seen from the perspective of the international as well as the domestic order." Wallace, "The War-Making Powers: A Constitutional Flaw?", 57 Cornell L. Rev. 719, 720 (1972). This has been a recognized and well-settled proposition at least since Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 83-84 (1795).

66/ As Grotius observed, "inter bellum et pacem nihil est medium" (between war and peace there is no other category). H. Grotius, De Jure Belli ac Pacis III, xxi, 1 (1625).

practice of using armed force without declaring war, 67/ such as the French intervention in the American War of

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67/ Among other things, the declaration of war alters the declarant's international legal status, empowering the declarant to take action, *i.a.*, against certain shipping, and forcing other States to declare war or neutrality -- a fact the Federalists, mostly from northern trading states, were keenly aware of. Indeed, it was in Massachusetts that the first American Prize court was established. 1 J.B. Scott, *Prize Cases Decided In The United States Supreme Court 1789-1918* 2 (1923). In the 1807 British Prize case *The Neptune*, Sir William Scott (Lord Stowell) observed that "[i]t is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce." 165 Eng. Rep. 978, 979, 6 Rob. 403, 405-06 (1807). *See also* *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 535-36 (1867) (it is universally accepted that "the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealings between the subjects of the belligerent states."); *The William Bagaley*, 72 U.S. (5 Wall.) 377, 405 (1866) ("War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the law of nations, to make prize of the ships, goods, and effects of each other upon the high seas."); *Jecker v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855) ("The consequence of this state of hostility is, that all intercourse and communication between [belligerents] is unlawful."); *The Commercen*, 14 U.S. (1 Wheat.) 382, 395-407 (1816) (Marshall, C.J., concurring) (declaring war between the U.S. and Britain gave the U.S. the "direct right" under international law to capture as Prize Swedish vessel where Sweden was a co-belligerent with Britain against France, a war in which the U.S. was neutral); *The Nereide*, 13 U.S. (9 Cranch) 388, 418 (1815) ("[W]ar gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend."); *The Rapid*, 12 U.S. (8 Cranch) 155 (1814) (A state of war provides states with the right to authorize capture of enemy vessels); *The Julia*, 12 U.S. (8 Cranch) 181, 193 (1814) ("[I]n war, all intercourse between the subjects and citizens of the belligerent countries is illegal"); *The Sally*, 12 U.S. (8 Cranch) 382 (1814) (Property of enemy nationals as well as citizens of U.S. trading with the enemy, captured on the high seas, is prize

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Independence, or limiting the Executive from using armed force short of war in pursuit of the then-recognized international law rights of self-help and reprisal. 68/ It was perhaps in this sense that Oliver Ellsworth observed during the constitutional debate that "[w]ar . . . is a simple and overt

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of war under international law); *Hannay v. Eve*, 7 U.S. (3 Cranch) 242, 247 (1806) (during a declared war, international law authorized the U.S. government to allow the crew of an enemy vessel to submit their ship and collect the Prize). *See generally The Paquette Habana*, 175 U.S. 677 (1900); 10 M. Whiteman, *Digest of International Law* 791-913 (1968); 7 G. Hackworth, *Digest of International Law* 1-341; A. Verzijl, *Le Droit des Prises de la Grande Guerre* (1924); 7 J.B. Moore, *supra* note 42, at 342-858.

Because of this, the War Power was linked to the Commerce Power, which is specifically assigned to the Congress. U.S. Const. art. I, § 8, cl. 3. One respected scholar has observed that "[n]eutral merchants had very profitable possibilities connected with the carrying trade of belligerents, while merchants operating as privateers, or others exercising belligerent rights had quite different opportunities which called for a careful readjustment of mercantile rights." A.P. Rubin, "Foreign Policy by Congress: Book Review," 4 Fletcher For. 283, 284 (1980). *See also* L. Atherley-Jones, *Commerce In War* (1907); F. Upton, *The Law of Nations Affecting Commerce During War* 16-36, *et seq*. (3d ed. 1863). It was, perhaps, in this vein that President Washington urged in his Farewell Address that "[t]he great rule of conduct for us in regard to foreign actions is, in extending our commercial relations to have with them as little political connection as possible." G. Washington, "Farewell Address," *in Basic Documents in American History* 70, 77 (R. Morris ed. 1965). The linkage of "war, peace and commerce" is also made in *The Federalist* No. 64 (J. Jay), *supra* note 27, at 325.

68/ *See, e.g.*, A. Hindmarsh, *Force In Peace: Force Short Of War In International Relations* 85, *passim* (1933, *reprinted in* 1973). The eminent international law scholar Judge Sir Hersch Lauterpacht observed that self-help and reprisal "are not necessarily acts initiating war." 2 Lauterpacht, *supra* note 66, at 203.

declaration." 69/ Similarly, when Elbridge Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war," he apparently contemplated a declaration, not the use of force in situations short of war. 70/ It should be recalled that it was Gerry who, in June 1775, proposed the establishment of the first American Prize Court, 71/ while Ellsworth had served as an appeals judge in

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69/ Quoted in A. Sofaer, supra note 63.

70/ John Bassett Moore noted that:

> Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another . . . and yet no state of war may arise. . . . The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights."

7 J.B. Moore, supra note 42, at 153-54.

71/ 1 J.B. Scott, supra note 67, at 2. In November 1775, General Washington urgently requested the Continental Congress to set up a system of national Prize courts. "Washington to the President of Congress, Nov. 8 and 11, 1775," in 4 The Writings of George Washington From The Original Manuscript Sources, 1745-1799 73, 81-82 (J. Fitzpatrick ed. 1931-1944). On Nov. 25, 1775, Congress responded by establishing Prize courts for a trial period. 3 Journals of the Continental Congress 371-75 (W. Ford ed. 1904-1937).

the Prize case of The Active, 72/ illustrating their understanding of and concern for the international law of war. 73/ Finally, Rufus King appears to say that he agreed that Congress' power should be restricted to a declaration of war because making war "was an Executive function." This distinction (between making war and declaring war) was recognized in Bas v. Tingy 74/ and Montoya v. United States. 75/ In both cases the Supreme Court found that a declaration of war was a profound legal act by the Congress, 76/ in contrast to the use of force in armed conflict. 77/

72/ Bourguignon, "Incorporation of the Law of Nations During the American Revolution -- The Case of the San Antonio," 71 Am. J. Int'l L. 270, 295 (1977).

73/ Id.

74/ 4 U.S. (4 Dall.) 36 (1800).

75/ 180 U.S. 261 (1901).

76/ "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 140 (1866) (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, J.J.).

77/ Hague Convention III of 1907, 36 Stat. 2259, provides in article I that: "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."

This statement may have been more a reflection of prior rather than contemporary practice. See, e.g., Moore, who noted: "It is universally admitted that a formal declaration is not necessary to constitute a state of war." 7 J.B. Moore, supra note 42, at 171. Nevertheless, the practice continued. See the British ultimatum to Germany initiating hostilities in the Second World War.

The Founding Fathers surely were concerned over the effects of a declaration of war on commerce. 78/ Perhaps the

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78/ In The Rapid, the Supreme Court noted that, upon a declaration of war

> a new state of things has occurred -- a new character has been assumed by this nation, and confers on it new rights . . . . The nature and consequences of a state of war must direct us to the conclusions which we are to form in this case . . . . The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy -- because the enemy of his country . . . . The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it.

12 U.S. (8 Cranch) at 160-62.

In The Aurora, Pinkney argued that "[t]he rule, that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it: there was no necessity for any subsequent law to enforce the rule." 12 U.S. (8 Cranch) at 213. He went on to argue that "this principle was decided to be correct as early as 1704 and 1707; and it is presumed, that those decisions were founded upon former cases." Id. at 213-14. Lauterpacht found the origins of this rule in the 15th century. 2 Lauterpacht, supra note 66, at 261.

Moreover, it was "settled doctrine" that the declaration of war extinguished commercial relations between citizens of belligerent states. "The doctrine is not at this day to be questioned, that during a state of hostility, the citizens of the hostile states are incapable of contracting with each other." Scholefield v. Eichelberger, 32 U.S. (7 Pet.) 586, 593 (1833). Accord Brown v. United States, 12 U.S. (8 Cranch) 110, 126 (1814) (Declaration of war authorizes Congress under international law to enact legislation to seize enemy property within the territorial U.S.); Jecker v. Montgomery, 59 U.S.

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best evidence of this distinction is the Supreme Court's opinion in Bas v. Tingy. 79/ The case grew out of a dispute involving the prize owed in the recapture of the Eliza during the undeclared "war" with France between 1798-1800. A unanimous Court observed that the United States could wage hostilities without a declaration of war, because the declaration of war was a distinct constitutional act affecting commerce and relations with other States. 80/ The Court thus recognized that the government could wage armed conflict 81/

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(18 How.) at 112 (During a state of war, "all intercourse and communication" between the belligerents' citizens is prohibited by "the law of nations"); The William Bagaley, 72 U.S. (5 Wall.) at 405 ("Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country."); Hanger v. Abbott, 73 U.S. (6 Wall.) at 535 (It is a universal principle of international law that when war is "duly declared or recognized" all commercial transactions are extinguished); Coppell v. Hall, 74 U.S. (7 Wall.) 542, 557 (1868) (Under international law, contracts made during war are "utterly void").

79/ 4 U.S. 37.

80/ 4 U.S. at 40. See Talbot v. Seemans, 5 U.S. (1 Cranch) 1, 18-20 (1801) (The U.S. and France were in "partial war").

81/ Professor Franck has noted that "[s]ince the decision of the Supreme Court in Bas v. Tingy in 1800 and in the Prize cases in 1862, and up to and including the Vietnam cases of 1971 to 1973, the courts have refused to sustain the proposition that the use of force by the President is unconstitutional except after a formal declaration of war by the Congress." T. Franck, Constitutional Practice Until Vietnam: Congress, the President and Foreign Policy 16 (1984).

absent a declared war. 82/

This distinction was also drawn by Daniel Webster, who noted that:

> This act [of May 28, 1798], it is true, authorized the use of force, under certain circumstances, and for certain objects, against French vessels. But there may be acts of authorized force; there may be assaults; there may be battles; there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under . . . the laws and usages of nations, and which all the writers distinguish from general war. 83/

82/ But even this persuasive distinction is blurred by the ambiguous use of "war" at the time of the Constitutional Convention. "War," at that time, usually was perceived in its international legal sense, which could not have escaped notice by the Founding Fathers. On the other hand, "war" was sometimes used colloquially to mean "combat." This ambiguity was reflected in the Articles of Confederation, which provided that "[t]he United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . .," and that "[t]he United States . . . shall never engage in a war . . . in time of peace . . . ." Art. 9, paras. 1 & 6. This ambiguity has led at least one author to equate, erroneously, the power to "declare war" with the power "to authorize the international use of force." Note, "The Future of the War Powers Resolution," 36 Stan. L. Rev. 1407, 1417 (1984).

83/ Speech on French Spoliations, 4 The Writings and Speeches of Daniel Webster 164 (1903). Webster went on to note that

> [o]n the same day in which this act passed, . . . Congress passed another act, entitled 'An act authorizing the President of the United States to raise a provisional army;' and the first section declared, that the President should be authorized, 'in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion,' to cause to be enlisted ten thousand men.

Id. at 164-65.

The original intent of the Framers appears to have been to regard the declaration of war as distinct from the use of armed force, such as the numerous Indian "wars" and the two Barbary "wars," and even the French intervention in the U.S. War of Independence.

It is impossible to state with certainty, however, the intent of the Founding Fathers. As Justice Jackson noted in the Steel Seizure Case, the "partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question." 84/ In fact, it is quite likely the Founding Fathers disagreed among themselves on the nature of the War Powers, preferring for the sake of political expediency to leave the issue unresolved and to let future generations grapple with the question. 85/

84/ Youngstown Sheet & Tube Co., 343 U.S. at 634-35 (Jackson, J., concurring).

85/ Another view is that much of the "foreign affairs power" is not mentioned in the Constitution because the Founding Fathers assumed the new government had the powers any State possesses under international law. Justice Story observed that powers in the Constitution flow not only from the aggregate of enumerated powers but also "from the aggregate powers of the national government." For instance, Story argued, since the Constitution omits reference to extending jurisdiction over conquered territory, one must look to the nature of government (and not Amendment X) for this power. "This would perhaps rather be a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incident of the powers specially enumerated." 2 J. Story, supra note 25, at 148. See also Jones v. United States,

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One thing that is clear is that advocates can muster authority for almost any interpretation of original intent on

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131 U.S. 202, 212 (1890). Cf. Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936). In The Chinese Exclusion Cases, the Court noted that Congress possessed jurisdiction over and could, therefore, exclude aliens (even though there is no specific constitutional authority) since

> [j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. . . . [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

130 U.S. 581, 603-04 (1889). See also Burnett v. Brooks, 288 U.S. 378, 396 (1933); MacKenzie v. Hare, 239 U.S. 299, 311 (1915).

Perhaps the most radical exposition of this thesis was by Mr. Justice Sutherland in United States v. Curtiss-Wright Export Corp., where it was stated that

> the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and . . . found the warrant for its conclusions not in the provision of the Constitution, but in the law of nations.

299 U.S. at 315-18 (citations omitted).

the War Powers. Perhaps the more reliable path to an understanding of the constitutional division of the War Powers is to analyze the structure of the Constitution itself to determine, from an architectural perspective, where the power should reside.

B. The Constitutional Separation of Institutions and Powers.

It has been observed that ours is a government of separated institutions sharing powers. The Supreme Court has noted that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers; it was woven into the document that they drafted in Philadelphia in the summer of 1787." 86/ "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." 87/ In this regard, the

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86/ Buckley v. Valeo, 424 U.S. at 124. The separation of powers "is at the heart of our Constitution . . .." Id. at 119. Accord Chadha, 462 U.S. at 951-52, 962; Springer v. Philippine Islands, 277 U.S. at 201. Cf. Miller & Knapp, "The Congressional Veto: Preserving the Constitutional Framework," 52 Ind. L.J. 367, 390 (1977) ("It is doubtful that the concept of separation of powers can really have any objective meaning.").

87/ O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

Framers were profoundly influenced by Montesquieu, 88/ whose injunction against the concentration of political power in any single branch of government was reflected in the Constitution's balance of powers. 89/ Montesquieu observed:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. 90/

In *The Federalist* No. 47, Madison found that when Montesquieu said that governmental powers should be separated, he (Montesquieu) did not mean isolated or fully independent.

> [H]e did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning . . . can amount to no more than

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88/ Madison observed that "[t]he oracle who is always consulted and cited on this subject is the celebrated Montesquieu." *The Federalist* No. 47 (J. Madison), *supra* note 27, at 244.

89/ "Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people" and had the "full approval" of the Framers. *Meyers v. United States*, 272 U.S. at 116.

90/ *Quoted in* *Constitutional Law: Cases and Other Problems* 649 (4th ed. P. Freund, M. Howe & E. Brown eds. 1977).

> this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. 91/

The Framers were pragmatic individuals who concluded that political powers should not be divided completely among branches, only that the branches should be independent of one another. 92/ Thus, said Madison, the three branches of our government "ought to be kept as separate from, and independent of each other as the nature of free government will admit; or as is consistent with the chain of connection, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity." 93/

The powers of government, however, were to be shared, so that each branch would have a check upon the other. "Even

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91/ The Federalist No. 47 (J. Madison), supra note 27, at 245 (emphasis deleted).

92/ This concept is often misunderstood. See, e.g., Vance, "Striking the Balance: Congress and the President Under the War Powers Resolution," 133 U. Pa. L. Rev. 79, 84 (1984) (Arguing that the war power does "not fit neatly into the classic concept of the separation of . . . powers. Instead, the area is one of shared and overlapping responsibilities . . . .").

93/ The Federalist No. 47 (J. Madison), supra note 27, at 246, quoting with approval the New Hampshire Constitution (emphasis deleted).

The Supreme Court observed in Buckley v. Valeo that there is "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separated from one another." 424 U.S. at 120.

a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty." 94/ Madison argued in The Federalist No. 48 that the political powers of each department should not be "wholly unconnected with each other"

> unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.
>
> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved. 95/

94/ Bowsher v. Synar, 478 U.S. 714 (1986) (Striking down the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985).

95/ The Federalist No. 48 (J. Madison), supra note 27, at 250.

Perhaps the quintessential example of this blending is the War Powers, which are divided between the political branches. 96/ It may be that one can discern the constitutional repository for the power to decide to deploy U.S. armed forces into hostilities or imminent hostilities

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96/ Rostow, supra note 43, at 847. See also E. Keynes, Undeclared War (1982); A. Sofaer, supra note 63, at 1-60. In Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972), aff'd mem. 411 U.S. 911 (1973), the district court noted that "the courts that have considered the war-making power of the United States have all agreed that such power is shared by the executive and legislature to the exclusion of the courts." See also Mitchell v. Laird, 488 F.2d 611, 613-14 (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 32 (1st Cir. 1971); Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970), aff'd sub nom., Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971); Drinan v. Nixon, 364 F. Supp. 854, 859 (D. Mass. 1973).

The conduct of foreign relations is generally reserved to the political branches. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). See also Chicago & Southern Airlines v. Waterman Steamship Co., 333 U.S. 103, 111 (1948). This does not mean, of course, that "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211 (1962). It is clear that

> [t]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts . . .. We cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986).

from an examination of the theory and practice of the separation of powers or, put another way, "by their nature, and by the principles of our institutions." 97/

There are two paths toward finding the proportionality of this sharing. The first is the "more like" line of inquiry: Is the power to decide to deploy U.S. armed forces into hostilities or imminent hostilities more like the power to raise and support the army, or is it more like the power to command the forces once deployed? This is a theoretical inquiry involving an analysis of specifically enumerated war-related powers. The other line of inquiry is to look for constitutional analogies to determine where this power most properly resides.

1. Constitutional Division of War-Related Powers.

As noted previously, the Constitution specifically assigns certain powers to Congress and others to the President. 98/

> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each

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97/ Ex parte Milligan, 71 U.S. (4 Wall.) at 139 (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, JJ.).

98/ Moreover, a fundamental constitutional distinction exists between powers exercised in domestic and foreign affairs. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304.

> includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of the Congress, nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law. 99/

a. The Congress.

Congress' powers include the raising of armed forces, 100/ appropriating funds to support them, 101/ prescribing rules to regulate their conduct 102/ and, most importantly, the power to declare war. 103/ Moreover, the Senate must approve Presidential nominees for promotion in the armed services. 104/

99/ See *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, JJ.).

In his veto message of the War Powers Resolution, President Nixon stated: "The authorization and appropriations process represent one of the ways in which such influence can be exercised." "Veto of War Powers Resolution," *supra* note 2. *See also* Glennon, "Strengthening the War Powers Resolution: The Case for Purse-String Restrictions," 60 Minn. L. Rev. 1, 28-38 (1975).

100/ U.S. Const. art. I, § 8, cls. 12 & 13.

101/ *Id*. art. I, § 8, cls. 12 & 13.

102/ *Id*. art. I, § 8, cl. 14.

103/ *Id*. art. I, § 8, cl. 11.

104/ *Id*. art. II, § 2, para. 2.

The War Powers Resolution appears to rest on only one of the Congressional powers enumerated above: the power to declare war. It is clear, or at least well-settled by custom and usage, that the President may send U.S. armed forces anywhere in the world, at any time he pleases, 105/ subject only to restrictions in the law, 106/ including (arguably) the War Powers Resolution. The theory underlying the War Powers Resolution is that the use of force may catapult the United States into a war, depriving the Congress of its power to decide whether or not to declare war. 107/ Thus, the President's use of force may on this ground be restrained. 108/

105/ See supra note 90.

106/ Such as prohibitions to spend funds for combat forces in a certain place. See, e.g., Act of July 1, 1973, supra note 12.

107/ Professor Henkin offers an alternative and interesting theory. He sees the policy aspect of the use of force as a source for Congressional war powers. See Henkin, "'A More Effective System' For Foreign Relations: The Constitutional Framework," 61 Va. L. Rev. 751, 764 (1975).

108/ This reasoning also ignores the fact that in the conduct of contemporary diplomacy, a wide variety of factors not involving the use of U.S. military forces might lead to war, such as food embargoes, economic sanctions, economic assistance to a State involved in an armed conflict and so forth. For instance, it is widely believed that the Japanese attack on Pearl Harbor, which triggered the

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The historical basis of this theory is shakey at best. At least in the 20th century, this country has run little or no risk of becoming embroiled in a declared war because of the use of American troops without Congressional approval. In the two largest military actions short of war, Korea and Vietnam, 109/ the Congress willingly and continuously exercised its power in support of the use of troops in combat by raising armed forces through conscription and supporting them with ongoing appropriations. In the minor incidents in which the President has ordered troops into

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U.S.' entry into the Second World War, was caused in part by U.S. economic policies towards Imperial Japan. *See generally* B.H. Liddell Hart, *History of the Second World War* 199 (1970); G. Prange, *At Dawn We Slept: The Untold Story of Pearl Harbor* (1981). Surely, the Congress may not control or interfere with the President in these areas based upon its power to declare war; therefore, Congress' War Power has limits. Based upon the writings of the Founding Fathers, international law at the time and Revolutionary War-era Prize cases, there is little reason to doubt that the phrase "declare war" meant anything other than what it says.

109/ Professor Henkin observed that

> [o]f the numerous recent 'uses' of force, only Korea and Vietnam would have been clearly covered [by the War Powers Resolution]. Had such legislation been in effect, President Truman would perhaps have acted anyhow, but might have been impelled to seek Congressional approval within thirty days. Vietnam was expressly authorized, and, presumably, any Tonkin Resolution would have clearly authorized hostilities beyond thirty days as well.

L. Henkin, *supra* note 37, at 103.

hostilities, such as the Dominican Republic in 1965-1966 and Grenada in 1983, there was little risk that the situation would escalate.

b. The President.

The President's powers flow from his broad mandate. He is vested with the "executive power," 110/ Commander in Chief, 111/ and the "sole organ" for the conduct of foreign relations. 112/ These are amorphous but extremely substantial powers, which led the Supreme Court to observe that "[t]he difference between the grant of legislative power under article 1 to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article II is significant." 113/

110/ U.S. Const. art. II, § 1. "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed." *Myers v. United States*, 272 U.S. at 118.

111/ *See infra* text accompanying notes 115-127.
Alexander Hamilton distinguished between the broad language of article II, § 1 and the specific grants in article I, § 1. "All legislative Powers *herein granted* shall be vested in a Congress of the United States." 7 *Works of Alexander Hamilton* 76 (H.C. Lodge ed. 1851). Hamilton concluded that "[t]he [article III] enumeration [in §§ 2 & 3] ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power; interpreted in conformity with other parts of the constitution." *Id.* at 80-81.

112/ *See supra* note 55.

113/ *Myers v. United States*, 272 U.S. at 128.

A President may act upon the sum of his powers, while Congressional action requires a specific constitutional provision, sweeping though it may be (consider the "commerce power," for instance). Thus, a theoretical analysis may be reduced to a single question: Does the power to decide to deploy U.S. armed forces into areas of hostilities or imminent hostilities flow to Congress from one of its specific powers, or to the President under his broad mandate of executive powers?

i. Commander in Chief Power.

It has been stated repeatedly, and wrongly, in my view, that the font of the President's war power is his constitutional appointment as Commander in Chief. 114/ One former Chief Executive and Chief Justice of the Supreme Court observed that "[t]he President is the Commander-in-Chief of the army and navy, and the militia when called into the service of the United States. Under this, he can order the army and navy anywhere he will, if the appropriations

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114/ In his concurring opinion in the Steel Seizure Case, Justice Jackson observed that the Commander in Chief power implies "something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by non-assertion yet cannot say where it begins or ends." 343 U.S. at 641.

furnish the means of transportation." 115/ This is probably not the power upon which the President properly may ground a decision to decide to deploy U.S. armed forces into a new armed conflict, although it is the power to wage war effectively. 116/ It is, therefore, a very substantial power. For example, it was in the exercise of this power that Franklin Roosevelt agreed with Winston Churchill during the Casablanca Conference in January 1943 that their countries would demand

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115/ W. Taft, The President and His Powers 94-95 (1916). During the debate surrounding the Congressional approval of the Act of March 3, 1909, 35 Stat. 773-74, requiring the President to maintain a complement of marines on Navy capital ships and cruisers of not less than 8 percent of the enlisted strength, Senator Borah stated:

> Congress has not the power to say that an army shall be at a particular place at a particular time or shall manouver in a particular instance. That belongs exclusively to the Commander in Chief of the Army. The dividing line is between the question of raising, supporting and regulating an army, and commanding it. It is difficult to define, for the reason that is is difficult to tell where the dividing line is. But when ascertained, there is no question about the constitutional provision covering it.

43 Cong. Rec. 2452 (1909).

116/ T. Eagleton, War and Presidential Power: A Chronicle of Congressional Surrender 113 (1974); Wallace, supra note 65, at 744-52 et seq.

the "unconditional surrender" of the three Axis powers 117/ -- a decision of profound significance for the war effort. Similarly, President Lincoln based the Emancipation Proclamation upon his role as Commander in Chief, claiming it was justified by military necessity. 118/ Further, it was as Commander in Chief that President Truman decided to drop the atomic bomb on Japan but not to use it in the Korean conflict.

117/ For an interesting and well-researched account of this momentous decision, see 7 M. Gilbert, Winston S. Churchill: Road to Victory, 1941-1945 309 (1986); H. Feis, Churchill Roosevelt Stalin: The War They Waged and the Peace They Sought 108-11 (2d ed. 1967). Roosevelt stated:

> Peace can come to the world only by the total elimination of German and Japanese war power. . . . The elimination of German, Japanese, and Italian war power means the unconditional surrender by Germany, Italy, and Japan. That means a reasonable assurance of future world peace. It does not mean the destruction of the philosophies in those countries which are based on conquest and the subjugation of other people.

Quoted in id. at 109.

118/ See infra note 119.

The designation of the President as Commander in Chief was intended to insure civilian control of the military 119/ and, once hostilities erupted, to vest the power to wage the struggle in him. 120/ In one of the most

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119/ 10 Op. Att'y Gen. 74, 79 (1861). See also L. Henkin, supra note 37, at 50; A. Schlesinger, supra note 37, at 6. "By making the Commander in Chief a civilian who would be subject to recall after four years, the Founders doubtless hoped to spare America tribulations of the sort that the unfettered command and consequent political power of a Duke of Marlborough had brought to England." Id.

The Commander in Chief power may and, in fact, has crossed the threshold and become a substantive power. Perhaps the best example of this is when President Abraham Lincoln used this power as his constitutional authority for the Emancipation Proclamation. Lincoln claimed that this was a necessary military measure to shorten the Civil War. W. Whiting, War Powers Under The Constitution Of The United States 66 (10th ed. 1864, reprinted in 1971). See also G. Milton, The Use of Presidential Power 1789-1943 118 (1965). Whether or not the Emancipation Proclamation was needed for military reasons, it certainly aided Lincoln politically in the northern states. Of all the Presidents, Lincoln made the widest and most frequent use of this power. Id. at 316.

120/ The Founding Fathers wanted to assure that control of military activities was not vested in the Congress because of the experience of war by committee during the war of independence. It was in this vein that Hamilton wrote that "[o]f all the cares or concerns of governmnet, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." The Federalist No. 74 (A. Hamilton), supra note 27, at 376.

It has been observed that

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying

[Footnote cont'd on next page]

frequently quoted passages of The Federalist, Alexander Hamilton opined that the power of the Commander in Chief "amount[ed] to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral . . .." 121/ Although the Commander in Chief power is broad and involves policy-making in war (and, perhaps, in high-intensity armed conflict), 122/ it was neither intended to nor does it carry with it the power to commit U.S. armed forces to combat, except for such

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[Footnote cont'd from previous page]

> on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belongs to the President as commander-in-chief.

Ex parte Milligan, 71 U.S. (4 Wall.) at 139 (Chase, C.J., and Swayne, Wayne and Miller, JJ., concurring) (emphasis added). In Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), aff'd, 165 U.S. 553 (1897), the Court of Claims noted that "although Congress may increase the Army, or reduce the Army, or abolish it altogether . . . so long as we have a military force Congress can not take away from the President the supreme command."

121/ The Federalist No. 69 (A. Hamilton), supra note 27, at 350. See also Fleming v. Page, 50 U.S. (9 How.) 603, 618 (1850) (The Commander in Chief power did not "extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.").

122/ This includes certain powers affecting citizens within the United States. See E. Corwin, The President: Office and Powers 1787-1984 231, 242 et seq. (5th rev. ed. 1984). Cf. Youngstown Sheet & Tube Co., 343 U.S. 579.

limited purposes as self-defense. 123/ Justice Jackson, in his concurring opinion in the Steel Seizure Case, rejected the notion that it vests the President with the "power to do anything, anywhere, that can be done with an army or navy." 124/ The Constitution, Chief Justice Stone observed in the Nazi Saboteurs Case, "invests the President as Commander in Chief with power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces." 125/ In United States v. Sweeny, 126/ the Supreme Court observed that the Commander in Chief power "is evidently to vest in the President the supreme command over all the military forces, -- such supreme and undivided command as would be necessary to the prosecution of a successful war." 127/

ii. Foreign Policy Power.

The decision to use American troops, in situations short of war, is clearly related to the conduct of U.S. foreign policy -- an executive, rather than a legislative,

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123/ See L. Henkin, supra note 37, at 53. But see Rehnquist, "The Constitutional Issues -- Administration Position," 45 N.Y.U.L. Rev. 628, 631-32 (1970).

124/ 343 U.S. at 641-42 (Jackson, J., concurring).

125/ Ex parte Quirin, 317 U.S. 1, 26 (1942).

126/ United States v. Sweeny, 157 U.S. 281 (1895).

127/ 157 U.S. at 284.

function. 128/ The President 129/ is responsible for sending and recalling ambassadors, opening and closing embassies, formulating and coordinating geopolitical strategy, negotiating trade agreements, entering into executive agreements, presenting and prosecuting international claims, and a host of other activities inherent in the foreign policy power. There is no question that the projection of military

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128/ The State Department took the position at one point that the President's use of force in foreign policy is outside the Congress' direct power to control.

> Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that his authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.

Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Comm. on Foreign Relations and Armed Services, 82d Cong., 1st Sess. 92-93 (1951) (statement of Secretary of State Dean Acheson), *reprinted in* *The Powers of the President as Commander In Chief of the Army and Navy of the United States* 66, 71 (D. Schaffer & D. Mathews eds. 1974). The implication of this testimony appears to be that the constitutional restraints on the use of force in the conduct of foreign policy are the same as those which apply to the normal conduct of diplomacy.

129/ In foreign policy making, Americans tend to adopt an anthropomorphic view. Of course, the President does not single-handedly make foreign policy decisions; rather, there are any number of departments of the Government which daily contribute to the foreign policy process. For instance, there are 26 federal government agencies, departments, and offices which regularly participate in international trade policy making.

power is a means of conducting foreign policy. 130/ Diplomacy and the use of force "are complementary aspects to the . . . art of conducting relations with other states." 131/ Thus, "foreign policy and war are on a continuum." 132/

Consider, for example, the "Carter Doctrine." In his State of the Union address on January 23, 1980, President Carter declared: "An attempt by an outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States. It will be repelled by use of any means necessary, including military force." 133/ Similarly, in his State of the Union address on December 2, 1823, fearing the reconquest of Spanish America by the Holy Alliance in favor of the Bourbons, President James Monroe declared that the United States "should consider any attempt . . . to extend [foreign intervention] to any portion of this hemisphere as dangerous to our peace and safety." 134/

130/ Clausewitz observed that the use of force is yet another means of conducting politics. K. Clausewitz, On War 101 (A. Rapaport trans. 1968).

131/ R. Aron, Peace and War: A Theory of International Relations 24 (1966).

132/ Wallace, supra note 65, at 733.

133/ "Transcript of President's State of the Union Address to Joint Session of Congress," N.Y. Times, Jan. 24, 1980, at A12, col. 3.

134/ The Monroe Doctrine, reprinted in R. Morris, supra note 67, at 99.

This became known as the Monroe Doctrine. 135/ President Woodrow Wilson's Fourteen Points also had profound consequences for American foreign policy. 136/ As historian Arthur Schlesinger noted, "[t]he Fourteen Points were of critical significance to the war and peace, but this was entirely a presidential initiative, without congressional consultation or clearance." 137/

Other notable instances where Presidents have set American foreign policies which implied the potential use of force include: the stationing of combat troops in Iceland in July 1941, the Atlantic Charter of August 14, 1941, and the Truman Doctrine of March 2, 1947, from which sprang the policy of containment. On October 23, 1962, President John F. Kennedy issued the Proclamation of a Quarantine of Offensive Weapons

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135/ In his State of the Union address on December 2, 1845, President James Polk reasserted the Monroe Doctrine, expanding it to prohibit diplomatic intervention by outside powers in the New World. He concluded that "[t]he people of the United States can not, therefore, view with indifference attempts of European powers to interfere with the independent action of any nation on this continent." Admittedly, the Monroe Doctrine was transformed from a defensive measure to a justification for intervention by President Theodore Roosevelt in his State of the Union address on December 6, 1904, in what later became known as the Roosevelt Corollary to the Monroe Doctrine, during the heyday of American gunboat diplomacy.

136/ The Fourteen Points, reprinted in R. Morris, supra note 67, at 153.

137/ A. Schlesinger, supra note 37, at 93.

during the Cuban Missile Crisis. 138/ President Kennedy thereupon ordered the U.S. navy to blockade the shipment of offensive weapons to Cuba, using force if necessary, and clearly bringing this country to the brink of war.

Moreover, is there any doubt that the decision whether or not to recognize another country, to establish an embassy and to exchange ambassadors, is an executive function? Could the Congress order the President to recognize a country? Could the Congress block the President's recognition of a country? The Supreme Court answered these questions with a clearcut "no" in United States v. Pink 139/ and United States v. Belmont, 140/ holding that as the "sole organ of the federal government in the field of international relations," 141/ these powers, either explicitly or inherently, belong to the President.

iii. Executive Power.

Particularly within the foreign affairs context, the President is vested with perhaps the broadest of all

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138/ "Interdiction of the Delivery of Offensive Weapons to Cuba," Proclamation No. 3504, 27 Fed. Reg. 10,401, reprinted in 47 Dep't State Bull. 717 (1962).

139/ United States v. Pink, 315 U.S. 203.

140/ United States v. Belmont, 301 U.S. 324.

141/ United States v. Curtiss-Wright Corp., 299 U.S. at 320.

delegations of authority -- the Executive power. It is axiomatic that the Constitution was created to supersede the Articles of Confederation, that practical necessity demanded a stronger and more effective national government. 142/ The *raison d'etre* of the constitutional blueprint was to replace administration by legislative committee (and not much of an administration, at that) with a government of defined though separated powers. Whether or not the Founding Fathers originally intended that the President would have the power to decide to deploy armed forces into areas of hostilities or imminent hostilities, it is beyond question today that, as among the three branches of government, this is appropriately an Executive function. That it is not an unfettered function is made clear by the fact that Congress may control the President's use of the armed forces, among other ways, simply by placing limitations upon appropriations. Moreover, the Executive Branch is continually held accountable to Congress' oversight function. On a political level, moreover, the President is obliged to maintain a working relationship

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142/ *See generally* *The Federalist* No. 70 (A. Hamilton), *supra* note 27.

with Congress in the politico-military area, lest he find political obstacles placed in the way of other objectives. Admittedly, Congress' checks against Presidential action cannot be implemented quickly. 143/ But then again, the constitutional checks and balances were not intended to act speedily.

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power. 144/

However, "Congressional unwillingness to use its constitutional powers cannot be deemed a sufficient reason for inventing new ways to act." 145/

Professor Corwin characterized the Constitution's lack of precision with respect to the power to deploy armed forces abroad into situations of hostilities as "an invitation to struggle for the privilege of directing American foreign

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143/ The Supreme Court observed that the strength of Congress lies in its thorough -- and time-consuming -- "step-by-step, deliberate and deliberative process," weighing the facts, debating the issues, before acting. See Chadha, 462 U.S. at 959. See also Consumer Energy Council v. FERC, 673 F.2d at 464.

144/ Bowsher v. Synar, 478 U.S. 714.

145/ Consumer Energy Council v. FERC, 673 F.2d at 477.

policy." 146/ How far can the Congress go without infringing upon the President's power? The Congress has the power to raise the armed forces, to provide for their support, to define the qualifications for its members, to approve appointments and promotions of officers, and to prescribe rules for its conduct. It ultimately can control the use of the armed forces through the appropriations process. It does not follow, however, that the Congress may direct the Executive when and how to use the armed forces directly or through a legislative veto. The Chadha parallel is instructive. In Chadha, the Attorney General was delegated certain powers, subject to a Congressional veto. The Court found that the ability of Congress to direct a different result following the Executive's decision violated the doctrine of the separation of institutions. The same reasoning applies to the War Powers Resolution, which allows Congress to veto the President's decision to deploy the armed forces. To my mind, the conclusion is inescapable that the War Powers Resolution violates the separation of powers and institutions upon which our Constitution is based.

146/ E. Corwin, supra note 122, at 171.

IV. EXECUTIVE AND CONGRESSIONAL COOPERATION IN THE DECISION TO DEPLOY ARMED FORCES INTO HOSTILITIES.

While the foregoing discusses the constitutional principles involving the War Powers, at the end of the day the question of how to deal with the use of force should not be approached as if we were preparing a brief for an appellate court. The constitutional principles provide us with an abstract understanding of the powers of each branch of our government. But our system works well only when its components interact in a mutually-reinforcing and complementary manner, and this depends upon each branch's recognition that the other has a job to do. Where the use of armed force is concerned, the Executive should embrace the affirmative responsibility of bringing the Legislature into the decisionmaking process. If a confrontation arises as to where the line should be drawn between the respective War Powers of the President and Congress, someone has been shortsighted or stubborn or both.

One writer has observed that "the problem addressed by the War Powers Resolution is at least as much political as it is constitutional . . . ." 147/ The successful resolution

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147/ P. Holt, The War Powers Resolution: The Role of Congress In U.S. Armed Intervention 1 (1978).

of political problems, especially in a crisis, requires comity between the coordinate branches. But comity itself is an amorphous concept. It rests not on a definition of roles, but on a constructive relationship between the President and the Congress.

How is comity achieved? Several subsidiary questions immediately spring to mind. When should Congress be consulted? Who in Congress should be consulted? What constitutes "consultation"? Suppose Congress does not approve the President's decision to deploy armed forces abroad in a hostile situation?

A. When Should Congress Be Consulted?

As a general principle, Congress should be consulted before the President makes a final decision to deploy U.S. armed forces in a hostile situation. It is, of course, impossible to prescribe precisely the extent of such consultation. There are, broadly speaking, three types of scenarios, each of which would point to a different result.

First, there are circumstances in which the President intends to use very limited force for a single stroke. In this case, speed and surprise are essential to success. The U.S. air strike against Libya is one such example. Without entering into a debate on the merits or demerits of that action, the success of the mission and the safety of the American troops involved had to be taken into account.

Second, there are circumstances in which the President is confronted with a rapidly changing situation where the time between the decision to deploy armed forces and the actual deployment may be a day or two or three at most. In such circumstances, the scope of advance consultation must necessarily be very restricted.

Finally, there are those situations where the President has a relatively longer period in which to decide whether or not to deploy U.S. armed forces, in what manner, and in what numbers. I am thinking here of Vietnam, where the introduction of combat forces and the escalation of their involvement was the outcome of very conscious and deliberate action over a long period of time. Clearly, in situations such as this, the President should consult with Congress every step of the way.

B. Who in Congress Should Be Consulted?

The conclusion that congressional consultation is necessary or appropriate raises, of course, the question of who should be consulted. As a general proposition, the shorter the time available and the greater the need for secrecy, the narrower the scope for consultation. At a minimum, it would include the leadership of both houses and the chairmen of key committees. If the Congress is kept fully informed, in the first instance, through its leadership and through the committees having primary jurisdiction, then it should be possible in due course for the leadership and the administration to agree that the time had come for broader consultation, up to and including hearings and debate.

C. What Constitutes "Consultation"?

The word "consultation" is, I think, an appropriate term for the process that should take place between the President and the Congress where the involvement of U.S. armed forces in hostilities short of war is concerned. The common meaning of "to consult" is to ask advice or opinion, to deliberate together. It is more than "to notify," which is merely to inform, and less than "to seek advice and consent," which implies the need for approval.

For the reasons discussed earlier, I believe the President has the constitutional authority to decide to deploy U.S. armed forces abroad in situations of hostilities short of a declared war. However, our government does not function well when one political branch stubbornly asserts its own power in defiance of the other. The solution is comity, and comity demands consultation -- a dialogue in which neither branch is subservient to the other.

D. Must Congress Approve the President's Decision to Deploy Forces in a Hostile Situation?

I do not believe that Congressional approval is a prerequisite to a Presidential decision to deploy U.S. armed forces abroad. As I have stressed, it is important that the President should, to the extent possible, consult with the Congress in advance. But consultation is not a request for "advice and consent." This is an important distinction since one can envision a circumstance where the President comes away with the sense that Members of the Congress are divided upon the use of force, and the President nevertheless concludes that the deployment of forces is the best alternative for the United States. In such a case, what purpose does consultation serve?

The answer, it seems to me, is that a very important function is served by the process of consultation itself. Before a President consults with Congress on the deployment of armed forces into hostilities, he would have to have a high degree of confidence in the correctness of that decision. Presidents do not lightly undertake the introduction of U.S. forces into hostilities. However, the initial process of consultation certainly exerts a salutary effect on Presidential decisionmaking. At the same time, it can blunt, neutralize, or result in increased support from the Congress.

Once having consulted Congress and having failed to win its support, any President would have to be extremely confident in his assessment of the necessity for and benefits of military action if he went ahead anyway with the deployment of U.S. armed forces. The President is the Chief Executive; as such, he must make tough decisions. But the President would do so only most advisedly if the Congress disapproved of his action. Indeed, one would think that the President would almost have to believe that his actions would demonstrate the correctness of his decision and persuade Congress to alter its view.

V. CONCLUSION.

Congress has a major and ultimately decisive role to play with respect to the decisionmaking process of using U.S. armed forces. The successful conduct of U.S. foreign policy, and particularly the use of American armed forces, depends upon close cooperation between the President and the Congress. Our real protection must ultimately depend on the willingness of each branch to respect the responsibilities and prerogatives of the other -- and that is a spirit which does not lend itself to legislation.

PREPARED STATEMENT OF ABRAM CHAYES

Mr. Chairman, members of the Committee:

It is, as always, an honor as well as a pleasure to appear before you. I have a brief statement, including what I hope is a practical suggestion. I will of course be very glad to answer any questions you may have.

I believe the War Powers Resolution of 1973 is constitutional, except for Section 5(c), which, as I think everyone agrees, is invalid under the rule of the Chadha case. It is obvious from the text of Articles I and II of the Constitution that the design of the Framers divides the power to use the armed forces of the United States between the President and the Congress. I believe even Executive Branch lawyers would recognize that.

The Constitution does not specify the precise line of division. In the 18th century, the functional importance of a declaration of war was much greater than it has become since, and the Framers relied heavily on that device to ensure that Congress had a co-equal role. The erosion of the technical requirement of a declaration should not fundamentally alter the constitutional structure.

The purpose of the scheme of shared and divided power was to ensure that, as in the case of ordinary legislation, both of the political branches of government were in agreement as to any major military action by U.S. armed forces, save perhaps for self-defense, where such agreement could be presumed. Agreement is not less, but more necessary today. Bitter experience has shown that the commitment of U.S. troops to action abroad cannot be sustained over any significant period without widespread public support, registered through Congress.

The War Powers Resolution, I believe, establishes a reasonable, simple and workable procedure for exercising the shared powers of the two branches. I would be opposed to amending its operative provisions either to loosen or tighten them. I don't believe there is a political consensus for more stringent limitations on the President's powers. And in any case, the proposals for accomplishing this goal increase the complexity and detail of the procedures under the Resolution and raise many new and difficult questions of interpretation.

Likewise, I would oppose relaxing the requirements of the present War Powers Resolution by eliminating the automatic 60 day period for withdrawal of troops in the absence of congressional approval. The draft put forward by Senator Byrd would require affirmative legislation to mandate the withdrawal of troops committed to action by the President. But there is no need of a special resolution to accomplish that result. In my view, the power of Congress to enact binding legislation forbidding deployment or requiring withdrawal of troops from foreign combat springs directly from the Constitution. If the President were prepared to ignore such legislation, he would surely not be deterred from doing so simply because Congress had acted pursuant to a previously adopted resolution.

What the constitutional provision for congressional declaration of war envisions is something more: affirmative concurrence by Congress in any commitment of U.S. forces to major military action, other than in self-defense. Senator Byrd's draft does not effectuate that requirement.

More broadly, I believe the difficulties that have arisen under the War Powers Resolution over the past twelve years cannot be cured by tinkering with its substantive provisions. The Resolution would provide an effective framework for joint exercise of the war powers by the two branches, if they were prepared to operate in accordance with its terms. The reason the Resolution has not worked as it was intended is not that either branch is out to usurp power. It is that each occasion for invoking the Resolution becomes an occasion for a battle between the branches about the constitutional allocation of power between them. In the absence of an authoritative outside decision maker, there is not way to resolve this controversy, except for one side or the other to give in. It is understandable that, in such circumstances, neither side is willing to do so, because that might be to abandon power that rightfully belonged to it under the Constitution.

You will recall that Harry Truman, on principle, refused to seek formal congrressional approval of the commitment of troops at the outset of the Korean War. He feared that it would set a precedent diminishing the constitutional power of the presidency. A number of congressional resolutions have been enacted since then -- Formosa, Lebanon, Cuba, Tonkin Gulf. In all of them, the object of executive branch lawyers at the drafting level was to make sure the language did not imply that congressional approval was constitutionally necessary.

The usual recourse in our system when there is a controversy over the division of governmental powers is to the courts. But the judiciary has on the whole been loathe to resolve interbranch conflicts, particularly in the area of military and foreign affairs. It has been content to let the Executive and Congress work out their own accomodation and resolution of the ambiguities. This prescription has not worked in the context of the War Powers Resolution. In fact, it has made matters worse. Every time the Resolution has been invoked, it has unleashed a debate about the respective powers and duties of the President and Congress under the Constitution, rather than about the wisdom or propriety of the particular military action.

I believe therefore that the best way to improve the War Powers Resolution is to provide for judicial determination of the consitutional questions it raises. I think this can be done by statute, because it seems to me that judicial abstention in the war powers cases reflects, for the most part, not inherent limits on the judicial power under Article III of the Constitution, but so-called "prudential" considerations. Congress can by legislation resolve those considerations in favor of adjudication. It might even be that the Executive Branch would agree to such an course of action in order to avoid the debilitating constitutional arguments that have attended every previous effort to invoke the War Powers Resolution.

Senator Byrd's proposal points in that direction. Section 5(c) of his draft resolution authorizes any member of Congress to sue to enforce certain limited provisions.

It is a controversial question whether a congressman has standing to sue to enforce a statutory on the basis that it is necessary limitations to prevent dilution of his/her vote. On the whole, the courts have not been hospitable to such actions. But an Act of Congress, simply by establishing a cause of action in favor of particular persons, can create standing where none existed before, at least in some circumstances. That was the case under the Freedom of Information Act, which establishes in every person a right of access to government documents, whether or not that person has any special or particularized interest in the documents sought. Similarly, the National Environmental Policy Act seems to give rise to a private right of citizen action that, in turn, supplies the standing requirement.

Some of the war powers cases suggest a more stringent standing or "ripeness" requirement. They look for evidence of a genuine conflict between the branches, not just a difference among members of Congress that can and should be settled by voting. Justice Powell rejected Senator Goldwater's effort to test the constitutional power of President Carter unilaterally to terminate the Mutual Defense Treaty with Nationalist China on this ground. Again, it is not clear whether the courts have seen this requirement as of constitutional dimensions or as merely prudential.

In any case, institutional action would clearly fulfill such a requirement. Congress, by concurrent resolution, could authorize suit to resolve any controversy arising under the War Powers Resolution. A single house resolution could authorize suit to bed brought in the name of that House. In either case I think it clear that standing to raise the issue would be present. I believe the same would be true if, by legislation, an appropriate group or committee of members were empowered to authorize suit on behalf of the Congress. The permanent consultative group established in Section 3(c)(1) of Senator Byrd's draft resolution would be such a group.

In Burke v. Kline, 759 F.2d 21 (D.C.Cir. 198_), for example, 33 individual congressmen sued to challenge an asserted exercise of the pocket veto power. The Senate was allowed to intervene under a resolution authorizing the Senate Legal Counsel to take the necessary steps. The Speaker of the House and the House Bipartisan Leadership Group, made up of the majority and minority leaders and whips intervened successfully to "assert the rights and privileges of the House of Representatives." In that case, the court suggested, as I have here, that the usual judicial prescription to let the two branches fight it out between them might be worse than the disease. Id. at 29.

If the War Powers Resolution were amended so as to establish standing to raise constitutional and interpretative issues arising under it and to indicate generally that Congress (and the President by approving the amendment) invited judicial resolution of these issues, I believe the courts would be prepared to adjudicate. With the courts available to settle these otherwise irreconcilable issues, the executive and legislative branches would be free to move forward and actually operate under the War Powers Resolution to secure the necessary commonality of purpose in those grave and difficult situations where U.S. military action is a possible response to foreign policy problems.

PREPARED STATEMENT OF ADM. WILLIAM J. CROWE, JR.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, IT IS A DISTINCT PLEASURE FOR ME TO APPEAR BEFORE YOU THIS MORNING IN RESPONSE TO YOUR INTEREST IN REEVALUATING THE EFFICACY OF THE WAR POWERS RESOLUTION OF 1973.

I MUST BEGIN BY CHARACTERIZING MY VIEWS AS THOSE OF A PROFESSIONAL MILITARY MAN, AND NOT THOSE OF A CONSTITUTIONAL SCHOLAR OR LAWYER. I WOULD LIKE TO OFFER THE BENEFIT OF MY OWN EXPERIENCES AND OBSERVATIONS, PARTICULARLY FROM THE PERSPECTIVE I

HAVE GAINED OVER THE LAST THREE YEARS AS CHAIRMAN OF THE JOINT CHIEFS OF STAFF.

AT THE OUTSET, I WANT TO STATE FOR THE RECORD THAT I AGREE WITH SECRETARY CARLUCCI'S STATEMENT AND HAVE CONSCIOUSLY ATTEMPTED TO AVOID A DUPLICATION OF HIS COMMENTS.

I STRONGLY SHARE THE DESIRE FOR CONSULTATION BETWEEN THE EXECUTIVE AND CONGRESS ON IMPORTANT ISSUES AND POLICIES--ESPECIALLY DECISIONS TO COMMIT OUR ARMED FORCES. AS A RESULT OF MY OWN EXPERIENCE IN VIETNAM I INITIALLY SUPPORTED THE WAR POWERS RESOLUTION, BECAUSE I BELIEVED IT WOULD NOT ONLY FACILITATE CONSULTATION BUT ASSIST IN BUILDING SUPPORT FOR OUR FIGHTING MEN WHENEVER THEY WERE COMMITTED IN DANGEROUS SITUATIONS.

CONSEQUENTLY, I HAVE FOLLOWED THE USE OF THE

WAR POWERS RESOLUTION WITH GREAT INTEREST AND MY PRESENT RESPONSIBILITIES HAVE BROUGHT ME DIRECTLY IN TOUCH WITH THE OVERALL PROCESS. UNFORTUNATELY, THIS EXPERIENCE HAS LED ME TO REVISE MY ORIGINAL VIEWS. I NOW BELIEVE THAT THE WAR POWERS RESOLUTION HAS NOT FUNCTIONED AS ORIGINALLY ENVISIONED AND HAS DEFINITELY HAD SOME UNANTICIPATED ADVERSE IMPACTS. ON BALANCE I WOULD STRONGLY RECOMMEND THAT THE CONGRESS SEARCH FOR OTHER WAYS TO ACHIEVE THESE HIGH PURPOSES.

I DO BELIEVE THAT CONSULTATION HAS TWO HEALTHY EFFECTS. FIRST, IT IS MY IMPRESSION THAT THE CONGRESS HAS BEEN KEPT BETTER INFORMED THAN IN THE PAST. MOREOVER, I SUSPECT IT HAS MADE THOSE ON THE EXECUTIVE SIDE THINK MORE DELIBERATELY ABOUT PLANNED ACTIONS. THIS DOES NOT MEAN, HOWEVER, THAT

CONSULTATION HAS BEEN A TOTAL SUCCESS.

THERE IS NO DEFINITION, EITHER FORMALLY OR PRACTICALLY SPEAKING, OF CONSULTATION AND IT MEANS DIFFERENT THINGS TO DIFFERENT PEOPLE. IN TURN, IT IS USED FOR A VARIETY OF PURPOSES, SOME OF WHICH HAVE LITTLE TO DO WITH THE SUBSTANCE OF THE ISSUES. I NOTICED THAT GENERAL SCOWCROFT EMPHASIZED THIS DEFICIENCY AND ELABORATED ON THE UNRESOLVED QUESTIONS IN HIS TESTIMONY. I WOULD CERTAINLY ASSOCIATE MYSELF WITH HIS COMMENTS IN THIS REGARD. THE BOTTOM LINE IS THAT IT IS NOT CLEAR AS TO WHAT A PRESIDENT IS EXPECTED TO DO OR AS TO WHAT THE CHARACTER (PARTICULARLY LIMITS) OF CONGRESSIONAL INVOLVEMENT SHOULD BE.

SIMILARLY, IT IS GRAPHICALLY CLEAR THAT THE RESOLUTION'S REPORTING SCHEME AND THE ATTENDANT

DEBATE HAS NOT PRODUCED THE DESIRED CONSENSUS. THE CONGRESS SPEAKS WITH A RELATIVELY UNIFORM VOICE IN FAVOR OF CONGRESSIONAL-EXECUTIVE BRANCH PARTNERSHIP WITH RESPECT TO THE COMMITMENT OF OUR ARMED FORCES. HOWEVER, WHEN THE DEBATE WAS FOCUSED ON THE PERSIAN GULF, THERE WAS A LOUD CHORUS OF CRITICISM OR PRAISE OF THE EXECUTIVE'S POLICY BUT LITTLE EFFORT TO COME TO A FINAL AGREED DECISION AS TO WHETHER OR NOT THE POLICY SHOULD BE PURSUED. TO BE BLUNT, TOO MANY MEMBERS OF CONGRESS WERE CONTENT TO DEBATE ABOUT THE WAR POWERS PROCESS AND WERE HAPPY TO AVOID BEING HELD ACCOUNTABLE FOR APPROVAL OR DISAPPROVAL OF THE POLICY. I DO NOT SEE THIS AS HELPFUL TO THE DECISION-MAKERS OR THE COUNTRY.

IN FACT, IT MAY BE COUNTER-PRODUCTIVE. I THINK THIS IS BEST ILLUSTRATED BY THE EFFECT SUCH A

CONTEST HAS ON TWO GROUPS OUTSIDE THE UNITED STATES; OUR ALLIES AND OUR ADVERSARIES.

THERE IS NO QUESTION IN MY MIND THAT THE WAR POWERS RESOLUTION, AND IN PARTICULAR ITS AUTOMATIC WITHDRAWAL PROVISION AND THE HEATED DEBATES CONDUCTED IN ITS NAME, HAVE HAD A DELETERIOUS EFFECT ON OUR RELATIONSHIPS WITH OUR FRIENDS. IT HAS INEVITABLY CREATED A CONTEXT FOR THEIR DOUBTS ABOUT OUR ABILITY TO MAINTAIN A CONSISTENT AND CONTINUOUS COURSE OF ACTION WITH REGARD TO MATTERS CONCERNING THEIR AND OUR VITAL INTERESTS. THIS DEBATE TENDS TO HAVE A SUBTLE, BUT NONETHELESS REAL, EFFECT.

WE TEND TO SEE THE ROBUST GIVE AND TAKE OF OUR POLITICAL SYSTEM AS ONE OF OUR GREATEST STRENGTHS, AND IT IS. BUT WHEN SUCH DEBATES CENTER ON

SPECIFIC FOREIGN POLICY INITIATIVES, AND WHEN THE PRESENCE AND/OR THE UTILIZATION OF OUR ARMED FORCES IS A CENTRAL FOCUS OF SUCH DEBATE, THEN THE "AUTOMATIC WITHDRAWAL PROVISION" OF THE WAR POWERS RESOLUTION FORMS A BACKDROP WHICH MAKES IT VERY DIFFICULT FOR OUR FRIENDS TO INTERPRET SUCH DEBATES AS ANYTHING OTHER THAN A LACK OF RESOLVE.

THAT BRINGS US TO THE EFFECTS OF THE WAR POWERS RESOLUTION UPON THOSE WHO ARE NOT OUR FRIENDS. WHETHER OR NOT THERE IS A WAR POWERS RESOLUTION, THERE WILL BE EXTENDED POLITICAL COMMENT AND DISCUSSION IN OUR COUNTRY REGARDING ANY COMMITMENT OF U.S. TROOPS. NEVERTHELESS, THE CONFRONTATIONAL FORMAT OF THE WAR POWERS RESOLUTION INSURES A PARTISAN POLITICAL DEBATE ON EVERY ASPECT OF THE CRISIS AND A TIME WINDOW FOR ACTION WHICH

ENCOURAGES OUR OPPONENTS TO USE THE U.S. POLITICAL PROCESS FOR THEIR OWN ENDS. IN OTHER WORDS THE WAR POWERS REPORTS OR LACK THEREOF AND DEBATE BECOME PART OF THE ADVERSARY'S TACTICAL CALCULUS AND MAY GIVE HIM A LEVER FOR INFLUENCING U.S. POLITICAL WILL. FOR EXAMPLE:

THE EXISTENCE OF A WAR POWERS RESOLUTION, WITH THE ATTENDANT DEBATE, MAY ENCOURAGE THOSE WHO WISH US ILL TO TEST WHETHER WE WILL CONFRONT THEM. BY THIS I MEAN THE POLITICAL DIALOGUE MAY PROVIDE AN ADDITIONAL REASON TO PERCEIVE US, HOWEVER WRONGLY, AS A NATION THAT IS TENTATIVE OR GROPING. THIS CAN BE CRUCIAL AT THE OUTSET OF A CRISIS, WHEN THE PROSPECT OF DECISIVE ACTION COULD DETER A FURTHER SPREAD OF HOSTILITIES.

ONCE UNITED STATES FORCES HAVE BEEN COMMITTED, THE WAR POWERS DEBATES MAY PUSH OUR OPPONENTS TO MAKE A MAXIMUM EFFORT AT THE OUTSET WITH THE OBJECTIVE OF EITHER ELICITING A CONGRESSIONALLY MANDATED WITHDRAWAL OR PREVENTING THE FORMATION OF PUBLIC AND LEGISLATIVE SUPPORT FOR THE COMMITMENT BEYOND THE RUNNING OF THE SIXTY DAY LIMIT ON SUCH INVOLVEMENT.

ON THE OTHER HAND, THE WAR POWERS DEBATE MIGHT HAVE AN OPPOSITE BUT EQUALLY DAMAGING EFFECT. OUR ENEMIES COULD PERCEIVE A GREAT ADVANTAGE TO THEMSELVES IN DELAYING ANY DECISIVE ENGAGEMENT ON THE BATTLEFIELD WHILE UNITED STATES DOMESTIC DEBATE WAS ALLOWED TO FESTER AND, AGAIN, THE RUNNING OF THE SIXTY DAY LIMIT BRINGS US CLOSER TO A DOMESTIC POLITICAL CRISIS.

IT IS IMPORTANT TO REALIZE, HOWEVER, THAT THE

REPORTING PROVISIONS OF THE RESOLUTION MAY ALSO IMPACT OUR OWN MILITARY TACTICAL DISPOSITIONS AND INITIATIVES. WHILE I DON'T BELIEVE THIS AFFECTS THE MAJOR DECISIONS TO COMMIT, ONCE OUR FORCES ARE DEPLOYED THERE ARE OFTEN SUPPORTING MILITARY STEPS THAT COULD BE TAKEN TO IMPROVE OUR POSITION. IF THESE ACTIONS COULD BE INTERPRETED AS PUTTING PEOPLE AT RISK, THE POTENTIAL NECESSITY TO FORMALLY NOTIFY CONGRESS INEVITABLY BECOMES PART OF OUR OPERATIONAL DECISION-MAKING. IF THE DEPLOYMENT HAS BEEN POLITICIZED, THEN PROVOKING FURTHER CONGRESSIONAL CONTROVERSY MAY TEND TO OUTWEIGH MILITARY JUDGMENT. THIS OUTCOME, OF COURSE, MAY BE WHAT SOME DESIRE, BUT I DON'T BELIEVE THAT DISCOURAGING MOVES THAT COULD IMPROVE THE U.S. MILITARY POSITION (AND PERHAPS SAVE AMERICAN LIVES)

WAS PART OF THE ORIGINAL RATIONALE FOR THE WAR POWERS RESOLUTION. CERTAINLY, FROM MY PERSPECTIVE THIS IS AN UNFORTUNATE BY-PRODUCT.

I AM CONFIDENT THAT THERE ARE WAYS TO ENSURE THAT THE CONGRESS IS ADEQUATELY INFORMED WITHOUT ALL OF THE ACCOMPANYING BAGGAGE WHICH THE WAR POWERS RESOLUTION CARRIES. I WOULD STRONGLY RECOMMEND THAT YOU FOCUS YOUR EFFORTS ON WORKING WITH THE EXECUTIVE BRANCH TO ENSURE A FLOW OF INFORMATION TO THE CONGRESS ON MILITARY DEPLOYMENTS OF MAJOR POLICY SIGNIFICANCE. I WOULD EXPECT THAT, ONCE THE INFORMATION ISSUE IS SEPARATED FROM THE WITHDRAWAL PROVISIONS OF THE WAR POWERS RESOLUTION, A MORE MEANINGFUL AND FOCUSED DEBATE ON THE POLICY ISSUE CAN ENSUE, IF SUCH IS NECESSARY, WITHOUT UNDULY JEOPARDIZING THE OPERATIONS THEMSELVES.

MR. CHAIRMAN, THAT COMPLETES MY STATEMENT. I WILL BE HAPPY TO ADDRESS ANY QUESTIONS YOU MAY HAVE.

PREPARED STATEMENT OF LOUIS HENKIN

Mr. Chairman and Members of the Committee:

My name is Louis Henkin. I am a professor at Columbia University, have held chairs in both Constitutional Law and International Law, and have written extensively on foreign affairs and the Constitution. I was pleased to be invited to join in your deliberations.

The subject you are considering is large and controversial. I shall make some brief general comments on the constitutionality of war powers legislation, address some of the difficulties with the present text of the War Powers Resolution, and make some suggestions for its improvement. Of course, I will answer any specific questions if I can.

I

I begin with the Constitution. Mr. Nixon vetoed the War Powers Resolution principally on the ground that it was unconstitutional but his veto message did not detail which provisions of the Constitution the Resolution violated. He said only that it would "take away . . . authorities which the President has properly exercised under the Constitution for almost 200 years."

There may be elements in the present resolution that raise serious constitutional questions; surely, the Chadha case, which invalidated the legislative veto in sweeping terms, casts a heavy shadow on Section 5(c). (I shall address that below). But, in general and in principle, in my view, Congress had constitutional authority to enact the War Powers Resolution, and therefore has the power to amend or rewrite it in the same spirit.

My view can be stated simply. The power of Congress to declare war gives Congress the power to decide when, and where, and whether, the United States shall go to war. Congress can direct the President to fight a war; Congress can direct the President not to fight a war. It can tell the President in what circumstances to fight a war. Congress can direct the President to end a war.

In my view, Congress can also act "prophylactically" and direct the President to refrain from activities that though themselves "short of war" are close to war or create a reasonable likelihood that they may lead to war. Congress in fact exercises this kind of prophylactic war power in much of its defense legislation, which is within the power of Congress because it is necessary and proper to carry out the war powers of Congress.

War powers legislation, I am satisfied, fall clearly within the war powers of Congress; the question is whether it is prohibited or limited by other Constitutional provisions. In this case, the argument which Presidents in effect raise is that Congressional power may not usurp or infringe on powers granted to the President by the Constitution. That, I assume, is the unarticulated argument of the Nixon veto message.

Nothing in the Constitution limits the power of Congress to forbid war-making by the President. The Constitution does not give the President power to make war and no President has ever claimed such power; therefore, Congress can deny him such power without infringing any Presidential authority. But over 200 years, Presidents, without authorization from Congress, have engaged in activities involving uses of force "short of war." And it is presumably those activities to which the Nixon veto message referred when it said that the Resolution would "take away ... authorities which the President has properly exercised under the Constitution."

It is unnecessary to reopen now and here debates as to whether the President had constitutional authority to engage in some or all of those hundreds of instances of the use of force short of war. History has confirmed the general practice and neither Congress nor the courts have challenged any particular use of force. If historic practice contributes to the development of constitutional authority, Presidents can surely claim to have acquired some authority to use some force in some circumstances. But the most that History has confirmed is the President's power to act when Congress is silent and acquiesces. There is no relevant history to support the view that the President can act when Congress denies him the power.

In the terms that we have come to use, the most the President can claim, I believe, is a concurrent power, one he can invoke when Congress is silent. When Congress acts to regulate Presidential activity, when the President presumes to flout the will of Congress, his power is -- as Justice Jackson put it -- "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."*

I repeat: Congress can prohibit or regulate any activities that amount to war. There is a strong case that Congress can regulate Presidential resort to hostilities "short of war" when involvement in such hostilities is likely to lead to war.

II

On this view, one can reduce and perhaps even render irrelevant the controversy about the President's constitutional authority that has swirled around Section 2(c) of the War Powers Resolution. There Congress declared that in its view:

"The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

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* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952). Justice Jackson continued: "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

As a statement of Presidential authority, Section 2(c) is too narrow for some and too broad for others. Presidents see it as denying them constitutional authority to do what they have done in hundreds of cases. Others have argued that the Framers contemplated only one situation in which the President can go to war on his own authority -- "to repel sudden attacks" on the United States.* Section 2(c), it is argued, seems to recognize Presidential authority not merely to "repel" an attack but to wage war. Moreover, it is argued, to permit Presidential war in case of attack on its "armed forces" opens a wide loophole: it might be construed to permit Presidential war not only when an enemy begins a war by attacking U.S. armed forces but even in response to a terrorist incident in which a few U.S. soldiers were killed. (Compare the incident in Berlin in 1986). On the other hand, even some who see little room for Presidential war-making think that the President ought to be able to use reasonable and proportional force to extricate U.S. nationals who are held hostage or are otherwise in danger, even if such use of force puts them "into hostilities or into situations where imminent involvement in hostilities is indicated."

Instead of engaging in difficult debate as to what the President may do under the Constitution on his own authority, Congress should consider laying down guidelines as to the circumstances in which force may be used (and improve the procedures for monitoring such uses, which I will address below). Then the President could clearly use force lawfully in the circumstances indicated, by authority of Congress (if not of the Constitution); but he could not lawfully engage the United States in War-like hostilities in any other circumstances unless specifically authorized by Congress.

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* At the Constitutional Convention, Madison and Gerry moved to change the previous draft text so as to leave to "the Executive the power to repel sudden attacks." See The Records of the Federal Convention of 1787, Farrand ed., vol. 2, Yale University Press, 1937, p. 318.

I am suggesting that Congress assume responsibility for the exercise of war powers by authorizing their exercise in some defined circumstances.

III

Congress should also attempt to redefine the kinds of "use" of the armed forces it seeks to regulate. That is not easy to do. The War Powers Resolution attempted to do that by regulating the introduction of U.S. forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." That formula has proved unsatisfactory. "Hostilities" may include uses of force that do not plausibly court war and whose links to the war power of Congress are not intimate; even if Congress could constitutionally reach every "involvement" in "hostilities," the formula used may reach some deployments of forces that Congress does not wish to regulate. A less sweeping definition may reduce constitutional objection and Presidential reluctance to comply.

I suggest that:

1. Congress redefine the kind of activities that trigger regulation. One way of doing that would be by adding a section defining "hostilities," perhaps by linking them to acts of war under international law, or "activities that will probably

involve U.S. forces in war or warlike activities." It will be difficult to write a good definition but it is worth trying and will be better than what we have now.

2. Congress should authorize the President to introduce forces into hostilities (as defined), in specified circumstances or for specified purposes, e.g., to repel attacks on the U.S. or on its armed forces; to extricate U.S. hostages or other U.S. nationals in danger.
3. Improved definitions are necessary, but will not be sufficient to achieve effective Congressional control of and participation in war-related decisions. In my view it is necessary for Congress and the President to establish a continuing, regular body, including Executive and Congressional representation at the highest levels, to review world affairs, anticipate situations that might lead to U.S. involvement in hostilities, consider any uses of force that the President may be contemplating and monitor the progress of any such involvement if it is initiated. Deliberations in such a body could lead to wider Congressional consultation or formal Congressional action where necessary.

IV

I offer now some comments on the present War Powers Resolution.

Regulating Lawful Uses of Force

In the War Powers Resolution, Congress declared that the President's powers to use force were strictly limited, then proceeded to regulate Presidential uses of force. It is not clear whether the regulations apply to the few circumstances in which Presidential uses of force would be within his constitutional powers as indicated in Section 2(c), or whether the regulations apply even where Congress thinks the President is not acting within his powers. That ambiguity should be eliminated. Declarations of constitutional limitation on the President are undermined if Congress proceeds to assume that he will violate them and prescribes procedures for such violations. (The ambiguity would largely disappear if Congress were to redefine the President's authority as I have suggested.)

Consultation.

Section 3 of the War Powers Resolution requires that the President "in every possible instance shall consult with Congress before introducing armed forces ...." The provision is ambiguous, as well as impossible to implement. "In every possible instance" might be interpreted as meaning whenever the President thinks it would not be undesirable; "before introducing" might mean a half hour before, when consultation could not influence the decision. Consultation "with Congress" means, strictly, with both houses of Congress formally. If there is to be meaningful consultation, it must be with a small, select Congressional body. It must be sufficiently in advance of the contemplated military action. In many circumstances consultation should be such as to give Congress a voice in the decision.

Reporting.

The reporting requirement of section 4 raises few constitutional questions. It has suffered from the fact that Presidents have not reported as required, perhaps because of uncertainties as to whether particular instances "triggered" the reporting requirement. If there is Congressional participation in advance, as I have suggested, the reporting requirement might be less important, but it is desirable to keep it, with redefining the circumstances that trigger it.

Termination of hostilities.

Section 5 is probably the most controversial section of the Resolution. There have been challenges to the constitutionality of its various subsections.

Section 5(c) looks like a legislative veto and would seem to fall within the sweep of Chadha, unless the war powers were constitutionally different for this purpose from other. legislative powers of Congress. The argument for the validity of Section 5(c) in the face of Chadha is that Chadha invalidates efforts to circumvent the presidential veto, but -- it is argued-- declarations of war and decisions as to war and peace are not legislative in character and are not subject to veto. The argument has been made; I do not know how to resolve the issue. In any event, the provision seems to address an unreal problem and a hypothetical situation not likely to arise.

Section 5(b) requires the President to terminate U.S. involvement in hostilities within 60 (or 90) days unless Congress acts to authorize continuation (or is physically unable to meet because of an armed attack on the United States). The 60-day period begins to run from the date of a Presidential report under Section 4 or from the time the President should have reported under that section. Therefore, the weaknesses in the reporting section infect the termination section as well. If the President does not report because he believes the circumstances do not require it, he will deny that the termination requirement applies. The definition of "hostilities" that I have proposed might reduce this difficulty as well.

Some have claimed that this provision violates the President's authority as Commander-in-Chief. I do not think so. Congress, which has the power to decide for war, can decide for peace. It can direct termination of a war by resolution; it can do so in advance by setting a time limit.

The desirability and effectiveness of such a provision are another matter. Section 5 reflects the unhappiness of members of Congress during the Vietnam War who did not have the votes (and perhaps the political courage) to terminate the war. This section seeks to shift the burden of taking action to end a war. Without Section 5, hostilities begun by the President continue as long as the President wishes, unless Congress affirmatively directs that they be terminated. Under Section 5, hostilities end after a prescribed time unless the President persuades Congress to act to authorize their continuation.

Questions of "legislative veto" apart, I think termination clauses are constitutional, but prima facie undesirable and of questionable utility. I think that we have to improve the processes of government so that vital decisions are not made by one Branch alone. For constitutional purposes, the Executive Branch is the President but decisions to engage in hostilities and to continue them are sometimes made in effect by unelected, unaccountable, often unidentified, officials. There must be effective participation in those decisions by Congress - through institutions and procedures that will have the effect of bringing to bear the judgment of Congressional leadership before, during, and after, commitment of U.S. forces into war and near-war. If that was done, Constitutional as well as political difficulties would be sharply reduced.

TURNER—EXECUTIVE SUMMARY

PREPARED STATEMENT OF ROBERT F. TURNER

RESTORING THE "RULE OF LAW":

Reflections on the War Powers Resolution at Fifteen

Robert F. Turner

Mr. Chairman, it is a great pleasure to be here this morning—on this fiftieth anniversary of the infamous Munich Peace Conference—to assist this special subcommittee in its important work of reviewing the 1973 War Powers Resolution. I have prepared a rather lengthy formal statement, which with the committee's permission I will simply submit at this time for the record. It consists of five sections, which I would propose to summarize very briefly before addressing any questions you might have.

I

Part one seeks to set the War Powers Resolution in historical perspective. It suggests similarities between the current efforts in Congress to preserve peace by legislative constraints on the foreign affairs powers of the President and those in the late 1930's which, while equally well-intentioned, contributed ultimately to further foreign aggression and the involvement of the United States in World War II.

It notes the successes of bipartisan foreign policy in the aftermath of that horrible conflict and traces several steps in the decision by the American Government to help defend the peoples of Indochina from communist aggression. In particular, it notes the special role played by such distinguished former members of this committee as Senators Mike Mansfield, Hubert Humphrey, and J. William Fulbright, in that commitment.

And *commitment* it was, first with the Senate voting its consent to the ratification of the SEATO Treaty with only a single dissenting vote, and then with a combined margin of 504 to 2 in the enactment of a joint resolution authorizing the President, as *he* determined necessary, "to take all necessary steps, including the use of armed force, to assist" victims of aggression in Southeast Asia requesting our help. In explaining this important new law to their colleagues, the Chairman and Ranking Republican of this Committee had the following colloquy:

> **MR. COOPER. . . . [L]ooking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?**
> **MR. FULBRIGHT. That is the way I would interpret it.**

In the years which followed, both houses of Congress reflected the strong public support for the conflict by time and again appropriating billions of dollars by overwhelming majorities. When an effort was made in the Senate in 1966 to repeal the statutory authorization for the conflict, it was overwhelmingly rejected by a vote of 92 to 5. During that debate several Senate leaders observed that a formal "declaration of war" was both inappropriate and unnecessary, and Senator Javits—who later led the Senate effort to enact a War Powers Resolution—asserted "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy." The following year, when the American Bar Association issued a lengthy legal brief affirming the legality of the President's conduct of hostilities in Vietnam pursuant to the Gulf of Tonkin Resolution, Senator Javits introduced a lengthy excerpt from the brief in the *Congressional Record* and said:

> **In my own thinking there can no longer be any doubt about the legality of our assistance to the people of South Vietnam in view of the report to be distributed today by the American Bar Association . . . . I have never doubted the lawfulness of the U.S. assistance to the Republic of Vietnam. Today, it is my privilege to present to the Senate and the American people a document which, I believe, supports this proposition beyond any reasonable doubt.**

In November 1967 this Committee issued a report which concluded:

> **The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to Formosa, the Middle East, and the Gulf of Tonkin are a proper method of granting authority . . . .**

This view was in keeping with decisions of the U.S. Supreme Court dating back to the year 1800.

In the months and years which followed, however, American public opinion turned against the conflict in Vietnam. In order to avoid being held politically accountable, members of Congress began pointing to the fact that Congress had never "declared war"; and with the election of a president from the minority party in 1968 it became even easier for the congressional majority to denounce the conflict as "Nixon's War." This effort to avoid accountability was not limited to Democrats. A number of Republicans, who had for years been strong supporters of the conflict, joined in assuring their constituents that they would promptly act to prevent future "Imperial Presidents" from dragging the nation kicking and screaming into unpopular foreign wars against the wishes of Congress. Representative Paul Findley, of Illinois, was perhaps typical of this group. In stressing his opposition to the conflict, he neglected to remind his constituents that as early as 1961 he had denounced Vice President Johnson and President Kennedy (who had been perhaps the most prominent Senate supporter of South Vietnam during the 1950's), for refusing to send combat troops to South Vietnam. For example, on 23 May 1961, Representative Findley said on the House floor:

> **U.S. combat forces are the most effective deterrent to aggression, and we should publicly offer such forces to South Vietnam without delay . . . . No patriotic American will ever criticize President Kennedy for committing combat forces to protect freedom-loving people from aggression. Every patriot has the right and duty to criticize ineptitude and the too-little, too-late policies which invite aggression.**

This is not to say that the Congress was completely devoid of courage during this time. The late Senator Sam Ervin, for example, who was widely regarded as the foremost constitutional scholar in this body and served as chairman of its Judiciary Committee, asserted in 1970:

> **I am certain that when Congress passed the Gulf of Tonkin joint resolution, it was aware of what authority it was granting to the President . . . . I contend that the Gulf of Tonkin joint resolution is clearly a declaration of war.**

While enacting a series of statutory constraints which ultimately guaranteed a North Vietnamese victory and delivered the people of non-communist Indochina to a Stalinist tyranny and a bloodbath which may have taken more lives in two years of "peace" than were killed on all sides during thirteen years of combat, the Congress enacted the War Powers Resolution over a presidential veto in November 1973. Ironically, by its own terms, it recognizes the power of the Commander in Chief to commit United States armed forces to foreign hostilities pursuant to "specific statutory authorization." In other words, by its own terms it clearly would have had absolutely no effect in preventing the tragedy we know as "Vietnam."

In the last fifteen years, the congressional attitude towards the Resolution's implementation has been characterized above all by a desire to avoid being held accountable for any policy failures. President Ford's *Mayaguez* rescue, which violated both the existing Cooper-Church statutory prohibitions against sending U.S. combat forces to Cambodia and several provisions of the War Powers Resolution, was greeted by this

Committee with a *unanimous* resolution of approval. When President Carter tried a similar effort in Iran, the Chairman and Ranking Minority member of the Committee denounced him for violating the War Powers Resolution. From my perspective the constitutional issues were the same—the difference was that President Ford's rescue effort was perceived by the voting public as a success, while President Carter's effort failed.

This same element of political expediency characterized the reaction of many congressional leaders both before and after the students returned from Grenada and the polls showed better than 90 per cent support for the operation in the United States and also on Grenada. The Speaker of the House, who had only hours earlier characterized the operation as "gunboat diplomacy," announced that he had "reconsidered" the matter and felt President Reagan's actions were "justified." A special hearing called in the House Foreign Affairs Committee to examine the legal implications of the operation was quietly "postponed"—and has yet to be rescheduled.

The resolution has proven to be a very safe way for members of Congress to avoid accountability during a dangerous national crisis—but this has not been without cost to the nation. In Lebanon, for example, shortly after a bitter and highly partisan Senate debate, our intelligence people reportedly intercepted a message from Islamic terrorists telling their forces: "If we kill 15 more Marines, the rest will leave." Days after this report was published, a terrorist attack killed 241 Marines. From my perspective, Congress deserves a great deal of the responsibility for that attack.

II

Part two of my statement presents a theoretical discussion of constitutional separation of national powers. It discusses the tremendous influence of such separation of powers theorists as Locke, Montesquieu, and Blackstone on the Founding Fathers—and notes that each of them argued that legislative bodies lacked the *competence* to deal with war and foreign affairs. Such matters could not be effectively regulated by antecedent "laws," and they required for their successful conduct the qualities of unity of plan, secrecy, and speed and dispatch—all of which were attributes of Executive power.

Scholars who seek simply to "count up" the enumerated powers of Congress and the President—and conclude that the Constitution is "an invitation to struggle"—tend to overlook the first section of article two of the Constitution, vesting "the executive power" in the President. As the late Professor Quincy Wright—who served as President of the American Political Science Association and the American Society of International Law—observed in his 1922 classic study, *The Control of American Foreign Relations*: "when the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant . . . ."

But the Founding Fathers departed somewhat from the Lockean model, vesting certain powers "executive" in their nature in the Senate (such as a "veto" over the ratification of treaties) and the Congress (such as a veto over a decision to launch a war against another State). These were important checks against possible executive abuse.

Relying on the "executive" power clause of article II, section 1, Thomas Jefferson wrote in 1790:

> **The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.**

Writing in his Diary three days later, George Washington noted that he had shared Jefferson's views with Representative James Madison, and that Madison "agreed" with Jefferson and John Jay.

Jefferson is undoubtedly the most frequently quoted Founding Father by those who argue for expanded congressional war powers. For example, Senator Mark Hatfield recently quoted Jefferson's 1789 letter to Madison which stated:

> **We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.**

But consider that statement for a moment. Although the Articles of Confederation had given the Continental Congress all war-related powers, Jefferson asserted that the new Constitution had "transferred" this power from the Executive to the Legislative branch. This reflects his understanding—in the tradition of Locke, Montesquieu, and Blackstone—that all "war" powers were by their nature "Executive." And thus, using Jefferson's earlier analysis (which was also shared by Madison)—as an *exception* to the general grant of Executive power it was intended to be construed "strictly."

Jefferson's chief rival was Alexander Hamilton, who wrote in 1793:

> **It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.**

The power of Congress to "declare war" was thus seen as a very important but also very narrow "check" on one aspect of the President's control of foreign affairs. The President could not launch an offensive war without the approval of both houses of Congress. Clearly, in Indochina, Congress played its full constitutional role. It perpetrated a political *fraud* on the American people in pretending that the terrible conflict had been imposed on the nation against the wishes of the legislative branch.

The Founding Fathers vested the exclusive "command" of whatever military forces Congress saw fit to create in the discretion of the President. From the earliest debates it is clear that Congress understood that it had no control over troop deployments. Even Senator William Borah, a prominent isolationist and powerful chairman of this Committee between the two world wars, recognized that Congress had no power to compel the President to withdraw troops from Europe in 1922. This is not to suggest that Congress is powerless in the even the President abuses his authority by using his discretionary command to launch a war on another country without congressional approval—the impeachment power is perfectly adequate for such a situation. But the belief that recent American presidents have been out launching "wars" against the will of Congress is a myth. And for Congress to attempt to seize control of the Commander in Chief power as a means of "preempting" a possible abuse by the President is simply unconstitutional.

III

The third part of my prepared statement looks in some detail at the 1973 War Powers Resolution, and concludes that several important provisions are clearly unconstitutional At least one of these, section 5(c), has already been struck down by implication by the Supreme Court in its 1983 *INS v. Chadha* decision. Section 5(b), which pretends to deprive the President of his constitutional Commander in Chief power in a dangerous crisis if Congress can not agree whether he is right or wrong—in essence trying to establish a legal presumption in the event of imminent armed conflict that the elected American President is wrong, and our enemies right—is equally unconstitutional. It is also *extremely* dangerous—coming from the same intellectual tradition as the 1938 Munich Agreement and the Neutrality or so-called "peace" laws of the same era—and both undermines the confidence of our friends and encourages the forces of international aggression.

If the American voters ever realize what Congress actually did in enacting this law, some of its most outspoken advocates are likely to go the way of Senator Gerald Nye and other prominent isolationists when the public watched their "neutrality" laws lead us into

World War II. You have tied the President's hands, surrendered the initiative to the most radical anti-American elements around the world, and essentially informed the Kadaffi's of the world that if they can kill just one American soldier abroad they can at minimum provoke a major constitutional crisis between Congress and the American President—and with any luck they can start the "war powers" clock running and ultimately cause the withdrawal of all American servicemen from their area of the world. **You have—intentionally or otherwise—placed a *bounty* on the lives of our servicemen and women.**

IV

Section IV examines some of the provisions of S.J. Res. 323, the War Powers Resolution Amendments of 1988. I commend Senators Warner, Nunn, and the other co-sponsors of this legislation for attempting to correct at least *some* of the more flagrantly unconstitutional provisions of the act. It is a good start, but it doesn't go far enough.

I have long favored the establishment of a Joint Committee on National Security to engage in regular consultations with the Executive branch—particularly during periods of imminent crisis, but also on a variety of long-term policy issues. But under the Constitution, Congress has no more legal right to *compel* the President to "consult" than he has a right to send a detachment of Marines to the Majority Leaders office and drag him back to the White House for a "meeting." Both Congress and the Executive are independent, co-equal branches of our Government; and it is both *unseemly* and *unconstitutional* for Congress to attempt by law to *force* the President to consult.

Furthermore, such a statutory provision is entirely unnecessary. If Congress will learn to safeguard national security information, and will deal with the President in a spirit of comity displaying the dignity and respect appropriate to his high elected office, it will likely find that the President realizes the critical importance of a bipartisan cooperative relationship. For *political* rather than legal reasons, congressional understanding and support of foreign policy initiatives are essential if the American people are going to stand behind their government.

Section five of the proposed amendments would invoke the "power of the purse" to strengthen the effort by Congress to deprive the President of his independent constitutional powers. It adds nothing of value to the resolution. The power of the purse, like all other constitutional powers, must be exercised in such a manner as not to conflict with other provisions of that great document. I had thought the Congress understood this message in 1946 when the Supreme Court, in *United States v. Lovett,* rejected your assertion of a "plenary" and unreviewable right to place unconstitutional conditions on Executive branch appropriations.

Consider also the 1872 case of *United States v. Klein,* in which the Court recognized your complete control over the jurisdiction of the Court of Claims, but nevertheless struck down as unconstitutional your effort to limit its jurisdiction for the purpose of denying effect to a presidential pardon. The power of pardon is vested in the President by the same sentence which makes him Commander in Chief, and the legal reality is you can not deprive him of such powers without going through the detailed procedures set forth in article V to amend the Constitution.

Much of the confusion in this area results from the fact that Congress regularly, and properly, places "conditions" on how appropriated funds for domestic purposes are to be spent. But in these cases the President is exercising domestic powers *delegated* to him by the Congress. When the President is acting in the area of foreign or national security affairs, relying upon powers vested in his office directly by the American people through the Constitution, Congress has no right to seize control of those powers by conditional appropriations.

Were this not the case, it would follow that you could also destroy the independence of the Judicial branch. While the Constitution prohibits the lowering of judicial salaries, it provides no guarantee of adequate appropriations to pay rent, utilities, printing costs, clerk and staff salaries, and the other costs essential to the effective functioning of the third branch of Government. If you can seize the Commander in Chief power by simply providing that "no funds" shall be available to deploy ships to the Persian Gulf—or for that matter no funds shall be available unless the President orders the third squad of Company C of a specified unit to attack Hill 401 at dawn—it would seem to follow that you could also condition funds for the workings of the Judicial branch (other than salaries for judges) upon no court holding any of a long list of newly enacted laws to be unconstitutional. You can be confident that the Court would not use the political question doctrine to avoid that particular inter-branch confrontation.

V

Mr. Chairman, my final section expresses some broad conclusions and policy recommendations which I thought might be of interest to the subcommittee. In the interest of time, I shall not dwell upon them at any length now. Let me only make two points.

I have entitled my presentation "Restoring the 'Rule of Law': Reflections on the War Powers Resolution at Fifteen." My most important conclusion is that Congress is in fact breaking the law. Some may wonder how that could be, since Congress "makes the law"—but I am talking about a higher law, the Constitution of the United States. Several provisions of the 1973 War Powers Resolution are in flagrant violation of the Constitution, and you betray your oath of office when you continue to permit such provisions to remain on the books. In an era of heightened public concern about the "rule of law," it would seem to me that Members of Congress ought to be more sensitive to their legal duties under the supreme law. **Put simply—you are breaking the law.**

Finally, I would suggest that so long as such laws remain on the books—and while the War Powers Resolution may be the worst offender, it is but one of scores if not hundreds of statutory provisions which would have shocked the Founding Fathers—the President will have no option but to resist the attack on his powers. Despite his desire to improve relations with Congress, he can not legally do so by simply surrendering his powers to an irresponsible and Imperial Congress. Because in a larger sense, they are not **his** powers at all—they are but powers of the American people which have been entrusted to his care during his tenure in that high office.

As the great Harvard legal scholar Charles Warren wrote more than half-a-century ago:

> **Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. . . . Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights—defense of power which the people granted him. . . . In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.**

Thank you Mr. Chairman—that completes my statement.

RESTORING THE "RULE OF LAW":
Reflections on the War Powers Resolution at Fifteen

Robert F. Turner

Introduction

Mr. Chairman, it is a great pleasure to appear before the subcommittee this morning to address the critically important subject of the 1973 War Powers Resolution.

This is an issue that I have followed with keen interest for a decade and a half. Having seen the horror of war first-hand during two Army assignments in Vietnam, and fifteen years later had the honor of serving for twenty months as the first President of the congressionally-established U.S. Institute of Peace, I have a deep concern about issues of war and peace—and a strong personal attachment to the latter.

During the first five years following the enactment of the War Powers Resolution I served as principal national security legislative assistant to a member of this Committee; and during one of the initial tests of the Resolution, the April 1975 evacuation of Saigon, I was the last congressional staff member to leave South Vietnam. In the years which followed, I spent several years in a variety of positions in the Pentagon, the White House, and the State Department—each involving at least some responsibilities relating to the War Powers Resolution.

I have also devoted a good deal of time to this issue as a scholar and active member of the legal profession. For three terms I chaired the Committee on Congressional-Executive Relations of the American Bar Association's Section of International Law and Practice. I am currently one of eleven members of the ABA Standing Committee on Law and National Security, on which I serve with one of your former members, Senator Charles Mathias.

My 1983 study, *The War Powers Resolution: Its Implementation in Theory and Practice*, has been used as a text at Harvard, Georgetown, by two of my colleagues at

Virginia, and at several other colleges and universities. I also prepared the separation of powers section of a soon to be published law school casebook on *National Security Law*.

After leaving the Institute of Peace last November, I accepted a joint faculty appointment at the University of Virginia. My primary work is as Associate Director of the Center for Law and National Security at the School of Law; but I also teach courses on "U.S. Foreign Policy," "International Law," and "Foreign Policy and the Law" in the Woodrow Wilson Department of Government and Foreign Affairs. The War Powers Resolution is addressed in each of these courses. **I would *emphasize*, however, that all of the views which I express today are mine *alone*, and should not be attributed to the Center, the University, the ABA, or any other group or organization with which I am or have been associated.**

With the subcommittee's permission, I would like to divide my testimony this morning into five sections. First, I will endeavor to place the War Powers Resolution in historic perspective—to discuss its origins and briefly its implementation during the past fifteen years. I would then like to spend a few minutes discussing the relevant underlying constitutional theory of separation of national security powers—with special emphasis on those powers of each branch relating to the use of military force.

In part three, I would like to examine some of the specific provisions of the 1973 statute both in the light of the constitutional separation of powers and on broader policy grounds. Part four will briefly consider some aspects of Senate Joint Resolution 323, the proposed War Powers Resolution Amendments of 1988, which have been introduced by Senators Warner, Nunn, Byrd, and Mitchell. Part five will set forth some of my own conclusions and policy recommendations.

I

Congress, Peace, and the War Powers Resolution in Historical Perspective

Commemorating the Munich Conference of 1938

Mr. Chairman, today marks the fiftieth anniversary of the start of the infamous Munich Conference of 1938 at which fearful British and French prime ministers pressured the government of Czechoslovakia to yield the Sudetenland to Hitler as a means of securing "peace for our time."[1] As you know, six months later Hitler seized the rest of

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[1] *See generally*, T. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 708 (10th ed. 1980).

Czechoslovakia—and within a year World War II was engulfing Europe. Historians now look back with disdain at what they call "the Munich sellout,"[2] but there is little evidence to question the sincerity of Prime Minister Neville Chamberlain's belief that he could secure "peace" by what he acknowledged was his policy of "appeasement" of Hitler and Mussolini.[3] In 1938 he returned to London to a heroes welcome.

Congressional "Peace" Efforts and World War II

In a similar way, I don't doubt the sincerity of Senator Gerald Nye and his isolationist colleagues who believed that the United States could avoid the coming war by simply tying the President's hands with a series of what historians would later characterize as "head-in-the-sands Neutrality laws"[4] and other constraints on the President's conduct of foreign affairs. Historian Cecil Crabb explains some of the impact of congressional policies on the efforts by Presidents Hoover and Roosevelt (and Secretary of State Stimson) to deter Japanese aggression in its early stages:

> **Stimson knew very well—as did the Japanese government—that the isolationist sentiment in Congress would preclude strengthening American bases or naval strength in the Pacific. . . . As one student of Sino-American relations has observed, during the early 1930s "Congress indicated no willingness to consider Japan's actions [in invading Manchuria] a threat to any interests of the United States and in the Senate, especially, there was strong opposition to an American stand against Japan." . . . Subsequently, Congress reduced military appropriations, and Senator Borah announced that he would never "support any scheme of peace based upon the use of force." . . .**
>
> **By 1937, leading congressional isolationists called upon the Roosevelt Administration to evacuate China, to relinquish the Philippines, and to avoid any step which might lead to a conflict with Japan.[5]**

For one who has read the lengthy "neutrality" debates of the late 1930's, a review of the post-Vietnam congressional "war powers" debates brings a sad sense of *déjà vu*. Senator Nye spoke of the need "to write a permanent neutrality law that will do away with many of the dangers of our country being drawn into other peoples' wars . . . ."[6] He explained:

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[2] *Id.* at 707.

[3] J. DOUGHERTY & R. PFALTZGRAFF, JR., AMERICAN FOREIGN POLICY: FDR TO REAGAN 22 (1986).

[4] BAILEY, *supra* note 1 at 701.

[5] C. CRABB, THE DOCTRINES OF AMERICAN FOREIGN POLICY 82-84, 87-88 (1982).

> **[T]he purpose of the stay-out-of-war law is to prevent any President from being forced by the necessity of choosing sides, and, as far as it is in the power of this Government, to starve wars. . . . The neutrality law prevents any commitment by the Executive to either side until Congress has expressed the will of the people. . . . [T]he power to commit the Nation to war is the greatest power in the world. The neutrality law keeps it where the Constitution put it—in the hands of Congress. . . . [T]hose who wish us to act as policemen for the world, oppose the neutrality law. The passage of that law had the overwhelming support of the people for the very reason that it protected the country against war for the sake of profits for a few individuals, and prevented the Government from forcing the country into the role of world policeman."[7]**

A few days later, when Senator Nye was asked in a radio interview whether it was true his law would in fact favor Japan, he responded that "I should like to state very definitely that the purpose of the neutrality legislation was to keep this country out of war. The question of whether its application in any given instance would work to the greater disadvantage of one belligerent or another has nothing to do with this main purpose."[8]

Senator Nye was hardly alone in his view that trying the President's hands would guarantee peace for America. Representative Hamilton Fish, a sixteen year veteran of the House Foreign Affairs Committee, explained:

> **We are prepared to spend millions for defense but not one dollar to send American soldiers to foreign lands to fight other people's battles.**
>
> **We are opposed to all entangling alliances, entrance into the League of Nations, war sanctions, and commitments. We propose to avoid taking part in all ancient blood feuds and boundary disputes, or "picking the chestnuts out of the fire" for foreign nations. Our policy is and must be to mind our own business, stay at home, and try to solve our own problems for the best interest of all the American people. . . .**
>
> **The preservation of peace should be the continuous policy of our country. There are many thinking people who sincerely believe that another world war is inevitable and that we cannot escape being drawn into it. I do not agree with either the logic or the reasoning of such arguments. In the World War . . . . [w]e became involved because we insisted on**

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[6] *Reprinted in* 81 CONG. REC. APP. 121 (1937).

[7] *Id.* at 2187.

[8] *Id.* at 2257.

> **adhering to the ancient principles of international law governing the freedom of the seas, neutral ships, and neutral cargoes. . . .**
>
> **Both the President and Secretary of State Hull are internationalists and former supporters of the League of Nations. I am unalterably opposed to giving either one unnecessary discretionary powers to entangle us in the League or involve us in European disputes.**
>
> **I am also opposed to the Congress delegating its constitutional power to declare war to the President, whether he is a Democrat or a Republican. . . . We should give the President a minimum amount of discretionary power, as it is generally passed on to subordinates in the State Department who love to have their finger in the foreign pie and are more apt to involve us in war than to drag out a plum.**
>
> **The Congress should prescribe the rules and regulations by law, and not leave them to the State Department, which enjoys nothing better than meddling in the affairs of foreign nations and making commitments for us that might involve us . . . eventually in war. . . . The American people want peace, and we propose, through mandatory neutrality legislation, to help maintain and preserve peace with all nations even if we must relinquish some war profits in order to keep out of war.**[9]

On July 8, 1937, Representative Jerry Voorhis gave a speech at the University of Virginia in which he explained: "The American people want peace. In overwhelming majority they are determined that this Nation shall keep out of other people's wars. Unless, therefore, this will to peace is stifled, broken down, and destroyed, America will keep the peace."[10] He explained that whether "American boys once more fight and die on foreign battlefields" would "depend":

> **[I]f we conceive it our duty to rush to the aid of France, Russia, and England in any future war in which they may become engaged; if we insist upon the complete freedom of the seas for all our commerce all the time; and if we cling to our essentially imperialistic policy in the Pacific and hang on to the Philippines after promising to let them go—then the chance of America remaining at peace is indeed slight.**
>
> **On the other hand, America can remain neutral and keep the peace . . . .**
>
> **First, then, we must write into our Constitution the Ludlow amendment, which, excepting the case of armed invasion gives to the American people the right to decide by national referendum whether they choose to go to war or not. . . . American ships, moreover, should be prohibited from entering zones of active war.**[11]

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[9] *Id.* at 231-32.

[10] *Id.* at 1734.

[11] *Id.* at 1735.

Now during the late 1930's these "voices for peace" did not go unchallenged. Like the Towers and Warners of the post-Vietnam era, there were men of courage and vision who recognized the dangers inherent in "tying the President's hands" during a period of growing international crisis. Senator Henry Cabot Lodge noted the problem with respect to the 1937 Neutrality Act—which was labeled the "Peace Act of 1937"—recounting that "A colleague who also voted against it received a telegram on the following day saying, 'Extremely disappointed to see that you voted against peace.'"[12] This same problem exists in the 1980's, when those who question whether permitting international aggression to continue unchecked is likely to promote long-term peace are accused of being "warmongers" (and, thanks to the War Powers Resolution, "lawbreakers" as well). Discussing the 1937 bill, Lodge observed:

> **The cash-and-carry theory would have you believe that if you lead with your chin your opponent will not hit you. All human experience seems to be against it. Give up some of your rights and it becomes harder to hold on to the others. I hope I am wrong, but I fear that this bill will give fresh stimulus to every swashbuckler and jingo the world around.[13]**

The separation of powers problems with some of the neutrality provisions did not go unnoticed. Consider this exchange from the Senate floor debate of April 29, 1937:

> **MR. CONNALLY. . . . Under the Constitution, the President is given very wide powers to deal with international matters; and whatever we do is to a certain extent an infringement on this discretion and on his constitutional function.**
>
> **MR. ROBINSON. The Senator from Texas has with almost complete accuracy anticipated the next statement I intended to make.**
>
> **Under our Constitution and under our practice from the beginning of the Government, the Executive, and not the legislative, conducts our foreign relations; and the carrying on of foreign relations is intimately associated with the problems involved in this legislation. We all know that as Commander**

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[12] *Id.* at 973.

[13] *Id.* An American strategy of "Peace Through Strength" dates back to the earliest days of our country. A few years before taking office as our first Secretary of State, Thomas Jefferson wrote in a letter to John Jay: "Justice . . . on our part, will save us from those wars which would have been produced by a contrary disposition. But how can we prevent those produced by the wrongs of other nations? By putting ourselves in a condition to punish them. Weakness provokes insult and injury, while a condition to punish, often prevents them. . . . I think it to our interest to punish the first insult; because an insult unpunished is the parent of many others." 5 THE WRITINGS OF THOMAS JEFFERSON 95 (Mem. ed. 1904), quoted in Turner, "International Law, the Reagan Doctrine, and World Peace," *The Washington Quarterly*, Autumn 1988, p. 120.

> in Chief of the Army and Navy and as Chief Executive, a President, if he is disposed to do so, may at times contribute to the endangerment of the peace of the country. In the performance of his duties in carrying on the foreign relations of the country, he may so conduct them as to cause anger and resentment on the part of other governments and thus in a measure jeopardize the peace of the country.
>
> We also know, on the other hand, that in the discharge of his normal functions under the Constitution he may, and usually does, pursue a policy which is calculated to preserve the peace of the nation. . . .
>
> MR. CONNALLY. The Senator said that ever since the Government began we had Presidential control of our foreign relations. Is it not true, however, that under the Confederation and during the Revolution the Continental Congress undertook to exercise the function of carrying on our foreign relations, and made a lamentable failure of it, and that is one reason why we vested such large powers in the Executive?
>
> MR. ROBINSON. Without doubt. It would be very difficult for my associates in the Senate and myself to carry on the foreign affairs of this Government effectively, however much confidence we may have in ourselves, and however much admiration we may feel for one another; and the difficulty would be augmented when we take into consideration the 435 other individuals at the other end of the Capitol who themselves have a measure of responsibility. . . . Many of our citizens believe, and some of our great writers express themselves as believing, that it is possible by passing a law through Congress to accomplish almost anything, and that it is possible by merely declaring neutrality to guarantee the peace of the country for all time to come. . . . In my judgment, there is no way in which by law we can make it impossible for our people to be drawn into war. . . .
>
> MR. CONNALLY. . . . I wish . . . to dissent from the expression of the views of the Senator from Michigan [Senator Vandenberg] that we can and should anticipate by legislation every conceivable situation, and have a mandatory act to enforce our edicts, and to compel the President to sit up in the White House merely as an automaton to register the will of Congress with regard to international situations which we cannot foresee, which nobody ever has foreseen, and which never will be foreseen.
>
> It is sound to invest the President, as the Constitution does invest him, with a very large discretion with regard to international affairs.[14]

But these voices were not heeded, and Congress enacted one neutrality law after another.

In May of 1939, a desperate President Roosevelt and Secretary of State Cordell Hull urged Congress to repeal the neutrality laws, but public opinion was strongly in favor of peace and isolationism and Congress agreed to only minor revisions. In a fit of anger, Secretary Hull told Congress that the coming war in Europe would not be just "another goddam piddling dispute over a boundary line," but of "vital" concern to the United States. The neutrality laws, he said: "substituted a wretched little bobtailed, sawed-off domestic statute for the established rules of international law" and in the process were encouraging the aggressors.[15]

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[14] 81 CONG. REC. 3945-46 (1947).

When Secretary Hull predicted war in Europe by the end of summer, 1939, Senator William Borah, the Chairman of this Committee, contradicted him—implying that he had more reliable sources of information about events in Europe than was possessed by the State Department.[16] Even after the War began in Europe, Congress refused to give the President the authority he requested to strengthen the United States and assist the victims of Nazi aggression.

Presidential "Lawbreaking"

Finally, in frustration, when Churchill appealed to Roosevelt in July 1940 for the loan or lease of forty or fifty old World War I-vintage U.S. Destroyers—which were tied up in US shipyards and not in active service—Roosevelt decided to ignore Congress and provide the ships. He entered into an executive agreement with Churchill, and in return for fifty Destroyers the U.S. received certain military basing rights in Bermuda and Newfoundland. Isolationists in Congress charged that the President had "broken the law," and the *St. Louis Post-Dispatch* asserted in a headline: "Dictator Roosevelt Commits an Act of War." Does this sound familiar to anyone?

Mr. Chairman, I don't doubt the *sincerity* of the Senate isolationists who helped bring us World War II. They were simply mistaken about how best to preserve peace. But their "mistakes" had tragic consequences for the cause of world peace. As Stanford Historian Thomas Bailey has observed, "[t]he storm-cellar legislation of the 1930's presumably encouraged the dictators by serving notice that their victims could expect no aid from the rich Uncle Sam. . . . Such legislation . . . tended to accelerate World War II, into which the United States was ultimately sucked."[17] Put simply, your predecessors forgot that war can result from the actions of foreign countries as easily as from those of an unconstrained American president; and in tying President Roosevelt's hands they removed one of the few incentives which might have led Japan and Germany to have second thoughts about continuing their aggression.

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[15] A. DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 576 (2d ed. 1971).

[16] *Id.*

[17] BAILEY, *supra* note 1 at 703.

WW II and the Shift to Bipartisan Internationalism

When the attack on Pearl Harbor established that placing a straight-jacket on the American president was scant protection against war imposed by foreign aggressors, Senator Nye and several other prominent isolationists fell victim to public outrage at the polls. Many of those who survived, like Arthur Vandenberg of Michigan, emerged from the experience with a far more realistic approach to world peace.

Indeed, Senator Vandenberg played a critical role in the negotiation and Senate approval of the United Nations Charter in 1945; and in the years which followed—as Chairman of this Committee—he worked closely with President Truman and Secretary of State Acheson in forging a successful bipartisan foreign policy. Abandoning the pre-war spirit of isolationism, the Congress gave strong approval in 1947 to the Truman Doctrine and helped serve notice to potential aggressors that the combined strength of the free world would confront further violations of the non-use-of-force provisions of the U.N. Charter.

War in Korea

In January 1950 Secretary Acheson made the mistake of announcing that South Korea was outside the American "defensive perimeter" in Asia, and this contributed to the North Korean invasion which followed five months later. Pursuant to a decision of the U.N. Security Council, President Truman—without seeking congressional approval—responded by sending combat troops to help defend South Korea. The initial public opinion polls showed that more than 80 per cent of the American people supported the commitment, and few in Congress questioned the President's constitutional authority to act immediately to meet the danger.[18] Indeed, a 1973 report from this Committee acknowledged that "[w]hen President Truman committed the armed forces to Korea in 1950 without Congressional authorization, scarcely a voice of dissent was raised in Congress . . . ."[19]

One of the few isolationists who did question the President's constitutional authority was Republican Senator Robert Taft, of Ohio—and even he acknowledged that

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[18] I discussed this period in greater detail in my prepared testimony before the House Subcommittee on Arms Control, International Security and Science, on August 4, 1988.

[19] 119 CONG. REC. 1406 (1973).

"if a joint resolution were introduced asking for approval of the use of our armed Forces already sent to Korea and full support of them in their present venture, I would vote in favor of it."[20] Nevertheless, Taft and Representative Frederick Coudert of New York proposed a "war powers resolution" of sorts to give Congress some control over future commitments of U.S. troops abroad; but they were quickly attacked by prominent liberal historians like Arthur Schlesinger, Jr., and Henry Steele Commager.[21] In a letter to the *New York Times*, Professor Schlesinger denounced Senator Taft's position as "demonstrably irresponsible," and argued:

> **From the day that President Jefferson ordered Commodore Dale and two-thirds of the American Navy into the Mediterranean to repel the Barbary pirates, American Presidents have repeatedly committed American armed forces abroad without prior Congressional consultation or approval. . . . Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities.**[22]

The subcommittee may wish to consider Professor Schlesinger's recent testimony of June 14—in which he told you that the theory behind President Truman's commitment of forces to the Korean conflict "rests doctrinally on an extravagant interpretation of the commander in chief clause" which was "an interpretation rejected by the Framers," in the light of his prior scholarly assurances to the contrary.

As an aside, I would note that I have far more concerns about the propriety of President Truman's actions in 1950 than Professor Schlesinger and most others expressed at the time. I find it an arguable case on either side, but believe in such a situation the President *should* have promptly gone to Congress for approval by joint resolution. Because he did not, when the public ultimately turned against the "no win" conflict, it became easy for members of Congress (especially Republicans) to denounce it as "Truman's War." Professor Alexander DeConde provides an accurate summary in his *A History of American Foreign Policy*:

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[20] *Quoted in* 4 THE DYNAMICS OF WORLD POWER 375 (A. Schlesinger, Jr. ed. 1973).

[21] "Whatever may be said of the expediency of the Taft-Coudert program this at least can be said of the principles involved -- that they have no support in law or in history." Commager, "Presidential Power: The Issue Analyzed," *New York Times Magazine*, January 14, 1951, at 23-24. Like Schlesinger, Professor Commager later decided that Truman's use of troops was "if not wholly unprecedented, clearly a departure from a long and deep-rooted tradition." 119 CONG. REC. 1406 (1973).

[22] *New York Times*, January 9, 1951.

> **At first the American people, and even Republican critics of the administration's Far Eastern policy, overwhelmingly supported Truman's prompt action. They approved the intervention, seeing it as a necessary effort to save a small country from Communist aggression and to show allies, or potential ones, that the United States would help defend them. . . . Later, as the war budget mounted and the casualties multiplied, critics denounced the President for allegedly usurping Congress' power to declare war and for involving the country in a perilous fight outside the national interest.[23]**

The Vietnam Commitment

The belief that Acheson's statement that South Korea was outside the American "defense perimeter" was a major factor in the start of the conflict led to a renewed emphasis on collective security agreements. In 1955, with only one dissenting vote, the Senate consented to the ratification of the SEATO Treaty—which provided in article IV:

> **Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that even act to meet the common danger in accordance with its constitutional processes.[24]**

An accompanying "protocol" to the treaty "unanimously designate[d] for the purposes of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam."

When the Senate was asked to consent to the ratification of this treaty, it clearly recognized that it was undertaking a major new commitment. Senator Mike Mansfield had been a part of the negotiating delegation, and this Committee's *Report* on the treaty stated:

> **The committee is not impervious to the risks which this treaty entails. It fully appreciates that acceptance of these additional obligations commits the United States to a course of action over a vast expanse of the Pacific. Yet these risks are consistent with our own highest interests. There are greater hazards in not advising a potential enemy of what he can**

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[23] DECONDE, *supra* note 15 at 706-07.

[24] 6 U.S.T. 81, 83 (1955).

> **expect of us, and in failing to disabuse him of assumptions which might lead to a miscalculation of our intentions.**[25]

When Secretary of State Dulles was asked during the SEATO hearings what the term "constitutional processes" in article IV of the treaty meant, he responded that "the normal process would be to act through Congress," but suggested that the President might act on his own if "the emergency were so great that prompt action was necessary to save a vital interest of the United States."[26] This led to a proposed reservation to the treaty during committee markup which would have prohibited the use of U.S. armed forces to carry out the treaty in the absence of a "congressional declaration of war." The proposal was rejected by the committee.[27]

The attitude of Congress during this early period is accurately reflected by Leslie Gelb and Richard Betts, in their book *The Irony of Vietnam*, which was published by the Brookings Institution. I suspect most of you know these two gentlemen; and, whatever else may be said about them, neither could be accused of being an apologist for Richard Nixon or a fan of Ronald Reagan. They wrote:

> **As for Congress, in early 1955 two senators, Mike Mansfield and Hubert Humphrey . . . initiated a save-South-Vietnam drive by supporting the Diem campaign. Mansfield said the United States had no choice but to support Diem. Humphrey accused U.S. policymakers of "wavering," saying that this was no time for "weakness," and that the fall of the South would threaten the rest of Asia.**[28]

Another strong supporter of aid to South Vietnam was Senator John F. Kennedy, who told a meeting of the American Friends of Vietnam in September 1956:

> **Vietnam represents the cornerstone of the Free World in Southeast Asia, the keystone to the arch, the finger in the dike. Burma, Thailand, India, Japan, the Philippines and obviously Laos and Cambodia are among those whose security would be threatened if the red tide of Communism overflowed into Vietnam . . . . The fundamental tenets of this nation's foreign policy, in short, depend in considerable measure upon**

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[25] U.S. Senate, Executive Report No. 1, Senate Committee on Foreign Relations, 84th Congress, 1st Session, January 25, 1955, at 15. The Committee no doubt had in mind the experience of Korea, where the Communist invasion had come shortly after Secretary of State Acheson had publicly suggested that the United States would not fight to save South Korea.

[26] *Id.* at 12.

[27] *Id.*

[28] L. GELB & R. BETTS, THE IRONY OF VIETNAM: THE SYSTEM WORKED 207-08 (1978).

> **a strong and free Vietnamese nation . . . . Vietnam represents a test of American responsibility and determination in Asia . . . . As President Diem recently wrote a great friend of Vietnam, Senator Mansfield, "It is only in winter than you can tell which trees are evergreen." And I am confident that if this nation demonstrates that it has not forgotten the people of Vietnam, the people of Vietnam will demonstrate that they have not forgotten us.[29]**

Still another early supporter of U.S. support for South Vietnam was J. William Fulbright, who chaired this Committee during most of the Vietnam conflict. Gelb and Betts note: "[In] 1959, as conservatives began to charge misuse and waste of American funds by the Diem government, Senator J. William Fulbright rose to the defense, saying that although the aid may have been misused, it was still vital to continue in the long-term interests of the Free World."[30]

Typical of the early congressional attitude was that of Representative Paul Findley, who later played a major role as a Republican co-sponsor of the War Powers Resolution. On 23 May 1961 he arose on the floor of the House of Representatives to respond to a report that Vice President Johnson had told the press during a visit to Saigon that he did not intend to recommend that President Kennedy send combat troops to South Vietnam. Mr. Findley warned:

> **Mr. Speaker, there is an ominous parallel between a recent statement made by Vice President Johnson and the speech of Dean Acheson as Secretary of State shortly before the Communist invasion of South Korea.**
>
> **In this speech Acheson placed Korea beyond America's defensive perimeter. It was an invitation to trouble, and trouble came.**
>
> **In Saigon the Vice President said he would not recommend that U.S. combat forces be stationed in South Vietnam. This, too, is an invitation to trouble.**
>
> **Today nobody knows how far the United States will go, and the Vice President has added to the uncertainty.**
>
> ***U.S. combat forces are the most effective deterrent to aggression, and we should publicly offer such forces to South Vietnam without delay . . . . No patriotic American will ever criticize President Kennedy for committing combat forces to protect freedom-loving people from aggression.* Every patriot has the right and duty to criticize ineptitude and the too-little, too-late policies which invite aggression.[31]**

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[29] *Id.* at 144, 147.

[30] GELB & BETTS, *supra* note 28 at 208.

[31] 107 CONG. REC. 8587 (1961) (emphasis added).

Let me stress that it is not my purpose to criticize Representative Findley—either for his initial enthusiasm for sending American combat troops to Vietnam or for his later conviction that having committed troops was a mistake. He is a decent individual, and he was probably in the majority on both occasions. But as we try to understand what really happened in Vietnam, I think it is important that we realize that the American Congress was not "dragged kicking and screaming" into the conflict.

The Gulf of Tonkin Resolution

For all of his faults, President Johnson understood the need to involve Congress in major foreign policy initiatives. He had, after all, served as Senate Majority Leader. In his autobiography, President Johnson wrote:

> **I believed that President Truman's one mistake in courageously going to the defense of South Korea in 1950 had been his failure to ask Congress for an expression of its backing. He could have had it easily, and it would have strengthened his hand. I had made up my mind not to repeat that error.**[32]

As the situation in Vietnam deteriorated and it looked more and more likely that U.S. troops would be necessary, LBJ decided to bring Congress formally on board. He asked for and promptly received statutory authority—a joint resolution, which is the same mechanism used by Congress to "declare war."[33] This "Southeast Asia Resolution" provided in part:

> **SEC. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is therefore, prepared, *as the President determines,* to take all necessary steps, *including the use of armed force,* to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.**[34]

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[32] L. JOHNSON, THE VANTAGE POINT: PERSPECTIVES ON THE PRESIDENCY 116 (1971).

[33] The utility of a formal "declaration of war" was discussed in my House testimony last month, and is addressed more briefly *infra*, at notes 83-91 and accompanying text.

[34] Pub. L. 88-508, 78 Stat. 384 (1964) (emphasis added); *repealed* by Pub. L. 91-672 § 12 (1971).

This law was better known as the "Gulf of Tonkin Resolution" of August 1964. There has been a great deal of controversy over the naval engagements which occurred of the coast of North Vietnam two dozen years ago, but both North Vietnamese admissions after the end of the war and recently declassified intelligence intercept traffic leave little doubt that an attack did take place.[35] Furthermore, the reality is that the "Gulf of Tonkin" incident was no more than a convenient occasion for congressional action—and the attitude at the time was such that any of a number of other incidents could have served the same purpose. I shall therefore not dwell on that issue at this point.

Now there are those who suggest that the Congress really "didn't know what it was doing" when it enacted this statutory authority for the President to use armed force in Southeast Asia. Those of us who have spent time on the Hill might be tempted to smile at this suggestion; because if it were necessary that all members of Congress knew the full contents of every bill they approve *many* of our laws would be quite suspect. But in fact the Gulf of Tonkin Resolution received more lengthy consideration than most prior congressional authorizations of armed conflict, and its sponsors were quite candid in explaining what the legislation would accomplish. Consider, for example, this exchange on the Senate floor between the resolution's principal sponsor—Foreign Relations Committee Chairman J. William Fulbright—and this Committee's ranking Republican, Senator John Sherman Cooper:

> **MR. COOPER. Does the Senator consider that in enacting this resolution we are satisfying that requirement [the "constitutional processes" requirement] of Article IV of the**

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[35] Douglas Pike—who essentially traded jobs with me in Vietnam twice, now serves as director of the Indochina Studies Program at the University of California at Berkeley, and is in my view without question the most knowledgeable Western expert on Vietnamese communism—wrote in a 1987 book review of 2 THE UNITED STATES NAVY AND THE VIETNAM CONFLICT (Naval Historical Center: Government Printing Office, 1987): "The 'nada notion'—that nothing happened and the Gulf of Tonkin Incident was the product of inexperienced sonarmen and the overworked imagination of young deck-watch offices—can no longer be sustained. The electronic intercept traffic cited here is too voluminous to permit a conclusion that somehow everything was the figment of the collective imaginations of both sides. And there is the fact of Vietnam's position today. After the war, Hanoi officials not only acknowledged the event but deemed it important enough to designate its date, Aug. 2, as the Vietnamese Navy's Anniversary Day, 'the day our heroic naval forces went out and chased away Maddox and Turner Joy.' . . . The conspiracy theory has been dying for several years, and this work will probably be a stake through its heart. To have a Tonkin Gulf conspiracy means that the several hundred National Security Agency and naval communications cited have been doctored,. In turn, that means a minimum of several hundred persons were party to a plot that has remained watertight in sieve-like Washington for two decades. And who is going to believe that?" Pike, "What Really Happened in the Gulf of Tonkin," *Washington Post Book World*, May 3, 1987, p. 10. Further, it might be added that even if it were established that the reports from the Gulf of Tonkin were mistaken—in Pike's words, "the product of inexperienced sonarmen"—it seems clear that officials in both the Executive and Legislative branches accepted them as accurate and made decisions accordingly. I am unaware of even any credible charges that President Johnson or his staff "staged" the incident to "trick" Congress into giving authorization for an expanded American role.

> **Southeast Asia Collective Defense treaty? In other words, are we now giving the President advance *authority* to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?**
> **MR. FULBRIGHT. I think that is correct.**
> **MR. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into *war*, we will give that authority by this resolution?**
> **MR. FULBRIGHT. That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution.[36]**

Support for this statute and the policy it authorized was *overwhelming*. The vote in Congress approving the new law was 416 to 0 in the House, and 88 to 2 in the Senate. In the month surrounding the vote (and the accompanying bombing of North Vietnam), President Johnson's "approval" rating in public opinion polls shot up from 42 to 72 percent—a thirty point jump in one month. And U.S. policy in Vietnam was clearly the reason.[37]

Even as the war intensified, congressional support remained overwhelming. In March 1966, one of the two members of Congress to vote against the 1964 Gulf of Tonkin Resolution, Senator Wayne Morse of Oregon, introduced an amendment in the Senate to repeal the statute. His effort was overwhelmingly rejected—by a vote of 92 to 5.[38] During the debate, Senator Javits—who, as you know, went on to become a principal co-sponsor of the 1973 War Powers Resolution—said "I agree with [President Johnson's] policies [in Vietnam] to date," and argued that "a declaration of war would be most inadvisable at this time . . . ." He concluded: "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy."[39]

Senator Richard Russell, the Chairman of the Armed Services Committee, announced that he had intended to introduce language *reaffirming* the Tonkin Resolution, but the vote on the Morse Amendment would serve his purpose. Discussing the 1964 Resolution, he said:

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[36] 110 CONG. REC. 18049 (1964) (emphasis added).

[37] GELB & BETTS, *supra* note 28 at 212.

[38] 112 CONG. REC. 4404 (1966).

[39] 112 CONG. REC. 4374 (1966). Another strong critic of the war and advocate of war powers legislation was Senator Thomas F. Eagleton, who acknowledged before this subcommittee during his testimony on July 13, 1988: "That [Gulf of Tonkin] Resolution sounded a lot less alarming and drastic than a declaration of war, but it had the same legal effect. No doubt about it, Congress had legalized 'Johnson's War.'" Prepared testimony, p. 2.

> **I saw how broad it was in its terms. . . . I cannot plead ignorance. I knew that the joint resolution conferred a vast grant of power upon the President. It is written in terms that are not capable of misinterpretation, and about which it is difficult to become confused. . . . Personally, I would be ashamed to say that I did not realize what I was voting for when I voted for that joint resolution.**[40]

Majority Leader Mike Mansfield—also a member of this Committee—reaffirmed his support for the 1964 Resolution,[41] and he was followed by Minority Leader Everet Dirksen, who said: "I wish to make clear that the position of the [Republican] minority—and I think I speak for most of them—is that we completely separate ourselves from the views expressed by the distinguished Senator from Oregon [Senator Morse]."[42]

Later that year some House Republicans spoke critically of President Johnson's handling of the conflict, and Representative Edward Boland quickly came to the President's defense.[43] A year later, in 1967—when there were in excess of 400,000 American soldiers in Vietnam—Representative Boland called the attention of his House colleagues to a poll taken in a high school in his Massachusetts district. Congressman Boland said that the poll showed that the students "overwhelmingly supported—by over 80 percent—the commitment of the Johnson administration to Vietnam." He said the poll "not only shows strong support for the U.S. presence in Vietnam, it also shows strong support for a gradual escalation of the war effort." According to Mr. Boland, the poll reflected "a national trend" and "demonstrated that most voters support present policies in Vietnam."[44]

Congressional support for America's commitment to Indochina was reaffirmed time and again by the appropriation of new funds for the conflict by strong bipartisan majorities.[45] For example, following the Gulf of Tonkin Resolution the Congress considered an Administration request for $125 million in additional funds for South Vietnam—and provided instead $400 million.[46] In April of 1965, Congress approved another $700 million request in its entirety by a vote of 408 to 7 in the House and 88 to 3 in the Senate.[47]

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[40] 112 CONG. REC. 4370-71 (1966).

[41] 112 CONG. REC. 4376 (1966).

[42] 112 CONG. REC. 4377 (1966).

[43] 112 CONG. REC. 23709 (1966).

[44] 113 CONG. REC. 36460 (1967).

[45] Although section 8(a)(1) of the War Powers Resolution seeks to discount the importance of appropriations in ratifying presidential actions, the Supreme Court has frequently recognized its significance—particularly in the area of "foreign policy and national security." *See, e.g., Dames & Moore v. Regan*, 435 U.S. 654, 678-79 (1981); *The Prize Cases*, 67 U.S. (2 Black) 635, 670-71 (1863); and *Haig v. Agee*, 453 U.S. 280, 291 (1981).

[46] J. Emerson, "Congress and the Commitment to Vietnam," in AMERICAN BAR ASSOCIATION, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 65 (1984).

In 1966 a $13 billion supplemental appropriations bill for Vietnam passed the House 389 to 3, and the Senate 87 to 2.[48] The following year, a $12 billion Vietnam supplemental appropriation was approved 385 to 11 in the House, and 77 to 3 in the Senate (a combined margin of greater than 30 to 1).[49] During House debate on this bill, an amendment to prohibit expenditure of funds for military operations in or over North Vietnam was rejected by a vote of 18 to 372.[50]

In my House testimony last month I describe how a variety of factors contributed to a shift in American public opinion on the conflict, and how "Vietnam" soon became a political liability for members of Congress. When President Nixon was elected—and there was no longer any pressure on congressional Democrats to show loyalty to the policies of their party's President—many Democrats acted just as their Republican counterparts had in the early 1950's. Just as an unpopular Korean conflict became "Truman's War," by 1969 Vietnam was "Nixon's War." The fact that Congress had overwhelmingly supported the initial commitment, and had played a full constitutional role in authorizing the conflict, was simply ignored. After all, there had been no formal "declaration of war" in those terms—and, besides, who in Congress wanted to be held accountable to an angry electorate over an obviously collapsing policy?

Some of the more principled veterans could not tolerate this revisionism. Senator Sam Ervin—perhaps the most respected constitutional scholar in Congress at the time—told the Senate in 1970:

> **Now, Mr. President, I maintain that the Gulf of Tonkin resolution, which is technically known as the Southeast Asia resolution, constitutes a declaration of war in a constitutional sense . . . . I am certain that when Congress passed the Gulf of Tonkin joint resolution, it was aware of what authority it was granting to the President of the United States . . . . I contend that the Gulf of Tonkin joint resolution is clearly a declaration of war.**[51]

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[47] *Id.*

[48] Pub. L. 89-375 (1966).

[49] Pub. L. 90-8 (1967).

[50] 2 CONGRESSIONAL QUARTERLY, CONGRESS AND THE NATION 1965-68 at 82 (1969).

[51] 116 CONG. REC. 15925-26 (1970). Senator Gale McGee, a highly principled veteran of this Committee, remarked that same year: "I have no doubt that in terms of this war, that, had it been successfully concluded in a year or 18 months, Members of this body would have been bragging about how the Senate of the United States approved the Gulf of Tonkin resolution and participated in that decision, and they would be seeking the credit for that resolution." *Id.* at 15730.

But political courage was in short supply as opposition to the war intensified. Instead, Members of Congress assured their constituents that Congress certainly deserved no responsibility for "Nixon's War," and that they would act promptly to guarantee that no future "Imperial President" could drag the nation kicking and screaming into an unpopular foreign war against the wishes of Congress.

The 1973 War Powers Resolution

After prohibiting further U.S. combat activity in Indochina with the Cooper-Church Amendment,[52] Congress enacted the 1973 War Powers Resolution—over President Nixon's veto. As Senator Javits—who seven years earlier had concluded: "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy"[53]—explained in the Senate:

> **The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful. . . . By enumerating the war powers of Congress so explicitly and extensively in article I, section 8, the framers of the Constitution took special care to assure the Congress of a concurrent role in any measures that would commit the Nation to war. Modern practice, culminating in the Vietnam war . . . has upset the balance of the Constitution in this respect.**[54]

Put simply, the War Powers Resolution was essentially a *fraud* (although many who voted for it no doubt did so in innocence). Congress had played a full role in getting the United States into the Vietnam conflict—and, indeed, some of the strongest supporters of the War Powers Resolution had earlier been sharp critics of the Executive for not sending combat troops earlier and escalating the war quicker.[55] Its primary purpose was to keep Congress from being held politically accountable by an angry electorate—and in the process to pin all of the blame on an unpopular president of the minority party. And as I will explain later, it had the additional characteristic of being *flagrantly unconstitutional*.

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[52] Actually there were a series of such amendments.

[53] 112 CONG. REC. 4374 (1966).

[54] 119 CONG. REC. 1394 (1973).

[55] *See, e.g.*, *supra* note 31 and accompanying text.

Implementation of the War Powers Resolution

Mr. Chairman, five years ago I wrote a book about the War Powers Resolution which looked in some detail at about a dozen incidents which might arguably have come under its purview. This is not the time to review all of those cases. But I have detected an alarming theme in the way many members of Congress have reacted to these situations—and this might be an appropriate time to register my concern.

Mayaguez Rescue

I will begin[56] with the May 1975 rescue of the crew of the *S.S. Mayaguez* from their Cambodian captors. A few years have passed, but I'm sure most of you recall the incident. I was working in the Senate at the time, and it was clear to me that the Ford Administration did not really "consult" with Congress. A handful of leaders—my boss among them—were "informed" or "notified" of the rescue operation after it had already been set in motion and U.S. combat forces had entered Cambodian territory. Shots had already been fired before these "notifications" took place.[57] Trying to put the best light on it, Senate Republican Leader Hugh Scott asserted: "We were informed. We were alerted. We were advised. We were notified. We were telephoned. It was discussed with us. I don't know whether that's consultation or not. We were advised that certain actions would be taken using the minimum force necessary."[58] This hardly satisfies my sense of what real "consultation" ought to be—and even this "notification" did not occur until after the "introduction" of U.S. forces into the danger zone.

Furthermore, section 2(c) of the War Powers Resolution makes no provision for the President to rescue endangered American citizens in the absence of a declaration of war or other statutory authority. In this, and other, respects it is clearly unconstitutional.[59] But the fact remains, President Ford clearly violated the language of the "law."

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[56] I am tempted to first address the evacuation of Indochina—in part because I was one of the evacuees who would have been abandoned when Congress adjourned its conference committee had President Ford not decided to authorize the evacuation on his own authority. This was not one of the Legislative Branches more impressive performances. President Ford had gone before a joint session of Congress on 10 April to ask Congress "to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by insuring their evacuation, if this should be necessary." He said "I hope that this authority will never have to be used, but if it is needed, there will be no time for congressional debate. Because of the gravity of the situation, I ask the Congress to complete action on all of these measures not later than April 19." *Quoted in* R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 52 (1983). Four days after the President's "deadline," the Senate finally approved a bill. The House approved a different bill shortly thereafter. After a lengthy conference, the Senate approved the report but the House decided to delay a vote until after the weekend—during which time the approach of North Vietnamese tanks forced the President to either abandon the Americans in Saigon or act on his own authority. Fortunately for those of us in Saigon at the time, he had the courage to act. The "clarification" the President has courteously requested from Congress was never approved. As Senator Eagleton later observed: "Congress fumbled the ball." *Id.* at 58.

[57] *Id.* at 62.

[58] *Quoted in id.*

Furthermore, the Cooper-Church Amendment was still theoretically in force—although it, too, in my view was unconstitutional—prohibiting the use of appropriated funds for combat operations "in or over or from off the shores of . . . Cambodia."[60]

One might therefore have expected an angry Congress to take the occasion to confront the President for his "illegal" conduct. But that did not happen. Senator Mansfield rejected a reporter's characterization that the War Powers Resolution had been "to a slight extent, bent or violated," responding that "maybe he didn't have the time.[61] Senator Church told the press: "From beginning to end, he had my full support." Senator Clifford Case added: "I don't want anyone saying that we liberals or doves would prevent the President from protecting American lives in a piracy attack."[62] Ultimately, this Committee passed a resolution that said in part: "We support the President in the exercise of his constitutional powers *within the framework of the War Powers Resolution* to security the release of the ship and its men."[63]

Iran Rescue

Five years later, after Iranian militants had seized the American Embassy in Tehran and more than 50 hostages, a different President tried another "rescue" operation to save American lives. As in the case of the *Mayaguez*, President Carter did not "consult" with congressional leaders until the rescue forces were already on Iranian territory. The Administration stressed that it had planned on discussing the operation with Congress prior to the final stage—and apparently concluded that deploying U.S. combat forces to an isolated desert landing site in Iran did not meet the "imminent involvement in hostilities" standard of section 3—the consultation provision.

There were, of course, differences between the *Mayaguez* rescue and the attempt in Iran. Given the disorganized condition of Cambodia in May 1975, and the relative isolation of the island thought to be holding the Americans, one could argue that there was a somewhat greater need for "secrecy" in the Iran rescue. This would be a close call, and both Presidents decided not to inform Congress until the last minute. A significant difference was that in Iran there was no "Cooper-Church" law prohibiting the deployment of U.S. combat troops.

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[59] *See infra*, note 231 & 242 and accompanying text.

[60] *See infra*, note 264 and accompanying text.

[61] *Quoted in* TURNER, *supra* note 56 at 63.

[62] *Id.*

[63] *Id.* (Emphasis added.)

Given the similarities between the two situations, however, one might have expected the Congress to react similarly in both instances. After all, Presidents were doing their best to rescue Americans who had been seized by rather unsavory foreign groups. But whereas Senate Majority Leader Mansfield had virtually apologized for President Ford's lack of prior "consultation" during the *Mayaguez* rescue; in 1980 Majority Leader Robert Byrd said he was "furious" over the lack of prior notice.[64] This Committee didn't follow its earlier precedent of passing a supportive resolution, either; instead, the Chairman and Ranking Republican issued a joint statement *denouncing* the President for violating the War Powers Resolution.[65]

Grenada

Another illustrative example is the October 1973 Grenada rescue mission. When news first broke of the operation, the initial reaction by many in Congress—particularly members of the opposition party—was strong and hostile. House Speaker Tip O'Neill, for example, called the operation "gunboat diplomacy." Numerous references were made to a violation of the War Powers Resolution, and my colleague Professor John Norton Moore—one of the nation's foremost experts on national security law—received an urgent call asking whether he would appear on a panel before the House Foreign Affairs Committee the following week to discuss the legality of the Grenada operation. He agreed.

A few hours later, airplanes began landing at an Air Force Base in South Carolina and the evening news showed pictures of American students from Grenada kissing the ground and praising President Reagan for saving their lives.[66] About the same time, news reports began arriving from Grenada that thousands of people had turned out in the streets to cheer and thank the American soldiers for the rescue operation.[67] A call-in poll of American public opinion sponsored by the ABC News "Nightline" program received more than 300,000 calls in one hour, indicating almost 90 percent approval of the operation.[68] A CBS poll of residents of Grenada reported even greater support.[69]

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[64] *Id.* at 73.

[65] *Id.*

[66] Ward Sinclair, "Student Evacuees Return, Praising U.S. Rescue Effort," *Washington Post*, October 27, 1983, p. A1.

[67] *See, e.g.*, "Message From Grenada: 'Yankees Don't Go Home,'" *U.S. News & World Report*, Nov. 21, 1983, p. 33.

Shortly thereafter, Speaker O'Neill "changed his mind." Along with many of his Democratic colleagues, he concluded after a more careful look at the facts that the operation was "justified."[70] Discussing the Speaker's change of position, the *New York Times* reported: "His switch marked what some Democrats acknowledged was 'a strategic retreat' politically. It came amid strong public support for the United States-led invasion . . . ."[71]

Another journalistic account asserted:

> **What finally persuaded most Democrats in Congress to switch and back Reagan on the invasion of Grenada? It wasn't what lawmakers found on their visit to the island, insiders report, but an avalanche of mail from voters back home heartily endorsing the President's action. Veteran politicians had no trouble following that weather vane.**[72]

Professor Moore subsequently received a telephone call explaining that the Foreign Affairs Committee had decided to "postpone" its investigation of the legality of the Grenada operation. Nearly five years later, he had still not been called to testify on the matter.

Several things can be observed about this situation. First of all, a political environment in which senior congressional leaders denounce foreign policy initiatives first and *then* look at the facts is unhealthy. It would have been virtually unheard of during the years between U.S. entry into World War II and the early days of the Vietnam commitment.

More importantly, when the Grenada operation is considered along with rescue missions in Cambodia and Iran, the one common thread in the legislative response has not been high constitutional *principle* but clear political *expediency*. From a constitutional standpoint there were few obvious differences between President Ford's rescue of merchant seamen in Cambodia and President Carter's effort to rescue American diplomats in Iran. The difference is that one succeeded and was strongly supported by the American public, and the other failed and was not. When members of Congress realized that the public was behind President Reagan's Grenada mission, many seemed to abandon their initial concerns about insuring that the President was "obeying the law."[73] That, too, is unhealthy. These examples suggest that Congress has been just as *unprincipled* in dealing with the implementation of the War Powers Resolution as it was in disclaiming its actual role in authorizing the commitment of United States armed forces to Indochina in 1964.

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[68] "An ABC Call-In Poll Shows 90% Support Invasion of Grenada," *New York Times*, October 30, 1983, p. 22.

[69] *Washington Times*, Nov. 15, 1983, p. 2C.

[70] Hendrick Smith, "O'Neill Now Calls Grenada Invasion 'Justified' Action," *New York Times*, November 9, 1983, p. 1.

[71] *Id.*

[72] "Washington Whispers," *U.S. News & World Report*, November 14, 1983, p. 23.

Lebanon

These are but three of many examples in recent years in which members of Congress have approached important national security problems in a partisan and unhelpful way. Another example that could be cited was the deployment in 1982 of a contingent of U.S. Marines to Beirut, Lebanon, as a component of a multi-national peace-keeping force. The international force was *invited* into Lebanon by the government of that country and with the approval of neighboring States and major parties to the dispute that had nearly decimated the once beautiful country. The mission was to take up positions between feuding factions—without engaging in hostilities—as a means of promoting confidence, restoring order, and encouraging negotiations among the parties. By no stretch of the imagination could it be seriously charged that, in committing the force to Lebanon, the President had deprived Congress of its constitutional authority to "declare war" against another State.

It was understood that Beirut was a city in turmoil, and that there was a significant chance that Marines would be the target of terrorist acts or even the victims of accidental injuries--which proved to be the case as one Marine was killed and three others injured when a 155-mm Israeli artillery round exploded during a clean-up operation at the airport. According to the press, this accident led you, Mr. Chairman, to charge that the Marines were clearly involved in "hostilities" so as to bring into force the War Powers Resolution.[74] Since the accidental death of the Marine resulted indirectly from an *Israeli* artillery shell, and underlying your assertion was an apparent assumption that the President was impermissibly treading upon the power of Congress to "declare war," I could not help but wonder at the time whether you were of the view that the President had without legislative authority launched a "war" against Israel by his conduct in the matter.

On the merits, however, the deployment generally received little criticism from Congress. The situation was probably summarized accurately when Senate Assistant Majority Leader Ted Stevens remarked: "I'm sure the president will get the support of the

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[73] I would contend that the Grenada operation was conducted in compliance with applicable law. *See* on this subject J. MOORE, LAW AND THE GRENADA MISSION (1984).

[74] *Washington Post*, October 1, 1982.

Senate, but a lot of us are going to hold our breath."[75] Although often a sharp critic of President Reagan, even Senator Thomas Eagleton publicly took the position on the merits that the risk must be taken, and said "Congress undoubtedly would approve the commitment of troops as part of the multinational force."[76]

However, recognizing the risks involved in the deployment and still smarting from the Vietnam experience, many members of Congress began looking for "insurance policies" in case the worst came to pass. Few wanted to criticize an effort to promote Middle East peace on the merits, but many were happy to insulate themselves from ultimate accountability by raising procedural objections to the deployment. Once again, the vehicle was the 1973 War Powers Resolution. House Foreign Affairs Committee Chairman Clement Zablocki charged in the *Washington Post* that the President's failure to invoke the War Powers Resolution was "eroding the integrity of the law" and threatened to precipitate a "constitutional crisis."[77] Neither Chairman Zablocki nor his many colleagues who joined the chorus addressed the question of what signal would be sent if, after announcing to the world that the Marines were being sent to Lebanon on a mission of peace to encourage negotiations, the President then turned around and submitted a public report to Congress announcing his expectation that the Marines would likely soon be involved in armed combat. This would hardly have been compatible with the operation's objective of reassuring the rival factions and promoting a non-violent resolution of the dispute. Indeed, having received no indications that the Marines were coming to fight on *their* side, it would not have been surprising to have nervous factions from various sides welcoming the Marines with automatic weapons fire--on the mutual assumption that *their* group must be the intended target of the "war" the American President had told Congress he was initiating.

Writing in *U.S.A. Today,* Senate Minority Whip Alan Cranston suggested that on the merits the Senate "might well authorize" the deployment of Marines if the President would tell them "exactly how and when we proposed to extricate them."[78] Indeed, it became increasingly apparent that a request by the President for formal legislative endorsement of the mission would be met with demands for detailed micromanagement of the operation by legislative constraints. Members not only wanted to know on what day the Marines would be removed, but whether additional Marines could be deployed, what rules of engagement would authorize them to defend themselves, whether they were permitted to carry loaded weapons on patrol, and the like.

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[75] *Washington Post,* October 1, 1982.

[76] *New York Times,* November 17, 1982.

[77] *Washington Post,* October 3, 1982.

[78] *U.S. A. Today,* October 22, 1982, p. 8.

The acrimonious and partisan public debate which followed—ostensibly motivated not by opposition to the peace mission on the merits, but by allegations that Congress was protecting its constitutional power to "declare war" against another State (and during the entire debate no member of Congress actually *advocated* declaring war, or even indicated against what State they were being deprived of their right to approve such a declaration)—was followed with interest abroad by America's friends and foes alike. Syria's President Hafez al-Assad was quoted as saying that the Americans were "short of breath."

Last Friday the Center for Law and National Security hosted a seminar on the War Powers Resolution at the University of Virginia. While not unanimous, there seemed to me to be a general consensus both that the Resolution is not "working" very well, and also that at least some of its provisions are unconstitutional. But a former Chief of Staff to this Committee suggested that, whatever its shortcomings, it really didn't do any serious harm to leave the statute on the books. He specifically referred to the deployment of Marines to Beirut to illustrate this point. I strongly disagree.

Marine Commandant General P.X. Kelley--a man of exceptionally uncommon integrity and courage--went so far as to warn Congress in mid-September 1983 that any use of the War Powers Resolution to set an artificial deadline for the withdrawal of the Marines from Lebanon "could encourage more hostile fire and endanger the Marines there."[79] A few weeks later, six days before a terrorist bomb killed 241 Marines asleep in their battalion landing team headquarters building, *U.S. News & World Report* carried a story about an increase in sniper attacks on the Marines and noting that "a radio message between two Moslem militia units" had read: "If we kill 15 Marines, the rest will leave."[80] When 241 Marines were killed at the end of that week, members of Congress immediately began a search for a scapegoat so they could assure the voters that *they* were not accountable. Given the outcry that had come from some members at the disclosure months earlier that some Marines were carrying loaded rifles on patrol, there was a certain irony in the indignant charges from congressional investigators following the bombing that the Marines were *inadequately* armed.[81] But the ultimate objective was apparently achieved:

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[79] Walter Andrews, "Marine Corps head cautions Congress," *Washington Times*, September 16, 1983, p. 7.

[80] "Marines Draw a Bead on Snipers," *U.S. News & World Report*, October 31, 1983, p. 13. This issue went on sale the day following the Sunday morning bombing of the Marine barracks.

[81] It is clear from my personal observations from within the various departments of the government that the existence of the War Powers Resolution creates pressure on policy makers to keep U.S. armed forces in potentially dangerous areas as lightly armed as possible to avoid "triggering" the Resolution's clock. For example, in 1981 a decision was made to deny U.S. advisors and technical personnel the protection of M-16 rifles on the theory that Congress would be less likely to complain if the personnel were only armed with handguns.

the voters did not hold Congress responsible for the failure. The fact that a few very good Marines had their careers destroyed in the process was, well, unfortunate.[82]

Joint Resolutions vs. Declarations of War

Mr. Chairman, perhaps I should digress at this point to deal with a legal issue which has been a major source of confusion and misunderstanding, but which ought to be a "non-issue" and ought to be put to rest. That is the question of whether Congress can authorize offensive hostilities by joint resolution without formally "declaring war."

Put simply, a declaration of war has two aspects. Under International Law it is essentially an anachronism. Such declarations have historically been associated with offensive uses of force, which are now outlawed by the U.N. Charter. No country in the world has formally "declared war" in more than forty years. (I dealt with this issue in greater length in my testimony last month before the House Foreign Affairs Committee.)

The second issue is one of U.S. constitutional law. The use of "joint resolutions" to authorize the President to initiate armed conflict against another nation dates back at least to the Administration of John Adams, and was upheld by the Supreme Court in 1800[83] and again in 1801.[84] While a major debate has existed over the years about the precise dividing line between those uses of force which could be authorized by the President in his capacity as "commander in chief"[85]—widely recognized to include at minimum "defensive" responses to foreign attack and the protection of endangered U.S. citizens abroad and on the high seas—and those which require formal congressional authorization,[86] no genuine dispute exists over the constitutionality of uses of force pursuant to affirmative congressional authorization by joint resolution. As this Committee observed in its 1967 Report on the "National Commitments Resolution":

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[82] Commandant Kelley, who had been the subject of speculation that he might become the first Marine officer selected as Chairman of the Joint Chiefs of Staff, caused considerable offense in Congress by defending the conduct of his men and refusing to provide a scapegoat. In so doing, he virtually surrendered any chance he might have had at being selected Chairman. Colonel Timothy Geraghty, who had been selected to command the Marine contingent in Beirut because of his outstanding record in Vietnam and other assignments, quietly accepted the uninformed congressional criticism--which was perhaps relatively painless compared to the anguish of losing so many fine Marines under his command, many of them good friends--and retired from active duty in late 1986. A book on the Lebanese conflict by *New York Times* writer Robin Wright reported that Geraghty "was considered by diplomats and other [Multi-National Force] commanders to be the coolest and most thoughtful of the three Marine commanders to serve in Beirut . . . ." R. WRIGHT, A SACRED RAGE 78 (1985).

[83] *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

[84] *Talbot v. Seeman*, 5 U.S. (1 Cranch 1 (1801) (Marshall, C.J.).

[85] "The President shall be commander in chief of the army and navy of the United States . . . ." U.S. Const., art. II, sec. 2. For a discussion of the scope of this power, *see* J. Moore & R. Turner, *The Legal Structure of Defense Organization* 87-94 (1986).

[86] "The Congress shall have power . . . To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water . . . ." U.S. CONST., art. I, sec. 8.

> **The committee does not believe that formal declarations of war are the only available means by which congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to Formosa, the Middle East, *and the Gulf of Tonkin* are a proper method of granting authority.**[87]

Indeed, the War Powers Resolution itself concedes this point when it asserts in section 2(c) that:

> **The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) *specific statutory authorization*, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.**

It is, furthermore, clear that the issue of a formal "declaration of war" was discussed by congressional leaders when the initial authorization to use armed forces in Indochina was given—and it was emphatically rejected as being unnecessary.[88] Instrumental in reaffirming this view was a massive legal brief—occupying more than 50 pages when reprinted in the *Congressional Record*[89]—drafted by my colleague Professor John Norton Moore and two other distinguished legal scholars on behalf of the American Bar Association in June 1966. I would commend it still today—more than twenty years later—for anyone who harbors any doubts about the legality of the U.S. commitment of troops to Indochina.

While inserting excerpts from this study in the *Record*, Senator Jacob Javits—who, as you know, years later would become the principal Senate sponsor of the War Powers Resolution—told his Senate colleagues:

> **Mr. President, now, for the first time, we have an authoritative analysis of the legal basis for U.S. assistance to the Republic of Vietnam. In my own thinking there can no longer be any doubt about the legality of our assistance to the**

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[87] Sen. Rept. No. 90-797, 90th Cong., 1st Sess. 25 (1967) (emphasis added).

[88] *See, e.g.*, 112 CONG. REC. 4374 (1966) (statement by Senator Javits).

[89] 112 CONG. REC. 15519 (1966).

> **people of South Vietnam in view of the report to be distributed today by the American Bar Association . . . . I have never doubted the lawfulness of the U.S. assistance to the Republic of Vietnam. Today, it is my privilege to present to the Senate and the American people a document which, I believe, supports this proposition beyond any reasonable doubt.**[90]

Three weeks later, while inserting the entire text of the ABA legal brief in the *Record*, Senator Russell Long of Louisiana added: "I think it is time for the Hanoi regime to know that so far as we are concerned we have declared the war we are fighting. We declared a limited war. We did that at the time of the Gulf of Tonkin incident."[91]

II

Constitutional Theory of Separation of National Security Powers

Mr. Chairman, I have had a chance to read over much of the testimony you have received during these hearings, and with all due respect I believe the Subcommittee has in many instances been *very* poorly served. Indeed, as much as I commend you for your *intentions* in these hearings, I fear that some of your witnesses have so misstated the facts and the law that you may be like the readers of the irresponsible American press of 1807, of whom Mr. Jefferson lamented: "the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors."[92]

To give you just one example, as you consider my testimony, keep in mind the assertion you received on 14 July from the very distinguished Professor Arthur Schlesinger, Jr:

> **One would think that this historical recital might impress an administration devoted to what the late [*sic*] attorney general has called "the Jurisprudence of Original Intention" and thereby settle some of the arguments that assail us today. For no one can doubt that the original intent of the Framers was to assure Congress the major role in the formulation of foreign policy . . . . Yet the present administration somehow**

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[90] *Id.* at 13870.

[91] *Id.* at 15519.

[92] 11 THE WRITINGS OF THOMAS JEFFERSON 225 (Mem. ed. 1903).

> **manages to champion a theory of inherent presidential prerogative in foreign affairs that would have appalled the Founding Fathers.**
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> **This theory of presidential supremacy has only crystallized in recent times.[93]**

I do not wish to be discourteous to the good professor, but the stakes in these hearings are critical to the security of the nation and the subcommittee deserves better from a gentleman of such obvious learning. Certainly there is room for disagreement among scholars about the "original intent" of the Constitution, and for that reason I have sought to include sufficient authority and citations to assist the subcommittee or its staff to verify my assertions. Professor Schlesinger did not do so, for reasons which I believe will become obvious as you consider the testimony which follows. You may wish to consider inviting him to flesh out his assertions in future testimony.

Analytical Approaches to the Separation of Foreign Affairs Powers

Mr. Chairman, there are a variety of analytical approaches to the separation of foreign affairs powers under the Constitution, and it might be helpful if I identified and commented upon a few of the most popular contemporary approaches.

The Duty to "faithfully execute" the "Laws"

There is a great deal of talk these days about Executive abuse of the Constitution and laws in the field of foreign affairs. Some find these questions simple, and note that under the Constitution the President is required to "take Care that the Laws be faithfully executed . . . ."[94] Since Congress has the "legislative" power—that is, the power to "make" laws—it would seem to follow that the duty of the President in foreign affairs is to "execute" whatever "laws" Congress finds it "necessary and proper"[95] to enact. However, this approach ignores the fundamental difference between the role of Congress in domestic and foreign affairs; and, more importantly, it begs the question of "what is the *Law.*" Certainly the Constitution itself is superior to enactments of Congress, and when the two are in conflict the President would seem to have little option but to ensure that the Constitution is "faithfully executed"—even if that requires that a statutory enactment be read narrowly so as not to conflict with constitutional principles. This line of analysis is therefore not particularly helpful.

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[93] Testimony of Arthur Schlesinger, Jr., Special Subcommittee on War Powers, Senate Committee on Foreign Relations, 14 July 1988, p. 4 (typescript).

[94] U.S. CONST. art. II, sec. 3. Professor Louis Henkin writes: "In regard to foreign, as to domestic affairs (our characterizations, not the Constitution's) Congress was to legislate and the president was to take care that the laws be faithfully executed." Henkin, "Foreign Affairs and the Constitution," 66 *Foreign Affairs*, 284, 287 (No. 2, Winter 1987-88).

[95] U.S. CONST. art. I, sec. 8: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Foreign Policy as a "Shared Power"

Another approach is to view "Foreign Policy" as "a shared power."[96] Certainly it is true that both the President and Congress have constitutional powers that may be exercised in such a way as to affect foreign affairs. The President is given the "executive" power through article II, section 1,[97] and designated "commander in chief" and given other expressed powers. But Congress is given a veto[98] over a decision to launch a war against another State, and the Senate is given a veto over diplomatic appointments and the ratification of treaties.

Article I, section 8 of the Constitution also expressly vests other important powers with foreign affairs implications in the Congress, such as to "regulate Commerce with foreign Nations," to "raise and support Armies," to "provide and maintain a Navy," and the like. (But not, despite a contrary suggestion by one of your witnesses, a broad power to "provide for the common defence."[99]) But the suggestion that these are "shared" powers—while in some respects not technically inaccurate[100]—invites imprecise and misleading analysis. To conclude that, because both the President and the Senate have a *role* in the treaty-making process, it is constitutionally permissible for the Senate to assume the negotiation function, to "interpret" the international effect of a treaty,[101] or to bring an approved treaty into international legal effect by transmitting it to the United Nations, is simply *wrong*. It would be akin to saying that, since both the President and the Senate have a "role" in the appointment process, the Senate may assume the function of *nominating* cabinet officials and then *appointing* them over the President's objection. A far more useful analysis, in both instances, is to recognize that the President, the Senate, and the Congress each have certain specific powers which influence United States relations with the external world.

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[96] U.S. CONGRESS, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR 391 (H. Rept. No. 100-433, November 1987).

[97] For a discussion of the meaning of this provision, *see infra*, notes 108-32, 158 and accompanying text.

[98] *See infra*, notes 102, 126 & 132 and accompanying text.

[99] Article I, section 8, provides that "The Congress shall have Power To law and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform through the United States." The reference to "the common Defence" is clearly a "purpose" for which "Taxes" and other revenues may be raised, and not a general vesting in Congress of substantive powers.

[100] The President, for example, does have a role in all of Congress's article I, section 8 powers (such as the power to 'declare war") by virtue of his qualified veto over legislative proposals. U.S. CONST. art. I, sec. 7.

[101] Of course, this is currently being attempted. *See* Turner, "Beware the Tyranny of the Senate," *Wall Street Journal*, Feb. 22, 1988, p. 20.

It should be kept in mind that in foreign affairs the relationship between the branches is *reversed* from that which prevails in domestic affairs. One of the great American scholars of this century in this field was the late Quincy Wright—who served as President of the American Society of International Law, the American Political Science Association, and the International Political Science Association, and authored more than twenty books during his distinguished career. In his classic 1922 study, *The Control of American Foreign Relations*, Professor Wright explained:

> In foreign relations . . . the President exercises discretion, both as to the means and to the ends of policy. He exercises a discretion, very little limited by directory laws, in the methods of carrying out foreign policy. . . . Though Congress may by resolutions suggest policies its resolutions are not mandatory and the President has on occasion ignored them. Ultimately, however, his power is limited by the possibility of a veto upon matured policies, by the Senate in the case of treaties, by Congress in the case of war . . . . In foreign affairs, therefore, the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the President, checked only by the veto of the Senate or Congress upon completed proposals."[102]

Elsewhere in the same study, Professor Wright explains: "[W]hile acting as the representative organ of the government in foreign relations," the President "has an independent constitutional position, and is not subject to the direction of Congress."[103] He writes:

> Declarations of foreign policy may be made by Congress in the form of joint resolutions, but such resolutions are not binding on the President. They merely indicate a sentiment which he is free to follow or ignore. Yet they are often couched in

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[102] Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 149-50 (1922).

[103] *Id.* at 350.

> **mandatory terms and in defense of his independence the President has frequently vetoed them.**[104]

This view that the President might ignore some congressional initiatives (including statutes) which clearly infringe upon his independent constitutional foreign affairs powers has been embraced by other writers as well.[105]

Totaling "Enumerated" Powers

Still a third approach is to count up the enumerated powers of Congress dealing with foreign affairs—the power to "regulate Commerce with foreign Nations," to "declare war," to "raise and support armies," and the like—and to compare these with the enumerated powers of the President in this area, such as the power to be "Commander in Chief of the Army and Navy," and the power to "make Treaties" with the approval of two-thirds of the Senate. For example, my friend and colleague W. Taylor Reveley III, who honors us with his presence here this morning, has written: "On its face, the text [of the Constitution] tilts decisively toward Congress. Comparison of Articles I and IV with Article II shows that most of the specific grants of authority run to Congress."[106]

This analysis tends to lead to two apparently reasonable conclusions: (1) the bulk of the "foreign affairs" powers are vested in Congress and the Senate; and (2) there is a great deal of unspecified territory—a finding which in turn leads to the conclusion that the Constitution was intended to be "an invitation to struggle for the privilege of directing American foreign policy."[107] I believe this approach results from a misperception of article II, section 1, of the Constitution.

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[104] *Id.* at 278.

[105] *E.g.*, Professor John Norton Pomeroy wrote more than a century ago: "Congress may pass resol[utions] in relation to questions of an international character," but such actions "can only have a certain moral weight; they have no legal effect; they cannot bind the Executive." J. POMEROY, INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 672 (1868). *See also*, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 113 (1972), who writes: "Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. So, should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation, as he has 'riders' purporting to instruct delegations to international conferences."

[106] W. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS 29 (1981).

[107] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th rev. ed. 1957).

The Grant of "Executive Power"

Advocates of broad congressional "war powers" like to portray the Constitution as a source of great ambiguity and uncertainty—as if the Founding Fathers really didn't think much about the business of defending the new nation or weren't very concerned about trivial details like "separation of powers." Perhaps it was because they didn't consider defending the new nation to be important, or perhaps they simply couldn't agree upon how best to divide the powers; but by this version they gave most of the power to Congress, a small amount to the President, and invited the two political branches to "struggle" over the remainder of the power.

I believe there is a great deal more clarity and wisdom inherent in our constitutional separation of foreign relations powers than is commonly perceived in the post-Vietnam era. In my view, the key to understanding the division of powers in this area is contained in the first section of article two of our Constitution, which provides that "The executive Power shall be vested in a President of the United States of America."

It is important to remember that this constitutional grant of "executive power" to the President is in broad terms, conditioned only by specific constitutional grants to the Senate or Congress and the rights guaranteed to the people; while the grant to Congress in article I, section 1, is limited to "[a]ll legislative powers *herein granted* . . . [emphasis added]." As Jefferson,[108] Hamilton,[109] and Madison[110] observed, the "exceptions" to the executive power that are vested in the Senate and Congress were intended to be construed *strictly*. Since the powers vested in the President by the Constitution may not be taken away by simply statute,[111] a statute which pretends to compel the President to yield the independent powers of his office to the Congress would not be a part of the "supreme law of the land."[112] Since the President is required by the Constitution to take an oath of office to "preserve, protect and defend the constitution of the United States,"[113] and since the Constitution is the preeminent "law" that the President is required by the Constitution to

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[108] *See infra*, notes 130-56 and accompanying text.

[109] *See infra*, notes 157-67 and accompanying text.

[110] *See infra*, notes 168-84 and accompanying text.

[111] U.S. CONST. art. V.

[112] "This constitution, and the laws of the United States *which shall be made in pursuance thereof;* and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . ." *Id.* art. VI (emphasis added.). Any statute which sought to deprive the President of his independent powers under the Constitution would exceed the proper authority of Congress, and thus not be a "law . . . made in pursuance" of the Constitution.

[113] U.S. CONST. art. II, sec. 1.

"take care" is "faithfully executed,"[114] even a *cooperative* President would not have the legal option of acquiescing in such an unconstitutional procedure.[115]

The Intent of the Founding Fathers

The Theories of Locke, Montesquieu, and Blackstone

If "original intent" is not the only step in understanding the Constitution, at least it provides us with a useful starting point.[116] Many legal scholars try to examine to the debates of the Federal Convention of Philadelphia in an effort to understand the Constitution; but I propose beginning a little earlier still. If we want to understand what "executive power" meant to the men who gathered in Philadelphia in the summer of 1787, we should begin with the scholars and theorists whose works most influenced our Founding Fathers on separation of powers questions—Locke, Montesquieu, and Blackstone.

All three of these writers viewed the control of foreign affairs to be the exclusive province of the executive. They argued, in essence, that legislative bodies were *incompetent* to manage foreign affairs because they lacked the essential qualities of unity of design, secrecy, and speed and dispatch. Locke, of course, distinguished between the "executive" power to "execute" the laws enacted by the legislature, and what he called the "Federative" power over "War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth . . . ." But he explained:

> **147. These two Powers, *Executive* and *Federative*, though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without*, with all those that it may receive benefit or damage from, yet they are always almost united. And though this**

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[114] *Id.* art. II, sec. 3.

[115] This is not to say that a cooperative President could not waive his privilege to deny sensitive national security information to Congress. Every President in recent decades has done so in the large majority of occasions. But it would be improper for one President to conspire with the Congress to deprive a subsequent President of his constitutional executive privilege. A statute to that effect, even if signed into law and endorsed by a sitting President, would still not be a valid legislative act under the Constitution.

[116] The Supreme Court has often emphasized the value of "contemporaneous constructions" in interpreting constitutional language. *See, e.g.*, *Cooley v. Port of Philadelphia*, 53 U.S. 299, 313 (1851).

> ***federative Power*** **in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the** ***Executive*****; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*****sic*****] good. For the laws that concern Subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.**
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> **148. Though, as I said, the Executive and Federative Power of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the Society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands . . . .**[117]

Montesquieu distinguished between the "legislative" power, "the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."[118] Blackstone argued that the handling of all aspects of the "national intercourse with foreign nations" was an "executive" prerogative.[119] Professor William Goldsmith observed in volume one of his study *The Growth of Presidential Power* that the Founding Fathers "were obviously greatly influenced by Blackstone's definition of executive powers, and gave their democratic monarch many of the same responsibilities."[120]

In vesting "the executive Power" in the President through article II, section 1, the Founding Fathers intended to grant the President *exclusive* control over foreign affairs, subject only to certain very important but limited *exceptions* spelled out in the text of the Constitution. Writing in 1922 in his classic study, *The Control of American Foreign Relations*, Professor Wright characterized "the works of John Locke, Montesquieu, and Blackstone" as "the political Bibles of the constitutional fathers," and asserted that "when the constitutional convention gave 'executive power ' to the President, the foreign relations power was the essential element in the grant . . . ."[121] Similarly, Professor Louis Henkin has observed that "The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[122]

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[117] J. LOCKE, SECOND TREATISE OF GOVERNMENT §147-48 (emphasis in original). In 1790, Jefferson wrote that "Locke's little book on Government . . . is perfect . . . ." 5 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 7 at 173.

[118] 1 MONTESQUIEU, THE SPIRIT OF LAWS 151 (T. Nugent trans., rev. ed. 1900). *See also* FEDERALIST NO. 47, *quoted infra*, note 182 and accompanying text.

[119] *See, e.g.*, Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 4 SEATON HALL L. REV. 527, 532 (1974).

[120] 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 56 (1974).

If, as its natural meaning would seem to suggest, the language in article II, section 1, vesting "the executive Power" in the President was intended to have that effect, it clarifies some of the confusion which results from "counting up" the constitutional powers of Congress and the President in the foreign affairs area. Note again the distinction between article I, section 1—which provides that "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . ."[123]—and the much more comprehensive grant in Article II to the President of not "All executive Powers *herein granted*," but instead "*The* executive Power . . . ."[124] Thus, in view of this difference in wording, it was necessary for the Founding Fathers to enumerate *every* foreign affairs power of Congress, while conveying the bulk of the Executive foreign affairs powers to the President in the first sentence of article II.

The President's broad "executive" power over foreign affairs was not identical to that of the King of England; because certain very specific and important "checks" were included in the American system to guard against abuse. Thus the Senate was given a veto over important diplomatic appointments (to insure that no "unfit" person was appointed by the President[125]) and over Treaties,[126] and Congress was given the power to "declare war," "regulate commerce," "raise and support armies," and the like. But, as I will demonstrate in a moment, these were viewed by the Founding Fathers to be *exceptions* out of the large grant of "executive" power to the President, and as exceptions they were intended to be narrowly construed.

Advocates of legislative branch preeminence in this field like to dismiss article II, section 1, of the Constitution as not granting *any* power to the President.[127] Consider, for example, this excerpt from the testimony before this subcommittee of Senator Charles Mathias:

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[121] WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS *supra* note 102 at 147.

[122] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972)

[123] Emphasis added.

[124] Emphasis added.

[125] *See, e.g.*, 3 THE WRITINGS OF THOMAS JEFFERSON 17 (Mem. ed. 1903); and THE FEDERALIST NO. 76 at 509, 513 (J. Cooke ed. 1961) (A. Hamilton).

[126] T. JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 169 § 52 (2d ed. 1812).

[127] *See, e.g.*, Henkin, "Foreign Affairs and the Constitution," *Foreign Affairs* vol. 66, no. 2 (Winter 1987-88) at 292 .

> **I am neither a strict constructionist nor doctrinaire about original intent, but I am still old-fashioned enough to think it is useful for lawyers to occasionally read the law. Looking first at Article I, Section 8, we find the first grant of war power was given to the Congress . . . .**
>
> **In Article II, the Constitution makes further provisions that affect the power to make foreign policy and the power to make war. Article II, Section 2, provides that "the President shall be Commander[-]in-Chief . . . .**[128]

I must confess that I am somewhat fonder of "original intent" than some others, but I strongly agree in the benefits that can result when lawyers "read the law." My primary suggestion for Senator Mathias would be to read the entire law—including in this instance the first sections of articles I and II. Along with some others, Senator Mathias apparently finds the first section of Article II to be of no value in understanding the separation of foreign affairs and war powers.

Put simply, I think they are mistaken. Their view was expressly rejected by the Supreme Court in the 1926 case of *Myers v. United States,*[129] and finds little support from the Records of the Federal Convention, the contemporary writings and statements of such diverse preeminent thinkers of the era as Jefferson and Hamilton, or the actual practice of the First Congress—two-thirds of whose members had served either at the Philadelphia Convention or in State ratification conventions.

Early Constitutional Interpretations

Thomas Jefferson

Volumes could (and have[130]) been written about early constitutional interpretations; and quotations can be found to support a variety of viewpoints. My own study of this field over a number of years has led me to conclude that, while there were differences of opinion, there was a substantial consensus with respect to the distribution of "foreign affairs" or "national security" powers.

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[128] Statement of Senator Charles McC. Mathias, Jr., July 13, 1988, at 3-4, 6.

[129] 272 U.S. 52, 128, 151 (1926).

[130] *See, e.g.*, A. SOFAER, WAR FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER (1976).

Coming from the University of Virginia, it is perhaps not surprising that I am fond of quoting our University's founder, Thomas Jefferson. Indeed, my fondness for our third president was more of a factor in my decision to seek employment at the University of Virginia than the other way around. However, I shall emphasize his views this morning not only because of my special admiration for his analysis; but also because he is the Founding Father most frequently quoted by advocates of broad congressional "war" powers.[131]

On April 24, 1790, Jefferson wrote in a carefully drafted legal opinion prepared for President Washington:

> **The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of representatives; it has declared that 'the Executive powers shall be vested in the President,' submitting only special articles of it to a negative by the Senate; and it has vested the Judiciary power in the courts of justice, with certain exceptions also in favor of the Senate.**
>
> **The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.**[132]

Note Jefferson's use of the term "negative" to describe the Senate's foreign affairs role. Although it has fallen into disuse in the modern era, the term was frequently used by the Founding Fathers to describe what we today call a "veto." Indeed, in his rules manual for the Senate Jefferson described the Senate's power to consent to the ratification of treaties as a "negative."[133]

Lest there be any confusion about how limited the role of the Senate was perceived to be in foreign affairs, it is useful to examine Jefferson's 1790 memorandum more carefully. At issue was whether the Senate, by virtue of its power to approve diplomatic nominations, was entitled to determine the appropriate *destination* or *grade* for an individual nominee. Jefferson concluded:

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[131] "Advocates of the War Powers Resolution turn to [Jefferson] perhaps more often than to any other founder as authority for their opinion that the president's war power was limited to meeting attack." Scigliano, "The War Powers Resolution and the War Powers," in J. BESSETTE & J. TULIS, THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 138 (1981). For example, as will be discussed, Duke Law School Professor William Van Alstyne once quoted the same lengthy paragraph from Jefferson's first annual report to Congress *twice* in one law review article. The real irony of this is that in the statement in question, Jefferson actually misled Congress about his actions. *See, infra* note 149-53 and accompanying text.

[132] 16 THE PAPERS OF THOMAS JEFFERSON 378-79 (J. Boyd, ed. 1961) (emphasis in original).

[133] T. JEFFERSON, A MANUAL FOR PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES §52 at 110 (3d ed. 1854).

> **The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.**[134]

Once again we see the view expressed that the Senate (much less the House of Representatives) was not expected to know the secret "concerns" of the Executive department.[135]

Now Jefferson's view is entirely inconsistent with the idea expressed by some modern commentators that the President in the sphere of foreign affairs was intended to be a "junior partner"[136] in foreign affairs—something of an "errand boy" for the all-powerful Congress—to be allowed a certain leeway when he behaved himself, but to be slapped down quickly when he displeased his masters. Furthermore, it is clear that the opinion reflected more than just Mr. Jefferson's personal thinking. Jefferson wrote in the margin of his file copy: "endorsed by Washington."[137] And as I will discuss in a few moments, three days later President Washington wrote in his diary that Madison and Jay also agreed with Jefferson's views on this issue.[138]

In a recent Senate floor debate respecting the War Powers Resolution, Senator Mark Hatfield quoted[139] with assurance Mr. Jefferson's September 1789 letter to James Madison, in which the then-Minister to Paris wrote:

> **We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.**[140]

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[134] *Id.* at 397.

[135] *See infra*, note 190 and accompanying text.

[136] *See, e.g.*, the testimony presented to this subcommittee on 14 July 1988 by Arthur Schlesinger, Jr., p. 3 ("The Framers, in short, envisaged a partnership between Congress and the president in the conduct of foreign affairs with Congress as the senior partner.")

[137] *Id.* at 380 n.

[138] *See infra*, note 184.

[139] 134 CONG. REC. S. 7176 (daily ed., June 6, 1988, Senator Hatfield).

[140] 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd, ed.).

The Senator apparently found this supportive of his own view of broad congressional "war" powers with respect to the current Persian Gulf situation.

I disagree. Two versions of this letter exist in the archives of the Library of Congress. The one found in Madison's files (quoted by Senator Hatfield) mentions the power "of letting [the Dog of war] loose", while the copy Jefferson kept for his own records refers instead to the power "to declare war."[141] Both expressions seem to have the same meaning. But the most remarkable thing about Jefferson's choice of words is his assertion that the power to "declare war" had been *transferred* by the new[142] Constitution from the Executive to the Legislative branch. Under the Articles of Confederation, since there was no "Executive," all "war powers" were expressly vested in the Continental Congress (with consequences widely recognized to be disastrous). And yet Jefferson clearly indicated that the new Constitution had *transferred* the power to "declare war" (or, if you prefer the Shakespearean metaphor, let loose the "dog of war")—that is, that this power was by its nature *Executive*.

I suggest that this was no accident. Like the other educated men of his era—raised as they were on the writings of Locke, Montesquieu, and Blackstone—Jefferson had been raised to consider (in Locke's language) "the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth"[143] to be the exclusive province of the Executive.[144] And thus, when he referred to "exceptions" to the control of foreign affairs being construed "strictly," it is clear that he viewed the power of Congress to "declare war" as such an "exception." A virtually identical position was taken three years later by Jefferson's chief rival of the time, Alexander Hamilton.[145] The idea that Congress would attempt to aggrandize its power by interpreting the limited power "to declare war" to encompass the power to seize control over decisions regarding troop movements or other "core" commander-in-chief authority might not have greatly surprised Jefferson—who warned Madison in 1787 to guard against the "evil" of the legislature becoming involved in "the details of execution,"[146] and two years later warned of the "tyranny of the Legislatures"[147]—but it certainly would have displeased him.

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[141] *Id.* at 397.

[142] Another interpretation is that Jefferson recognized that the decision to "transfer" this executive power occurred not in the new Constitution but under the Articles of Confederation. Since that document referred instead to the power "to make war," and in his own copy of the letter to Madison Jefferson used the expression "to declare war"—the precise language used in the new Constitution—I have concluded that was his reference. For our purposes, however, this point is irrelevant. What is *significant* is that he recognized the power to "declare war" as in its nature an "executive" power.

[143] J. LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT §146.

[144] Locke actually coined the term "federative" to describe this power, but he noted that it required the same attributes of secrecy, speed, and unity of plan as were necessary for the execution of the municipal laws that they were "hardly to be separated, and placed, at the same time, in the hands of distinct Persons."

[145] *See infra*, note 158 and accompanying text.

Perhaps the most frequently quoted statement from Mr. Jefferson relied upon by advocates of broad congressional "war" powers was his First Annual Message to Congress of December 8, 1801. (Indeed, one highly respected constitutional scholar was so enamored with the statement that he quoted it at length *twice* in a single law review article.[148]) Discussing a naval engagement with the Barbary Pirates, President Jefferson told Congress:

> **I sent a small squadron of frigates into the Mediterranean, with assurances to that power [Tripoli] of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The bey had already declared war in form. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded, and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with, and engaged the small schooner Enterprise, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the constitution, without the sanction of Congress, to go beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries.[149]**

Several things can be noted about this report. Although Jefferson was, indeed, very deferential toward legislative authority to authorize the commencement of offensive hostilities, there is no indication that his decision to deploy a squadron of armed U.S. naval vessels to the Mediterranean to protect American commerce—in a situation where he must have perceived "imminent involvement in hostilities was clearly indicated by the circumstances," to quote the War Powers Resolution—was preceded by "consultation" of any kind with Congress.

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[146] In a letter to Edward Carrington from Paris, dated August 4, 1787, Jefferson wrote: "I think it very material, to separate, in the hands of Congress, the executive and legislative powers, as the judiciary already are, in some degree. This I hope, will be done. the want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have passed them, and the things never done." 6 THE WRITINGS OF THOMAS JEFFERSON 228 (Mem. ed. 1903).

[147] In a March 14, 1789, letter to Madison, Jefferson warned: "The executive, in our governments, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years." 7 *id.* at 312.

[148] *See supra*, note 131.

[149] 3 THE WRITINGS OF THOMAS JEFFERSON 328-29 (Mem. ed. 1903).

Since this issue is analogous in some respects to the present deployment in the Persian Gulf, which some members have suggested infringes upon the power of Congress to "declare war," it is worth a moment or two of extra consideration. By the time Jefferson took office the issue had been considered and resolved in the Congress. In 1798 the House had approved a bill "for the protection of trade." Section four of the bill was written in such a way as to "authorize" the President to use the Navy to protect U.S. convoys. Speaker of the House John Dayton—the youngest man to sign the Constitution—objected to this provision as both unnecessary and potentially establishing a misleading precedent. While recognizing the power of Congress to "declare war," Speaker Dayton argued (as summarized in the *Annals of Congress*):

> **[W]hether the declaration should be made, or refused to be made, the military and naval force was not the less under the direction of the President, to be used as should appear to be most likely to promote the general welfare, having regard to the existing state of things, whether peace or war. That the Commander-in-Chief possessed the Constitutional power of employing these armed vessels as convoys in time of peace, he himself had no doubt . . . . It was, therefore, nugatory to enact, in the words of the section, "that the President of the United States be authorized and empowered to employ the armed vessels as convoys," or in any other manner for the purposes of defence, since he already possessed that power and authority, derived too from a higher source, the people and the Constitution. It might, indeed, be worse than nugatory, it might be of dangerous precedent, and considered as carrying a strong implication that, without this law, he could have no such authority . . . .[150]**

Taking a similar approach, Representative Samuel Sewall added that, "with respect to the Army, he believed no instance had ever occurred in which the President had been directed to employ, or restricted from employing, the armed force in any particular manner."[151] The section in question was then deleted from the bill by voice vote.

But I digress. Let me return to President Jefferson, and the assertion he made to Congress that he had authorized the U.S. naval squadron to limit its actions to those of a purely "defensive" nature. By authority of Congress, in 1929 the Office of Naval Records and Library published the first volume of a collection entitled *Naval Documents Related to the United States Wars with the Barbary Powers*. The documents it contains, reprinted from official government archives, suggest that Mr. Jefferson was being less than candid with Congress about his conduct in the Mediterranean.

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[150] 8 ANNALS OF CONG. 105 (1798).
[151] *Id.* at 1457.

Consider, for example, this excerpt from a message from the Acting Secretary of the Navy to Captain Richard Dale (commander of the American Squadron in the Mediterranean):

> **I am . . . *instructed by the President* to direct, that you proceed with all possible expedition, with the squadron under your command, to the Mediterranean. . . .**
>
> **[S]hould you find on your arrival at Gibraltar that all of the Barbary Powers, have declared War against the United States, you will then distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence—*by sinking, burning or destroying their ships & Vessels wherever you shall find them.*[152]**

Although Jefferson made much of the fact that the Tripolitan warship had been "disabled from committing further hostilities, [and then] liberated with its crew," the official Naval documents establish that this was not in any way connected with the perceived powers of Congress and the President to authorize military force. The orders given by Captain Dale to Lieutenant Sterett directed that the Enterprise proceed "with all posseble [*sic*] dispatch for the Island of Malta, there to take in is [*sic*] much water as you can possibley [*sic*] bring back," and "make every Exertion to Join me again as soon as possible." It continued:

> **In your Passage to and from Malta you will not chace [*sic*] out of your way *particularly in going*, as you have not much water on board . . . .[S]hould you fall in with any of the Tripolian Corsairs that you are confident, you can Manage, on your Passage *to* Malta you will heave all his Guns Over board Cut away his Masts, & leave him In a situation, that he can Just make out to get into some Port, but if *coming back* you will bring her with you if you think you can doe [*sic*] it with safety but on no account run any risque [*sic*] of your vessel or the health of your Crew . . . .[153]**

Whether Jefferson was simply trying to get Congress formally on board "at the takeoff," or had other reasons, it seems clear from the records that he authorized a far more "offensive" response to Tripolitan aggression than was evident in his report to Congress. Furthermore, it is worth noting that his narrow statement of presidential authority in responding to a foreign attack was *sharply* denounced by others at the time[154]—and both Congress[155] and the Supreme Court[156] appeared to accept the view of his critics that his Commander in Chief powers permitted the President to engage in "offensive" military action in response to a foreign attack.

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[152] 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465, 467 (1939) (emphasis added).

[153] *Id.* at 534-35 (emphasis added).

Alexander Hamilton

Although Alexander Hamilton does not appear to have been consulted by Washington on Jefferson's 1790 memorandum asserting that "the transaction of business with foreign nations is executive altogether"[157]—and thus belonged to the President by virtue of the grant of "Executive" power in article II, section 1 of the Constitution—he made an almost identical observation three years later in his first *Pacificus* letter, when he wrote:

> **The second Article of the Constitution of the UStates, section 1st, establishes this general Proposition, That "The EXECUTIVE POWER shall be vested in a President of the United States of America.**
>
> **The same article in a succeeding Section proceeds to designate particular cases of Executive Power. It declares among other things that the President shall be Commander in Cheif [*sic*] of the army and navy of the UStates and of the Militia of the several states when called into the actual service of the UStates, that he shall have power by and with the advice of the senate to make treaties; that it shall be his duty to receive ambassadors and other public Ministers and to take care that the laws be faithfully executed.**
>
> **It would not consist with the rules of sound construction to consider the enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications; as in regard to the cooperation of the Senate in the appointment of officers and the making of treaties; which are qualifica{tions} of the general executive powers of appointing officers and making treaties: Because the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd [*sic*] as a substitute for those terms, when antecedently used. The**

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[154] *See infra*, note 160 and accompanying text.

[155] *See infra*, note 161 and accompanying text.

[156] *See infra*, note 162 and accompanying text.

[157] *Quoted supra*, note 132 and accompanying text.

> **different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Govent. the expressions are— *"All Legislative powers herein granted shall be vested in a Congress of the UStates;"* in that which grants the Executive Power the expressions are, as already quoted "The EXECUTIVE PO{WER} shall be vested in a President of the UStates of America." . . . .**
>
> ***The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qu[a]lifications which are expressed in the instrument. . .***
>
> ***It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general 'executive power' vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.***[158]

Hamilton was a principal author of the *Federalist Papers,* and advocates of a narrow interpretation of the "commander in chief" power are fond of quoting from essay number 69. Consider this excerpt from the testimony you received a few weeks ago from Arthur Schlesinger, Jr.:

> **The Framers understood the commander in chief clause, however, as conferring a merely ministerial function, not as creating an independent and additional source of executive authority. The commander in chief clause definitely did not bestow war-making power on the chief executive. It meant only, in Alexander Hamilton's words, that the president should "have the direction of war when authorized or begun." Hamilton contrasted this strictly limited assignment with the power of the British king -- a power that, as Hamilton said, "extended to the declaring of war and to the raising and regulating of fleets and armies, -- all which, by the Constitution under consideration, would appertain to the legislature."**

Professor Schlesinger has combined two separate quotations here, and I shall discuss them in order. In the first, he quotes Hamilton as saying the President should "have the direction of war when authorized or begun." It is worth noting that Hamilton did not say that the President should have the direct of war *only when authorized by Congress.* The qualifying words "or begun" reflect Hamilton's widely shared view that in the event of a "war" imposed upon the United States by the decision of another Country the President would by the Constitution be empowered as Commander in Chief to defend the nation without awaiting authorization by Congress.

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[158] 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39, 42 (H. Syrett, ed., 1969) (emphasis added).

This point was made again by Hamilton in the first of his "Examination" articles in the *New York Evening Post* under the pseudonym Lucius Crassus, in criticizing Jefferson's suggestion (discussed above) that following a declaration of war against the United States by the Barbary Pirates the President was limited to "defensive" measures until Congress authorized more. As I have already noted, Jefferson—having already authorized the American naval squadron to sink Tripolian vessels "wherever you shall find them"[159]—misstated the situation to Congress. His narrow definition of the Commander in Chief power outraged Hamilton, who wrote on December 17, 1801:

> [The Constitution provides that] **"The Congress shall have power to declare War;" the plain meaning of which is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received; in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.**[160]

While it is difficult under normal circumstances to establish the "winner" in such debates, in this instance, not only did Jefferson *act* in accordance with Hamilton's theory, but a study by the Congressional Research Service of the Library of Congress also concluded that "Congress apparently accept[ed] Hamilton's view."[161] Even more importantly, Hamilton's view was also embraced by the Supreme Court in 1863 in *The Prize Cases*.[162]

Let us now take a closer look at Hamilton's assessment of the "commander in chief" power in *Federalist* No. 69—which is the source of the remainder of the quotation I extracted from Professor Schlesinger's testimony:

> **The President is to be the "Commander in Chief of the army and navy of the United States["] . . . . In most of these particulars the power of the President will resemble equally**

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[159] *See supra*, note 152 and accompanying text.

[160] 25 THE PAPERS OF ALEXANDER HAMILTON 455-56 (emphasis in original).

[161] CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION 327 (92d Cong., 2d. Sess, Senate Doc. 92-82, 1973).

[162] "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bund to accept the challenge without waiting for any special legislative authority. . . . The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." *The Prize Cases*, 67 U.S. (2 Blk.) 635 (1863).

> **that of the King of Great Britain and of the Governor of New-York. The most material points of difference are these — . . . . Secondly, the President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.**[163]

Note that Hamilton compares the President's power of "supreme command and direction of the military and naval forces" to that of the British King (and the Governor of New York—who was the most powerful chief executive of any of the States). This is hardly a "ministerial function," as Schlesinger asserts--if by that term Professor Schlesinger means that the President was to "lack discretion" in his decisions on where troops were to be deployed in peacetime, or how they were to be used during war. The exceptions to the King's power Hamilton enumerates are both unremarkable—being in each instances expressly provided in article I, section 8, of the constitutional text—and also fully consistent with the view that the Congress had no authority to override the President's judgement on military deployments. (The impeachment power was a check against the President intentionally initiating a foreign "war" without the sanction of Congress.)

It is very clear that Hamilton favored a very powerful executive in the new Constitution. Consider this excerpt from the transcript of one of Hamilton's proposals made at the Constitutional Convention by Robert Yates:

> **The executive to have the power of negativing all laws—to make war or peace, with the advice of the senate—to make treaties with their advice, but to have the sole direction of all military operations, and to send ambassadors and appoint all military officers, and to pardon all offenders, treason excepted, unless by advice of the senate.**[164]

Two points relating to this excerpt deserve comment. First, many of Hamilton's provisions were ultimately incorporated in the Constitution. Second, it can hardly be said to support the view that the Congress may direct the President where to deploy military forces.

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[163] THE FEDERALIST NO. 69 at 464-65.

[164] *Reprinted in* 4 THE PAPERS OF ALEXANDER HAMILTON 201.

Returning to the *Federalist Papers,* Hamilton emphasized to the American people the wisdom of the decision by the Constitutional Convention to establish a "vigorous executive"—consisting of a single President who could act without needing to obtain the approval of even an executive "council"—and to invest the office with certain exclusive powers relating to the national security. For example, Hamilton wrote in *Federalist* number 70 in March of 1788:

> **Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . . .**
>
> **That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.**
>
> **This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him. . . .**
>
> **In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, thought they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favourable circumstances palliate or atone for the disadvantages of dissention in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure, to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive, which are the most necessary ingredients in its composition, vigour and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national security every thing would be to be apprehended from its plurality.[165]**

One can only imagine how Hamilton would react to the present suggestion that Congress has a right to "veto" the President's decisions with respect to military deployments.

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[165] THE FEDERALIST NO. 70 at 471-73, 475-76 (J. Cooke, ed. 1961) (A. Hamilton).

Similarly, in *Federalist* No. 74, Hamilton noted that the Constitution's concentration of "military authority" in the President was consistent with the practice of most of the colonial State constitutions. He wrote:

> **The President of the United States is to be "Commander in Chief of the army and navy of the United States . . . ." The propriety of this provision is so evident it itself; and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the Chief Magistrate with a Council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part of the definition of the executive authority.**[166]

In arguing against giving the House of Representatives any role in the formation of treaties, Hamilton wrote:

> **The fluctuating, and taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, *secrecy* and dispatch; are incompatible with the genius of a body so variable and so numerous.**[167]

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[166] *Id.* No. 74 at 500.

[167] *Id.* No. 75 at 507 (emphasis in original).

James Madison

In fairness, it should be noted that, at Jefferson's urging,[168] Madison took up his pen and strongly disagreed with Hamilton's assertion in his *Pacificus* letters of broad executive powers in foreign affairs. For a variety of reasons, I would agree with scholars such as Myres McDougal and Asher Lans, who have concluded that Madison's *Helvidius* letters were deeply influenced by his "desire to befriend the French Republic . . . ."[169] Both Jefferson and Madison hoped that the United States would side with France in its war with Great Britain. Professor Marvin Meyers, editor of *The Mind of the Founder: Sources of the Political Thought of James Madison,* notes that Jefferson and Madison were unhappy with Washington's neutrality proclamation because they believed it neglected "America's moral, political, and treaty obligations to revolutionary France,"[170] and that Madison "saw a better chance of settling policy decisions his own way in Congress than in the executive branch, as his relations with Washington deteriorated."[171] Put simply, Madison was "forum shopping" in his *Helvidius* letters. (As we have already seen, Hamilton's view of Executive power over foreign affairs virtually paraphrased Jefferson's arguments of three years earlier[172]—and yet it was *Jefferson* who urged Madison to challenge him.)

Furthermore, Madison's *Helvidius* letters were in many respects in conflict with his own earlier views of relevance to this issue—statements made on occasions when he had no obvious policy preference to influence his analysis. Under the Articles of Confederation there was no "executive" and the power "to make war" was expressly vested in the Continental Congress. That language was initially carried over into the new draft Constitution, but Madison and Gerry moved to replace "make" with "declare." It may be useful to recount that decision at this time, as reflected in Madison's own notes from the Convention:

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[168] Jefferson's preoccupation with the welfare of France is apparent in his letter to Madison of July 7, 1793, enclosing copies of two of Hamilton's *Pacificus* letters, and urging his friend to respond. Jefferson wrote: "Nobody answers him, & his doctrines will therefore be taken for confessed. For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public. There is nobody else who can & will enter the lists with him.—Never in my opinion, was so calamitous an appointment made, as that of the present Minister of F[rance] here. Hot headed, all imagination, no judgment, passionate, disrespectful & even indecent towards the P. [President Washington] in his written as well as verbal communications, talking of appeals from him to Congress, from them to the people . . . ." 6 THE WRITINGS OF THOMAS JEFFERSON, (Ford ed.) at 338. This paragraph suggests that Jefferson, who had served as U.S. Minister to Paris and was known to favor the French position in its dispute with Great Britain, may have been motivated more by his affection for France (and dislike for Britain) than by concerns about Hamilton's constitutional theory. This conclusion is reinforced by the fact that Hamilton's basic conclusion about the control of foreign affairs was essentially paraphrased from Jefferson's memorandum of three years earlier. *See supra,* text accompanying notes 132 & 134.

[169] McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangable Instruments of National Policy,* 54 YALE L. J. 181, 249 (1945).

[170] THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 199 (rev. ed. 1981).

[171] *Id.* at 200.

[172] *See supra,* note 132 and accompanying text.

> **"To make war"**
>
> **M^r. Pinkney opposed the vesting this power in the Legislature. Its proceedings were too slow. It w^d. meet but once a year. the H^s. of Rep^s. would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. . . .**
>
> **M^r. Butler. The Objections agst. the Legislature lie in a great degree agst. the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.**
>
> **M^r. Madison and M$_r$. Gerry moved to insert "*declare*," striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.**
>
> **M^r. Sharman thought it stood very well. The Executive sh^d. be able to repel and not to commence war. ""Make" is better than "declare" the latter narrowing the power too much.**
>
> **M^r. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war. . . .**
>
> **M^r. Mason was agst. giving the power of war to the Executive because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "*declare*" to "*make*."**
>
> **On the motion to insert "*declare*"—in place of "*make*," it was agreed to.[173]**

Madison notes that the initial vote was 7 to 2 in favor of the change to "declare," but adds in a footnote that "On the remark by Mr. King that *'make'* war might be understood to 'conduct' it which was an Executive function, Mr. Elsworth gave up his objection, and the vote of Con. was changed to *ay*."[174] From this excerpt it appears reasonably clear that the Founding Fathers drew a distinction between "offensive" and "defensive" uses of armed force, and that they did not intend Congress to be involved in the actual "conduct" of military operations.

During the Constitutional Convention Madison argued that "[t]he President . . . would necessarily derive . . . much power and importance from a state of war . . . ."[175]

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[173] 4 THE WRITINGS OF JAMES MADISON 227-28 (G. Hunt ed. 1903).

[174] *Id.* at 228.

[175] *Id.* at 400.

Later, during the Virginia Ratification Convention, he even used an analogy to the power of the British King in explaining the separation of "war" powers under the proposed new Constitution. On June 14, 1788, Madison argued:

> **Mr. Chairman, the honorable gentleman has laid much stress on the maxim, that the purse and sword ought not to be put in the same hands, with a view of pointing out the impropriety of vesting this power in the general government. But it is totally inapplicable to this question. . . . The only rational meaning, is, that the sword and purse are not to be given to the same member. Apply it to the British government, which has been mentioned. The sword is in the hands of the British king. the purse in the hands of the parliament. It is so in America, as far as any analogy can exist. . . . [T]he president is to have the command; and, in conjunction with the senate, to appoint the officers. The means ought to be commensurate to the end. The end is general protection. This cannot be effected without a general power to use the strength of the union. . . . [W]here power can be safely lodged, if it be necessary, reason commands its cession. In such case it is imprudent and unsafe to withhold it. . . . I can see no danger in submitting to practice an experiment which seems to be founded on the best theoretic principles.**[176]

To give Congress—which already controls the "purse"—the power to decide ultimately upon the deployment of military forces would clearly be to *violate* Madison's theory of separating control of the "purse" from control of the "sword."[177]

Furthermore, Madison's speeches to the Virginia Ratification Convention establish that he shared Jefferson's concern about the "tyranny of the legislatures."[178] In proposing that the Constitution be amendment by adding a Bill of Rights, Madison noted on June 8, 1789:

> **In the declaration of rights which that country [Great Britain] has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether indefinite. . . . [I]t may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States . . .**

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[176] 3 *id*. 195-97.

[177] In a June 8, 1789 speech to the Virginia Convention, Madison proposed a series of amendments to the Constitution which included: "The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive . . . ." *Id*. at 379.

[178] *See supra*, note 147 and accompanying text.

> **In our Government it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other; because it is not the stronger branch of the system, but the weaker. It therefore must be levelled against the Legislative, for it is the most powerful, and most likely to be abused, because it is under the least control.**[179]

Madison also shared Jefferson and Hamilton's view that "exceptions" to the President's article II, section 1, "Executive" power which were vested in the Senate or the Congress were intended to be construed "strictly." On June 17, 1789, when he introduced a bill in the House of Representatives to establish the Department of Foreign Affairs, a debate arose over whether the President needed the approval of the Senate to remove the Secretary of Foreign Affairs (later that year redesignated Secretary of State). Madison argued that the President should be free to dismiss members of his cabinet despite the fact that the Constitution required Senate "advice and consent" to their appointment, and reasoned:

> **The doctrine . . . which seems to stand most in opposition to the principles I contend for, is, that the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment. I agree that if nothing more was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be a great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution no less explicit . . . ; it is that part which declares that *the Executive power shall be vested in a President of the United States*. The association of the Senate with the president in exercising that particular function, is an exception to this general rule; and *exceptions to general rules, I conceive, are ever to be taken strictly.*"**[180]

As *Helvidius* Madison spoke disdainfully of Locke and Montesquieu (of necessity, since, as he acknowledged, their theories of "executive" power undercut the position he advocated in 1793), arguing at one point "Writers . . . such as Locke, and Montesquieu . . . . are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry."[181] And yet, in *Federalist* No. 47, in expounding the meaning of the Constitution for the American people, he referred with favor to "the celebrated Montesquieu" as "[t]he oracle who is always consulted and cited" on the subject of separation of powers.[182] Not surprisingly, Madison subsequently stated that the task of replying to Hamilton's essay was "the most grating one I have ever experienced . . . ."[183]

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[179] 5 THE WRITINGS OF JAMES MADISON 380-82.

[180] 1 ANNALS OF CONG. 496-97 (1789)(emphasis added).

[181] THE MIND OF THE FOUNDER, *supra* note 170 at 203.

To take just one further example, consider Representative Madison's reaction to Washington's inquiry as to whether the "advice and consent" power of the Senate allowed that body to place conditions on the destination or grade of diplomatic nominees. As Washington recounted in his diary:

> **Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay's and Mr. Jefferson's—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no further than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.**[184]

This view is hardly consistent with the idea which has recently become vogue that the Constitution made Congress the "senior partner"[185] in the field of foreign affairs.

Traditional Congressional Deference

When members of the Constitutional Convention served in the early congresses, they established a strong practice of deference to the President in foreign affairs. For example, when the Department of Foreign Affairs was established in the First Congress the Secretary was charged simply with carrying out the directions of the President[186]—in sharp contrast to the Secretary of the Treasury, who was required to make regular reports to Congress.

Similarly, when funds were first appropriated for foreign affairs, the statute provided that:

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[182] THE FEDERALIST No. 47 at 324 (J. Cooke, ed. 1961) (J. Madison). *See also*, THE MIND OF THE FOUNDER, *supra* note 170 at 183.

[183] *Quoted in* GOLDSMITH, *supra* note 120, at 404.

[184] *Quoted in* 16 THE PAPERS OF THOMAS JEFFERSON 380 n. (J. Boyd, ed. 1961).

[185] *See, e.g.*, testimony of Arthur Schlesinger, Jr., before the Special Subcommittee on War Powers, 14 July 1988, p. 3 (typewritten).

[186] 1 Stat. 28 (1789).

> **[T]he President shall account *specifically* for all such expenditures of the said money *as in his judgment* may be made public, and also for the *amount* of such expenditures *as he may think it advisable* not to specify.**[187]

Within three years, this Contingent Fund of Foreign Intercourse had grown from $40,000 to $1 million—about 12 per cent of the entire federal budget.

The uniform practice in appropriating funds for foreign affairs during the first fifteen years under the new Constitution was summarized by Thomas Jefferson in a letter to Treasury Secretary Albert Gallatin in 1804:

> **The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties . . . . [I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the president.**[188]

When the Senate first established a standing Committee on Foreign Relations in 1816, one of its first reports stated:

> **The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and . . . . [f]or his conduct he is responsible to the Constitution. . . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.**[189]

The Need for Secrecy

A key reason for limiting the participation of the Senate and the House of Representatives in the business of foreign affairs was the Founding Fathers' belief that legislative bodies were not good at keeping secrets—and that secrecy was *essential* to the conduct of an effective foreign policy. This lesson had been reinforced during the experience under the Articles of Confederation, when the Continental Congress had been responsible for the exercise of Executive powers in the absence of an Executive.

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[187] *Id.* at 129 (1790)(emphasis added).

[188] 11 WRITINGS OF THOMAS JEFFERSON (Mem. ed.) at 5, 9, 10.

[189] *Quoted in* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, *supra* note 107 at 441 n.114.

Indeed, as early as 1775, the control of foreign affairs was largely delegated to a five member Committee of Secret Correspondence—chaired by Benjamin Franklin—whose sensitive proceedings were kept from most other members of Congress. When France agreed to provide covert assistance to the American Revolution,[190] Benjamin Franklin and Robert Morris (also a member of the Committee of Secret Correspondence) agreed that it was the committee's "indispensable duty to keep it a secret, even from Congress." Indeed, they observed: "We find, by fatal experience, the Congress consists of too many members to keep secrets."[191] (It is perhaps worth noting at this point that the Congress of 1988 has approximately ten times as many members as the First Continental Congress of 1774.)

The records of the debates in the Constitutional Convention establish that it was felt necessary to keep some legislative proceedings relating to foreign and national security affairs secret from the American people. Article I, section 5, provides in part that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy . . . ." Madison notes that an early version of this language provided "except such as relate to treaties & military operations."[192] When an effort was subsequently made to limit this clause to protecting only the journal of the Senate, it was noted that "cases might arise where secrecy might be necessary in both Houses. Measures preparatory to a declaration of war in which the House of Rep^{s}. was to concur, were instanced."[193] Further, a major reason why the power to consent to the ratification of treaties was limited to the Senate was that "the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature."[194]

The Founding Fathers believed that the new nation's interests could best be served if the Government had access to sensitive intelligence information about other countries; and they realized that foreign sources would be unlikely to share their information with the United States if it would be disclosed even to a Senate of 22 members. John Jay, in

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[190] Roughly 90 per cent of the gunpowder used by the American revolutionaries during the first two years of the war came from covert assistance from France, Spain, and other European enemies of the British. *See, e.g.*, A. DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 25 (2d. ed. 1971).

[191] *Quoted in* Sayle, *The Historical Underpinings of the U.S. Intelligence Community*, 1 INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE 5 (Spring 1986).

[192] 4 WRITINGS OF JAMES MADISON 166.

[193] *Id.* at 450.

[194] *Id.* at 397 (Mr. Sherman).

Federalist No. 64, explained this dilemma during the debate over ratification of the proposed Constitution:

> **It seldom happens in the negociation of treaties of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet he *will be able to manage the business of intelligence in such manner as prudence may suggest.***
>
> **They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. *So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.*[195]**

Indeed, the need for secrecy in certain governmental activities was seen as being so obvious that the delegates to the Federal Convention "readily adopted"[196] a series of "secrecy" rules, prohibiting members from taking copies of resolutions and providing that "nothing spoken in the House be printed, or otherwise published or communicated without leave."[197] James Madison made two noteworthy observations about the convention's extensive precautions to guarantee secrecy: (1) although the public was clearly anxious to learn what was taking place in Philadelphia, Madison saw no evidence of any public

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[195] THE FEDERALIST NO. 64 at 432, 433-35 (J. Cooke, ed. 1961)(J. Jay) (emphasis added).

[196] C. ROSSITER, 1787: THE GRAND CONVENTION 168 (1966).

[197] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 28 (1966).

"discontent . . . at the concealment"[198]; and (2) Madison was convinced that "no Constitution would ever have been adopted by the convention if the debates had been public."[199]

As in so many other areas, recent experience has affirmed the wisdom of the original scheme. Recent disclosures attributed to the former Chairman of the Senate Select Committee on Intelligence and the Speaker of the House of Representatives—to cite but two of many examples—suggest that George Washington's lack of confidence in "the secrecy of the Senate"[200] was not simply paranoia.

Executive Privilege

Related to the historic legislative deference in foreign affairs and the need for secrecy, is the constitutional doctrine of Executive Privilege—which the Supreme Court has recognized is at its strongest in the national security realm.[201]

The initial debate over a national security executive privilege occurred in late March of 1792, after the House of Representatives called for documents on the failed military expedition of Major General St. Clair. Washington, who was concerned that his response, "so far as it should become a precedent, . . . should be rightly conducted," called a meeting of his cabinet.[202] Discussion continued over a two day period, with Washington concluding that he "could readily conceive there might be papers of so secret a nature as that they ought not to be given up." The cabinet met again on April 2 and reached unanimous agreement on the issue. As Jefferson explained:

> **We had all considered and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the**

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[198] Madison letter to Jefferson, July 18, 1787, *reprinted in* 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 132 at 600.

[199] *Quoted in* ROSSITER, *supra* note 196 at 167.

[200] 1 THE WRITINGS OF THOMAS JEFFERSON 190-91 (P. Ford, ed. 1892).

[201] *United States v. Nixon*, 418 U.S. 683, 705-08, 710-12 (1974).

[202] Among many sources that discuss this incident, *see* Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959).

> **committee should instruct their chairman to move the House to address the President.**[203]

Jefferson "agreed . . . to speak separately to the members of the [House] committee, and bring them by persuasion into the right channel."[204] As a result, the House rephrased its request—directing it to the President. The practice of addressing such requests to the President with the qualification "if not incompatible with the public interest" became standard procedure with respect to inquiries concerning national security matters.[205]

It is perhaps worth noting that the Washington Administration's unanimous viewpoint on what is now called "Executive Privilege" was not inconsistent with most of the views expressed in the House of Representatives at the time. When the St. Clair resolution, discussed above, was first introduced it was challenged by legislators as incompatible with the Constitution. In its defense, Representative Boudinot explained: "The present proposition goes no further than a simple request. Having signified the wish of the House, the President may adopt such measures in relation to the subject as he may see proper."[206]

The issue arose again in 1794, when the Senate sought copies of correspondence prepared by the United States Ambassador to France. Consistent with established practice, Attorney General William Bradford wrote that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed."[207]

When the House in 1796 requested documents relative to the Jay Treaty in connection with an appropriations bill to implement the treaty, it was widely acknowledged in the House debate that the President had discretion to refuse to provide any sensitive parts of the requested information. Indeed, only one member of the House appeared to argue that the House had an absolute constitutional right to the documents.[208]

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[203] 1 WRITINGS OF THOMAS JEFFERSON 303-04 (Mem. ed.).

[204] *Id.* at 305.

[205] *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321 (1936), quoted *infra* note 92 and accompanying text; and CORWIN, *supra* note 107 at 113.

[206] 3 ANNALS OF CONG. 490 (1792).

[207] *Quoted in* A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 84 (1976). Sofaer notes that Washington "accepted the view esposed by his Cabinet that he could withhold information in the public interest," and in his reply to the Senate's request for documents the President asserted that he had "directed copies and translations to be made [for the Senate]; except in those particulars which, in my judgment, for public considerations, ought not to be communicated." These included politically sensitive and highly critical comments by Gouverneur Morris about French political leaders. Sofaer notes that "no further Senate action was taken to obtain the material withheld." *Id.*, at 84-85.

[208] 5 ANNALS OF CONG. 601 (1796) (Rep. Lyman).

In a strongly worded message, President Washington refused to make the documents available to the House of Representatives. Although James Madison—who had introduced the initial request for the documents—criticized the President's message, in the process he recognized the existence of a national security executive privilege. His objection was not that the President had denied information to Congress, but that the President's *justification* for so doing had involved a determination not of the sensitivity of the documents but of the need of the House for such information. As reported in the *Annals of Congress,* Madison argued:

> **He thought it clear that the House must have a right, in all cases, to *ask* for information which might assist their deliberations on the subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure. He was as ready to admit that *the Executive had a right, under a due responsibility, also, to withhold information* when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply on a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticise it. . . . It belonged, he said, to each department to judge for itself. *If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them,* because he was the competent though a responsible judge within his own department.**[209]

In June of 1807, Thomas Jefferson wrote:

> **All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. Hence, under our Constitution, in requests of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed . . . . The respect mutually due between the constituted authorities, in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same**

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[209] 5 ANNALS OF CONG. 773 (1796) (emphasis added).

> **candor & integrity to which the nation has in like manner trusted in the disposal of it's [*sic*] judiciary authorities.**[210]

One of the great Senate debates over separation of powers in foreign affairs occurred in 1906, when Senator Augustus Bacon proposed a resolution calling upon President Roosevelt to provide the Senate with negotiating instructions and other background materials regarding Morocco. Bacon's motion was opposed as an invasion of the President's constitutional powers by Senator John Coit Spooner, a three-term veteran of the Senate and one of the best constitutional lawyers of his time.[211] In a major statement on the power of the Senate and the President in foreign affairs, Senator Spooner told his colleagues:

> **Mr. President, the three great coordinate branches of this Government are made by the Constitution independent of each other except where the Constitution provides otherwise. We have no right to assume the exercise of any executive power save under the Constitution . . . . We as the Senate, a part of the treaty-making power, have no more right under the Constitution to invade the prerogative of the President to deal with our foreign relations, to conduct them, to negotiate treaties, and that is not all—the conduct of our foreign relations is not limited to the negotiation of treaties—we have no more right under the Constitution to invade that prerogative than he has to invade the prerogative of legislation.**[212]

At the end of Spooner's lengthy presentation, which cited a wealth of historic precedent and legal authority, Senator Henry Cabot Lodge—a Harvard Law School graduate who ultimately served six terms in the Senate, became its Majority Leader, chaired the Committee on Foreign Relations, and was a leader of the Senate's successful effort to reject the Versailles Treaty (thus keeping the United States out of the League of Nations)[213]—observed: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . which we have heard from the Senator from Wisconsin [Mr. Spooner] this afternoon."[214]

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[210] 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 200 at 57 n.1.

[211] Senator Spooner declined invitations to serve as U.S. Attorney General in the McKinley Administration, and to serve as Secretary of State under President Taft.

[212] 40 CONG. REC. 1420 (1906).

[213] Although in retrospect politically controversial, the Senate's decision to refuse to consent to the ratification of the Versailles Treaty was clearly within its constitutional powers.

[214] 40 CONG. REC. at 1431.

The late Professor Edwin S. Corwin noted that, during this debate, even Senator Bacon "conceded that 'the question of the President's sending or refusing to send any communication to the Senate is not to be judged by legal rights, but [is] . . . one of courtesy between the President and that body . . . .'" Corwin concluded:

> **The record of practice amply bears out this statement . . . . So far as practice and weight of opinion can settle the meaning of the Constitution it is today established that the President . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments.[215]**

Consider also this excerpt from volume three of Professor Westel Willoughby's classic treatise, *The Constitutional Law of the United States*:

> **§ 968. Information to Congress.**
>
> **The constitutional obligation that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," has, upon occasion, given rise to controversy between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.**
>
> **The discretionary right of the President to refuse information to Congress has been exercised from the earliest times.[216]**

The Supreme Court, too, has recognized the existence of a constitutional power of the President to deny national security information to Congress. In the landmark 1936 case of *United States v. Curtiss-Wright Export Corp.*, the Court noted:

> **[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives**

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[215] CORWIN, *supra* note 107 at 211-12.

[216] 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1488 (2d ed. 1929).

> **the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . .**
>
> **The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.[217]**

The Powers to "Declare War" and Serve as "Commander in Chief"

Before moving on to part III of my testimony, let me briefly address the relationship between the power of Congress "to declare war" and that of the President to be "commander in chief." It is critically important that the Congress understand that its role in the process of "war" was intended to be a limited one. As Hamilton explained in the *Federalist Papers,* "Energy in the executive is . . . . essential to the protection of the community against foreign attacks."[218] Congressional powers permitting interference with the conduct of foreign affairs by the Executive were set forth in *specific* terms and were intended to be *construed strictly.*[219] Madison moved during the Constitutional Convention to change the initial draft language—drawn from the Articles of Confederation—giving Congress the power "to make war" to the more limited power "to declare war" in order to leave the President free to defend the new nation against foreign aggression ("sudden attacks") and to make it clear that the "conduct" of war was "an Executive function."[220]

Only Congress could *create* an Army, but once established it was the President's constitutional discretion to determine how it was deployed—with the sole exception that he could not "declare war," and that would clearly include not only the diplomatic act but also the substantive act of initiating offensive[221] hostilities against another State in such a manner as to commence a *de facto* "war"—without first seeking the affirmative approval of both houses of Congress. Thus, for example, when President Jackson decided it would be wise to use military force to compel France to pay its debts a century and a half ago, Senator Henry Clay was fulfilling his proper constitutional role in objecting to and ultimately blocking the President's plan.

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[217] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321 (1936) (emphasis in original)

[218] FEDERALIST No. 70 at 471 (J. Cooke, ed. 1961).

[219] *See supra*, notes 132, 158, & 180 and accompanying text.

[220] *See supra*, note 173, and accompanying text.

[221] Declarations of war have not historically been associated with "defensive" uses of force. *See supra* note 83 and accompanying text.

The reality is that the type of hostilities which the Founding Fathers were trying to insure would be subject to a veto by Congress have essentially been *outlawed* by the United Nations Charter.[222] The widespread practice of the eighteenth century of launching wars to conquer new territory or resolve political or economic differences is now forbidden. And that is primarily what the Founding Fathers were seeking to control—not "defensive" uses of force resulting from aggression by foreign states or terrorist bands.

The power of Congress to "declare war" was understood by the Founding Fathers to be in its essence a "veto" or "negative"[223] over a presidential decision to *initiate* a war; and not an indirect way of vesting in Congress such "commander in chief" functions as deciding where to deploy troops during peace or war. In the 1833 edition of his *Commentaries on the Constitution of the United States*, Justice Joseph Story said of the commander-in-chief clause:

> **The command and application of the public force, to *execute the laws, to maintain peace, and to resist foreign invasion,* are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it. Of all of the cases and concerns of government, the *direction of war* most peculiarly demands those qualities, which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted *exclusively* with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure.**[224]

Here Justice Story makes it clear that the President's "command" is not limited to times of declared war, but is necessary, *inter alia,* to "maintain peace." And the power is vested "exclusively" in the President—the arguments against an "executive council" would be multiplied were the Senate permitted to "second guess" the President's decisions on troop deployments.

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[222] *See* U.N. Charter, article 2(4).

[223] *See supra,* notes 102, 126, 132 and accompanying text.

[224] J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 768 at 546-47 (*reprinted* 1988) (emphasis added).

Paraphrasing Chief Justice John Marshall's decision in *Marbury v. Madison*,[225] Justice Story adds: "In the exercise of his political powers he [the President] is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive."[226] And in discussing the President's exclusive power to conduct foreign negotiations, he emphasizes time and again "the utter impossibility of secrecy"[227] in "a large assembly" such as the Congress. Story notes that the Founding Fathers *could* have vested these powers in Congress and given it the option of "employ[ing] the president" as an "agent," but this was unsatisfactory because (1) the Congress "would also have the option of refraining" from relying on the president, and (2) "Nor could it be expected, that the president, as a mere ministerial agent of such branch, would enjoy the confidence and respect of foreign powers to the same extent, as he would, as the constitutional representative of the nation itself; and his interposition would of course have less efficacy and weight."[228] Thus, this approach was rejected.

In 1868, Professor John Norton Pomeroy wrote an excellent *Introduction to the Constitutional Law of the United States* in which he stated:

> [T]he disposition of the navy is left entirely to him [the President] as Commander in Chief. . . . Congress raises and supplies armies and navies, and makes rules for their government, and there its power and duty end; the additional power of the President as supreme commander is independent and absolute. . . .
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> Even the general clause of Article I, Section VIII, § 18, which authorizes Congress to make all laws *necessary and proper* to carry into execution the powers conferred upon any department of the government, *cannot permit the Congress to assume the capacities and duties of Commander-in-Chief*. . . . [I]n time of peace he [the President] has an independent function. He commands the army and navy; Congress does not. He may make all dispositions of troops and officers, stationing them now at this post, now at that; he may send out

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[225] Consider these excerpts from Marshall's opinion: "By the constitution . . . the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . ." "They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive." "[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165-66 (1803).

[226] STORY, COMMENTARIES ON THE CONSTITUTION § 814 at 579.

[227] *Id.* § 779 at 555.

[228] *Id.* § 781 at 556.

> **naval vessels to such parts of the world as he pleases; he may distribute the army, ammunition, and supplies in such quantities and at such arsenals and depositories as he deemed best.**[229]

Yale Law School Professor William Howard Taft (who also, of course, served as President and a member of the Supreme Court), wrote in *Our Chief Magistrate and His Powers* in 1916:

> **The President is the Commander-in-Chief of the Army and Navy, and the Militia when called into the service of the United States. Under this, he can order the army and navy anywhere he will, if the appropriations furnish the means of transportation. . . .**[230]

In 1920, Professor Quincy Wright added in an article in the *Columbia Law Review*:

> **Authority supported by practice shows that the President has independent power under the Constitution to employ the military or naval forces of the United States at home or abroad except as restricted by international law, in time of peace to enforce the laws and treaties, to protect officers of the United States. . . to protect the privileges and immunities of American citizens, to prevent foreign aggression and to protect inchoate interests of the United States abroad. . . . It is true that Congress can authorize the use of Armed Forces either by declaration of war or by joint resolution in time of peace . . . but *Congress cannot impair the concurrent power of the President to authorize the use of forces as given by the constitution.***[231]

Professor Westel Willoughby, in his classic treatise *Principles of the Constitutional Law of the United States,* noted that "[t]he President's military powers exist in times of peace as well as during war," and explained:

> **[U]pon his own discretion, the President is able to send American vessels of war to whatever ports he sees fit, whether for the purpose of friendly visits, or furnishing protection to American citizens or their property, or of making a**

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[229] J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 569, 588-91 (1868) (emphasis added).

[230] W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 94 (1916).

[231] Wright, *Validity of the Proposed Reservation to the Peace Treaty*, 20 COL. L. REV. 135-36 (1920).

> **"demonstration" in order to obtain desired action on the part of the State thus overawed.[232]**

Historically, Congress has recognized time and again that it has no constitutional authority to dictate where the President deploys whatever military force is placed at his command. Consider, for example, this 1922 exchange from the *Congressional Record* between Senator William Borah and Senator James Reed, who had proposed that Congress direct the President to withdraw U.S. soldiers from Germany following World War I:

> **MR. REED of Missouri. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?**
> **MR. BORAH. I do.**
> **MR. REED of Missouri. So do I . . . . Would it not be easier to bring the troops home than it would be to have the proposed [disarmament] conference?**
> **MR. BORAH. You can not bring them home, nor can I.**
> **MR. REED of Missouri. We could make the President do it.**
> **MR. BORAH. We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, *I do not know if any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.***
> **MR.REED of Missouri. *I wish to change my statement. We can not make him bring them home.*[233]**

Those of you who have studied history know that William Borah, an isolationist, was one of the most powerful foes of the League of Nations and a strong advocate of the prerogatives of the Senate in foreign affairs. He went on to serve for many years as the Chairman of this Committee—and, in the view of many historians, contributed to the outbreak of World War II by his efforts to curtail the powers of the President to keep America out of war during the 1930's.[234] And yet he realized full well that under the Constitution the Congress had no power to direct the movement of troops—during wartime or when the nation was at peace. A similar dialogue occurred on the Senate floor on the eve of World War II, when other isolationists acknowledged that the Senate lacked the power to prevent the President from sending draftees to Europe.[235]

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[232] W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 234 (2d ed. 1934).

[233] 64 CONG. REC. 993 (1922) (emphasis added).

[234] *See supra*, notes 5 & 16 and accompanying text.

[235] *See* R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 28-29 (1983).

Another pre-World War II isolationist, Senator Arthur Vandenberg, had undergone a major transformation by the time he became the distinguished Chairman of this Committee. In April of 1948, while serving as Foreign Relations Committee Chairman, Senator Vandenberg said on the Senate floor:

> **There is a general constitutional power resident in the President of the United States as commander in chief which has been exercised a hundred or a hundred and twenty-five times in the last 150 years, to use the armed forces of the United States externally for the protection of American life and property and the national interest without the direct license and direction of the Congress of the United States.**[236]

Nor, for that matter, is there a lack of judicial commentary on this point. In 1866 Chief Justice Chase wrote in *Ex parte Milligan*:

> **Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.* . . . [N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law.**[237]

The United States Court of Claims took a similar position in the case of *Swaim v. United States*:

> **Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force *Congress cannot take away from the President the supreme command* . . . . Congress cannot in the disguise of "rules for the government" of the Army impair the authority of the President as commander in chief.**[238]

And yet, despite this powerful collection of authority, this subcommittee has heard witness after witness reassure you with statements like:

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[236] 94 CONG. REC. 4747 (1948).

[237] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (emphasis added).

[238] *Swaim v. United States*, 28 Ct. Cl. 173, *aff'd* 165 U.S. 553 (1897)(emphasis added).

> **I do not think . . . that it is reasonable to argue that it is beyond the constitutional authority of the Congress to enact legislation of the nature of the War Powers Act.[239]**

and

> **[N]o one can doubt that the original intent of the Framers was to assure Congress the major role in the formulation of foreign policy . . . Yet the present administration somehow manages to champion a theory of inherent presidential prerogative in foreign affairs that would have appalled the Founding Fathers.**
>
> **This theory of presidential supremacy has only crystallized in recent times.[240]**

Believing as I do in the validity of Mr. Jefferson's admonition that "he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors," perhaps you will understand my concern that on the basis of such testimony you may emerge from these hearings worse off than you were when you entered them.[241]

III

The War Powers Resolution and the Constitution

Mr. Chairman, with the Committee's permission I would like at this point to take a quick look at some of the specific provisions of the current War Powers Resolution.

As you know, it consists of ten sections. In the interest of time, I shall focus upon the provisions which I find to be constitutionally suspect, and then make a general comment about the underlying standard of "imminent involvement in hostilities."

Section 2(c)

Section 2(c) appears to limit "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," to three circumstances: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

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[239] Statement of Senator Charles McC. Mathias, Jr., July 13, 1988, p. 1.

[240] Statement of Arthur Schlesinger, Jr., July 14, 1988, p. 4.

[241] Let me emphasize that I am basing my comment entirely upon the prepared written testimony that I have been able to obtain—which I realize may not reflect the quality of the oral testimony or subsequent discussions. In addition, some of the prepared statements I have read, such as those by Judge Sofaer—who as a Columbia Law Professor was commissioned by the American Bar Association to prepare what turned out to be a superb book on this subject, and thus is one of the nation's foremost scholarly authorities in this area—and Senator John Tower, have been quite excellent.

If this provision is intended to have the effect of law—and the language would certainly suggest that—it is unquestionably *unconstitutional* as an infringement upon the independent constitutional power of the President. In December 1984 I shared a panel with Senator Javits (and my colleague here this morning, Mr. Reveley) in New York City under the auspices of the American Branch of the International Law Association, during which Senator Javits *acknowledged* that this language did not recognize such independent constitutional authority as the President's power to rescue endangered American citizens abroad or on the high seas.[242] Under the Constitution, so long as Congress provides the Commander in Chief with an Army or a Navy, it is his to deploy and utilize as he deems necessary—with the single exception that if he concludes it is necessary to initiate offensive "war" against another State he must first obtain the statutory approval of both houses of Congress.

Section 3

I am a *strong* believer in the importance of "consultation," and during my service in the Department of State fought hard to replace the all too frequent practice of "informing" or "notifying" Congress of decisions already made with a policy of seeking the wisdom of congressional leaders *prior* to decisions being made. The way it is worded, I am not opposed to the principle reflected in this provision. For *political* if not legal reasons, it is essential that the President keep Congress informed about major foreign policy initiatives—consistent, of course, with the need to preserve the operational security of the mission and the safety of our military forces and other personnel.

However, consultation ought to be a process engaged in between co-equal branches of our government out of mutual self-interest and a spirit of comity. It is not a process that either branch should *impose* upon the other. As a matter of constitutional law, it is well established that Congress may not *compel* the President to provide national security information which in his judgement should be kept secret.[243]

The President of the United States is not your "agent," but a co-equal representative of the American people. It is both *unseemly* and *unconstitutional* for Congress to "direct" the President to consult about sensitive matters confided by the Constitution to his discretion—and the language of the current bill ("The President . . . *shall* consult") certainly implies a legal duty. As a matter of law, of course, such language does not alter the constitutional distribution of powers and is thus without effect.

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[242] *See, e.g., Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); and *In Re Neagle* 135 U.S. 1, 63-64 (1889).

[243] *See supra*, notes 190-200 and accompanying text.

There are great benefits for the President in a cooperative, bipartisan (or nonpartisan) relationship with Congress; and the President should realize that without the understanding and approval of Congress and the American people his foreign policy initiatives are unlikely to be viable over the long run. This reality may be a political rather than a legal check, but it is just as important.

In a sense, there is a form of "checks and balances" inherent in this relationship. The President needs your understanding and support, so he has an incentive to cooperate and keep you informed. (He also, of course, needs appropriations for many activities.) The Senate and the Congress want information, and if they behave responsibly—and don't continually "leak" our nation's secrets to the world—it is in the President's *self-interest* to keep you informed. But when you word your request as a *directive*, pretending by statute to *compel* the President to comply, you provide the President with a strong *disincentive* to cooperate—lest he appear to acquiesce to the unconstitutional demand—without in the process altering in any manner the underlying constitutional realities. The simple fact is that you can't alter the constitutional separation of powers by a simple *statute*.

Section 4

Again, as a matter of political wisdom I strongly favor a responsible Congress and Senate being kept up to date about major foreign policy initiatives—to the extent consistent with operational success. The Founding Fathers clearly did not intend for Congress to be given the more sensitive secrets of military or foreign policy—and the behavior of both Houses during the past two decades has served to confirm the wisdom of the original scheme.

I haven't studied the issue, but my expectation is that few (if any) members of Congress were informed in advance about the details of the D-Day invasion during World War II. Congress has no responsibility for the operations of war, and the dangers to the lives of our troops and the success of such operations which would result from even inadvertent disclosure justify a decision to limit advanced operational information to those in the chain-of-command with a genuine "need to know."

On the basis of fifteen years of practice I think the detailed "reporting" requirement is on balance a bad provision—at least in the current political atmosphere on the Hill. If you will recall, both Jay and Locke observed that the details of war and foreign policy could not be managed effectively by antecedent "law." And yet, when you demand that the President provide you with such details as the "scope and duration" of military operations, and then treat them essentially as legally binding commitments, you require the Executive to establish precisely the sort of artificial constraints in advance of developing situations that Locke and his contemporaries recognized were incompatible with the effective conduct of military operations.

Part of the problem with section 4 may result as much from current attitudes in Congress than from the language of the provision itself. If it were understood that the details in a "war powers" report were simply good faith "estimates" which could be departed from by the President when necessary to respond to changes by other participants in the conflict or newly perceived strategic or tactical opportunities, the only serious risks would be public disclosure of the information and thus perhaps a military edge for our adversaries and an increased risk to the lives or safety of some of our forces. Those, of course, would be serious risks indeed. But in today's political environment, the President can be confident that whatever "rules of engagement" (or "scope . . . of the hostilities or involvement") he provides to Congress will be viewed by many in Congress as legally binding commitment—*precisely* the sort of antecedent restrictions which Locke and others were trying to avoid—and we can be reasonably certain that if a shift in strategy by our adversaries leads the President to depart from the "game plan" provided to Congress, the President will promptly be accused of "lying to Congress" or "breaking the law" by his political opposition.

But these are *policy* considerations, and there is a more fundamental *legal* problem with this section. Put simply, I don't believe you have the constitutional *power* to compel the President to provide meaningful "reports" about ongoing hostilities. If you conduct yourselves honorably, as a co-equal branch of the national government, and treat the President with the respect and dignity appropriate to such a relationship, I don't believe you will *need* a statute to receive cooperation. History demonstrates that the cooperation which characterized the early years of the Vietnam conflict broke down not because of the Executive but because members of Congress—who had played a full partnership roll in the "takeoff"—sought to find "parachutes" before there was a crash landing.

Section 5(b)

Section 5 contains in my view the most *flagrantly* unconstitutional parts of the War Powers Resolution. Section 5(b) provides that if Congress does not act to authorize the continued presence of U.S. forces within 62 (or 92[244]) days of the initial commitment, the President must withdraw forces from any situation in which "imminent involvement in hostilities is clearly indicated by the circumstances"—even if not a single shot has been fired and the American forces are in a purely *defensive* setting and "in harm's way" simply by virtue of possible foreign aggression or terrorist attack. (Deploying armed forces on your own territory, on the high seas, or on the territory of a friendly foreign country in such a manner that they may be attacked by a determined aggressor has never been viewed as an "act of war," and does not infringe the power of Congress to veto a presidential decision to initiate a "war" against another State.)

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[244] If necessary to protect the safety of the troops.

This is a direct effort by Congress to exercise the "Commander in Chief" power vested exclusively by the Constitution in the President. The situation is not in my view a close call. The way the Constitution was designed to work is clear. If the President decides that the national interests require commencing a "war" against another State, he must obtain the approval of both the House and the Senate in advance of initiating such a conflict. Like other exceptions to the President's "Executive" powers, the power "to declare war" was intended to be construed narrowly. It gives Congress a "veto" over a presidential decision to launch an offensive "war," but it does *not* empower you to seize control of the President's independent constitutional powers on the theory that the President's management of military deployments might lead another State to commit aggression against the United States.

Virtually any military deployment is accompanied by some risk—many experts believe President Truman's decision to pull U.S. combat forces out of South Korea in 1949 was a significant factor in the North Korean decision to invade the South the following year. That is precisely the kind of judgment call that the Founding Fathers left to the *uncontrolled discretion* of the President.

While it is true that the President might use his Commander in Chief powers in such a way as to increase the likelihood of involvement in war, the experience of the Neutrality Acts of the 1930's demonstrates that when his hands are tied the prospects of war from foreign aggression increase substantially. Recent history—for example the so-called "Clark Amendment" of 1975, which prohibited the President from assisting the non-communist majority in Angola to resist Soviet and Cuban intervention; and in the end led to the introduction of more than 50,000 Cuban combat troops in Angola and other parts of Africa before being repealled by a wiser Congress—confirms that lesson. Should the people elect an *evil* President who seeks to initiate offensive "war" without first consulting Congress, Congress has a "check" in the power of impeachment.

Apart from its *legal* infirmities, consider for a moment what section 5 of the War Powers Resolution actually does in practice. Consider the signal it sends to our friends and adversaries alike. Countries which might wish to associate themselves with the United

States in deterring international aggression are told that the American Commander in Chief only has permission to function for sixty days. After that, he is at the mercy of a disorganized legislative establishment which has demonstrated the most incredible irresponsibility time and again in the recent past. (Consider, for example, the Clark Amendment and the "on again, off again" votes to resupply the so-called "Contras" in Central America.) To make it even more outrageous, the statute tells our friends (and our enemies) that Congress has determined in advance that, in the event it can't make up its mind whether the President is right or wrong, it will assume *as a matter of law* that the President is *wrong*. Inaction by Congress means the President loses his independent constitutional power—a "silent veto" works to accomplish something otherwise achievable only through a constitutional amendment.

And what signal do you send the most radical anti-American terrorists around the world? Whenever an American soldier is injured around the world, at least *someone* in Congress goes after a headline by charging that "hostilities" have begun and the War Powers Resolution must be implemented. (And if you believe this is far-fetched, recall the call for the Resolution's implementation by Representative Findley in 1978 because unarmed U.S. airman were at the Lubumbashi airport in Zaire when Belgian and Zairian troops got into a shoving match (no shots were fired) over ownership of a Peugeot automobile the Belgians claimed had been a "gift" from a local businessman. Findley charged in an alarmed speech on the House floor: "It is difficult to conceive of a situation where hostilities could have been more imminent without actually breaking out."[245] Actually, I could probably think of a few. What I probably could not do is come up with a more ridiculous factual situation which might prompt someone in Congress to suggest that the President was infringing upon the power of Congress to "declare war"—ostensibly the underlying foundation for this statute.)

In the process, of course, you send a signal around the world that Congress has essentially delegated broad legal authority to any anti-American foreign crackpot who can aim a rifle or toss a grenade at an American GI to set the "war powers" clock in motion. You have told them that all they have to do is "kill a few Marines" and the opposition party in Congress will reflexively go after the President's throat. At minimum, the American government enters a crisis and the American people—told by their legislators that their President is a "lawbreaker"—become further confused and demoralized. What a wonderful reward for an anti-American terrorist, and all he has to do to "win" is to attack an American GI.

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[245] TURNER, THE WAR POWERS RESOLUTION 69.

But there is also the "grand prize" to be won. With real luck, killing a few American might start the war powers clock and result in the withdrawal of all American military forces from the region. That would be worth some serious effort. (Recent precedent suggests that if a terrorist can kill 241 American servicemen he will not only get the American troops out, but may bring down one of America's most capable four-star generals as well.) And Governor Dukakis has reportedly already declared that he will if elected abide by this "law."[246] The big question in my mind is what the American voters are going to do when they realize that their elected representatives have placed a **bounty** upon the lives of their sons and daughters serving in uniform abroad. (Senator Nye might have some advice on that.)

Don't misunderstand me. I recognize that there are reasonable individuals who honestly believe that world peace can be best preserved by tying the hands of the President of the United States. I don't question the sincerity of Senator Nye, or Neville Chamberlain, or many of those who today believe the War Powers Resolution will promote "peace." I think all three are *incredibly* wrong—but quite possibly sincere. And more importantly, with respect to those who gave us the War Powers Resolution and continue to keep it on the books, I think they are breaking the law. This provision is a flagrant violation of the Constitution, and members who support it are in my view violating their oath of office.

Section 5(c)

This is the "legislative veto" provision, and it is obviously a direct violation of article I, section 7, of the Constitution, which provides in part:

> **Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.**

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[246] One hopes that, once the election is over, if he is elected, experience will persuade Mr. Dukakis to alter his views on this subject—as President Carter did. Few things would be more dangerous to our constitutional separation of powers than seeking to balance a renegade "Imperial Congress" with a weak and inexperienced President seeking above all to avoid offending the other branch.

This is not particularly complex language, and Members of good faith must recognize that it prohibits the procedures of section 5(c) of the War Powers Resolution, which provides:

> **(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.**

Unlike a Joint Resolution, which must be submitted to the President for his signature before becoming "law," a concurrent resolution requires only the approval of simple majorities of each House of Congress. Concurrent resolutions are perfectly acceptable for expressing "opinions" of Congress or dealing with "housekeeping" matters within the independent authority of the legislative branch, but they are not a constitutional means of giving binding direction to the executive branch. (Furthermore, for this particular "legislative veto" provision to be valid one would have to conclude that Congress may amend the Constitution by concurrent resolution, since all decisions on deploying armed forces are vested by the Constitution in the exclusive discretion of the Commander in Chief.)

In the aftermath of the Supreme Court's holding in *INS v. Chadha*,[247] there appeared to be a consensus that section 5(c) of the War Powers Resolution was unconstitutional. I shall not dwell on this at length, because it is my understanding that the bipartisan leadership of this committee, on the advice of your chief counsel, "conceded that the court decision removes" this section of the law, but did not strike down the entire statute because of the separability clause.[248]

I must say that I was deeply troubled by the attempt by House Foreign Affairs Committee Chairman Dante Fascell, in his July 13 testimony before this subcommittee, to defend section 5(c) as within the powers of Congress. He argued:

> **Finally, a word of caution about section 5(c). Following the Supreme Court decision in Chadha v. I.N.S., a common point of view had evolved that section 5(c) must be unconstitutional because it provides for a "legislative veto."**
>
> **First, the Supreme Court, indeed no court, has ruled that section 5(c) of the War Powers Resolution is**

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[247] *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

[248] Goshko, "War Powers Act Seen Surviving High Court Ruling, *Washington Post*, June 28, 1983, p. A4.

> **unconstitutional. Second, the concurrent resolution described in section 5(c) is not, strictly speaking, a "legislative veto". A legislative veto occurs when the Congress has granted the president explicit statutory authority and then seeks to revoke that authority through the instrument of a concurrent resolution. The War Powers Resolution does not grant the president, explicitly or implicitly, any authority he does not already have under the Constitution. In fact, section 5(c) is operative only if there has been no prior legislative grant of authority (i.e., in the absence of a declaration of war or specific statutory authorization).**
>
> **Since the Congress has never tested its power under section 5(c), I would be very cautious about abdicating that power simply because of a presumption held by some that it may be in error.**

I have great personal respect and affection for Chairman Fascell, and in this case I can only assume he relied excessively upon creative staffwork. He is by academic training an attorney, and he must certainly understand the doctrine of *stare decisis*. When the Supreme Court tells Congress that it may not "legislate" in violation of article I, section 7, of the Constitution, it is unnecessary for it to list every conceivable piece of legislation which will be affected by its ruling. However, of the many hundreds of statutes containing unconstitutional "legislative vetoes," it is perhaps noteworthy that Justice White, in his dissent, expressly did mention the War Powers Resolution as his first example of laws which were struck down in part by the *Chadha* decision. He complained that the Court had not only invalidated the provision in the Immigration and Nationality Act challenged in the *Chadha* case, "but also sounds the death knell for nearly 200 other statutory provisions . . . . operating on such varied matters as war powers and agency rulemaking . . . ."[249] For Chairman Fascell to say that "no court . . . has ruled that section 5(c) of the War Powers Resolution is unconstitutional" is akin to saying that "no statute or court decision has stated that *Dante Fascell* may not commit murder." Under our legal system, it is not necessary that criminal law statutes identify by name every individual to whom its provisions apply; and by the same principle the Court need not identify every statute by name which is affected by a clearly defined principle of law.

Chairman Fascell is correct in his second observation that the War Powers Resolution does not seek to use a legislative (or concurrent resolution) veto to revoke authority it has vested in the President; but this "victory" hardly strengthens his case. The reason his statement is correct is because control over military troops deployments is already vested in the President by article II, section 2, of the Constitution—which designates him "Commander in Chief." Congress doesn't possess that power in the first place, and thus can not possible "delegate" it to the President. But to reason from that reality that it is permissible for Congress to deprive the President of his independent constitutional power by concurrent resolution—a mechanism clearly invalidated by the *Chadha* decision when used to "legislate" on matters otherwise confided to the discretion of Congress—is to conclude that Congress may effectively amend the Constitution by a simple majority vote in both houses. It follows *a fortiori* that if Congress may not use a legislative veto to withdraw portions of its own constitutional powers which have been delegated by statute to the President, it may not use such a procedure to deprive the President of authority vested directly in his office by the American people through the Constitution—and thus denied to Congress under the doctrine of separation of powers.

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[249] 462 U.S. at 967.

If there is any doubt about this issue I would be happy to address it in more detail for the record.

The Legal Standard is "War," Not "Hostilities"

In an effort to make the War Powers Resolution as comprehensive as possible, the drafters came up with the basic standard that it would apply "to the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ."[250] This is an interesting formulation, and has led to hours of legalistic debate at both ends of Pennsylvania Avenue about whether the President was "violating the law" in the latest foreign policy crisis. Without wishing to deprive either branch of the intellectual exercise this standard promotes, I strongly believe a new standard is necessary. Put simply, this one is *illegal*.

Some may wonder how it can be "illegal" for Congress to set such a standard. After all, everyone knows that under our Constitution Congress "makes the law." And while that may be generally true, it is important from time to time to keep in mind that Congress is not the ultimate sovereign in the United States. That authority remains in the American people.

When the Founding Fathers met in Philadelphia two hundred years ago, the established a government of limited powers. To Congress they gave "[a]ll legislative powers herein granted,"[251] to the President they gave "[t]he executive power"[252]—subject to clearly spelled out "checks" vested in Congress and the Senate[253]—and to the courts they gave "[t]he judicial power."[254] To establish the ultimate authority of the Constitution, they required "[t]he senators and representatives . . . and all executive and judicial officers" to be "bound by oath or affirmation, to support this constitution"; and they declared that "[t]his constitution, and the laws of the United States *which shall be made in pursuance thereof*; and all treaties made . . . under the authority of the United States, shall be the supreme law of the land . . . ."[255] It follows that statutory enactments which are contrary to the Constitution are not the "supreme law" of the land.[256]

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[250] This and similar language appear throughout the statute, beginning with section 2(a).

[251] U.S. CONST., art. I, sect. 1.

[252] *Id.* art. II, sect. 1.

So if you wish to be faithful to your legal duty under the Constitution and your oath of office, I would urge you to *abandon* the standard "hostilities" and return instead to the proper constitutional standard of "war." The fact that the importance of the congressional power "to declare war" has been reduced by the prohibition in the U.N. Charter of the types of war with which such declarations have historically been associated should not be viewed by you with dismay but with joy. You have "lost" nothing to the President—you have both gained by developments of law which seek to provide a more peaceful world. Your diminished authority to approve "war" is hardly justification for an effort to seize other constitutional powers which were clearly denied to you by the Founding Fathers.

Finally, I would again urge you to keep in mind that the congressional role in initiating "war" was viewed by the Founding Fathers to be an "exception" to the general vesting in the President of control over relations with other states—and thus (as Hamilton put it) was "to be construed strictly, and ought to be extended no further than is essential to [its] execution."

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[253] Such as the power of the Senate to consent to the ratification of treaties (*id*., article II, section 2) and the appointment of "ambassadors" and "officers of the United States" (*id*.), and the power of Congress "to declare war" (*id*. article I, section 8).

[254] *Id*. article III, section 1.

[255] *Id*. article VI (emphasis added). (The distinction in language between "laws" and "treaties" was not to suggest that "treaties" could be made contrary to the Constitution, but to preserve in force several very important treaties which had been ratified under the Articles of Confederation and thus, technically, were not made "in pursuance" of the Constitution.

[256] *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803): "It is also not entirely unworthy of observation, that declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void . . . ."

IV

S.J. Res. 323

War Powers Resolution Amendments of 1988

Senators Warner, Nunn, Byrd and Mitchell have introduced a series of amendments to the War Powers Resolution in the Senate—and I understand Representative Hamilton has introduced essentially the same language in the House—which in my view constitutes an *excellent* step in the right direction. If enacted, they would eliminate some of the most clearly unconstitutional and otherwise objectionable features of the initial statute. I commend all of those responsible for this positive series of proposals.

But in my view this *still* does not solve all of the constitutional or political problems of the existing statute. As I have already discussed, the term "hostilities" is far too broad to withstand constitutional muster. There are many uses of armed force which lead to involvement in "hostilities" which are clearly within the independent authority of the Commander in Chief and are not subject to congressional regulation. (The *Mayaguez* rescue is but one example.) Unless Congress is willing to again violate the "law" and the oath of office each of its members took to uphold the Constitution, some solution is going to be necessary to resolve this problem.

Section 3(2)

Another difficulty I have with the amendments is they continue to take a "legalistic" and confrontational approach. For many years I have favored the establishment of a "Joint Committee on National Security," to be composed of essentially the same congressional leaders who would make up the "permanent consultative group" provided for in section 3(2) of the Nunn-Warner bill. It is an *excellent* idea in my view, and would facilitate the genuine consultation that is so essential to a real bipartisan foreign policy.

But it is both *illegal* and in my view *unseemly* for Congress to attempt by law to *compel* the President of the United States to "consult" on a timetable established by Congress. The President is the head of a great co-equal branch of the American Government, and he (or she) deserves to be treated with the dignity and respect appropriate to that high office.[257] Congress and the President should seek to cooperate in a spirit of comity out of the mutual realization that the safety and security of the nation require a joint effort. But for either side to *demand* that the other "appear on call"—either by Congress passing a "law" or by the President sending over the Marines to compel such a meeting—is to belittle the constitutional authority of a co-equal branch and is incompatible with our doctrine of separation of powers.

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[257] Given the number of legislators who seem to want some day to become President, I can't help but wonder why they work so hard on the way up to weaken the authority of the office. As a voter, I would be very wary of a presidential candidate who had a substantial record of disrespect for the powers of the office.

As Judge Sofaer has observed,[258] even if Congress had the *power* to compel the President to consult, the provision permitting this power to be *exercised* by majority vote of the proposed permanent consultative group would conflict with article I, section 7, of the Constitution as interpreted by the 1983 *Chadha* decision.

Section 5

Section five of Senate Joint Resolution 323 seeks to give Congress control over the President's Commander-in-Chief powers by use of the "power of the purse." This power—and the article I, section 8, power to "raise and support armies"—gives Congress the power to deny the President any "army" to command, and thus effectively to destroy the Commander in Chief power. And should you choose to deny the President an Army (or Navy) to command, that would be within your constitutional power.

But it does not follow that you may place "conditions" on the *use* of appropriated funds which have the purpose or effect of seizing control of the exercise of the Commander in Chief power. Such an effort would be a violation of the principles of separation of powers set forth in article I, section 1, and article II, section 2, of the Constitution.

It seems clear from the language of the proposed addition to the War Powers Resolution that its authors thought the "power of the purse" would give them some "higher authority" than a simple statute in their effort to constrain the President's Commander in Chief power. The provision reads in part:

> **SEC. 6 (a) No funds appropriated or otherwise made available under any law may be obligated or expended for any activity which would have the purpose or effect of violating—**
>
> **(1) any provision of law enacted pursuant to . . . [this law].**

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[258] Testimony of Abraham D. Sofaer, State Department Legal Adviser, September 15, 1988, p. 11.

A recent study[259] by Raymond J. Celada of the Congressional Research Service of the Library of Congress quotes a variety of inferior court opinions—in situations not at all on point with the current situation—as concluding that the "power of the purse" is essentially unlimited. An 1880 U.S. Court of Claims case asserted that "The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."[260] More recently, a federal district court asserted in 1945 that "The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same."[261] However, none of these cases involved an effort by Congress to use its "power of the purse" to take control of a power vested elsewhere in the government by the Constitution.

The "great principle" that "what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result"[262] has been affirmed time and again by the Supreme Court.[263] For example, when Congress sought to use its legitimate control over the jurisdiction of the Court of Claims—which is admittedly exclusive and complete—to deprive the President of his pardon power by saying that the court could not accept cases brought by pardoned former southern sympathizers seeking to reclaim their property, the Court held that Congress had "inadvertently" violated the separation of powers doctrine. The Court explained:

> **It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration.**[264]

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[259] Raymond J. Celada, "The War Powers Resolution (WPR): Some Implications of S.J. Res. 323, 'War Powers Resolution Amendments of 1988,'" Congressional Research Service, Library of Congress, Report 88-464 A, p. CRS-11.

[260] *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), which Celada notes was "quoted approvingly in Harrington v. Bush, 553 F.2d 190, 194 note 7" by the D.C. Circuit Court of Appeals.

[261] *Spaulding v. Douglas Aircraft Co.*, 60 F.Supp. 985, 988 (S.D. Calif. 1945), aff'd, 154 F.2d 419 (9th Cir. 1946).

[262] *Fairfax v. United States*, 181 U.S. 283, 294 (1901).

[263] *See* Turner, "The Power of the Purse: Controlling National Security Policy by Conditional Appropriations," *The Atlantic Community Quarterly*, Spring 1988, p. 79, and sources cited therein.

[264] *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872).

When in past years Congress has sought to abuse its "power of the purse" to accomplish unconstitutional ends, the Court has not hesitated to strike the measure down. During World War II, when Congress enacted a statute seeking to use what it claimed to be its "plenary" power over appropriations to deny funds to pay the salary of three named alleged "communists" in the Executive branch, the Supreme Court in *United States v. Lovett* struck down the measure as an unconstitutional Bill of Attainder.[265]

The "power of the purse" is important, but it is not a tool through which Congress may properly seize control of all powers of government. Like all other powers of the Government, it may not be used in violation of any specific constitutional prohibitions. Implicit in the language designating the President "commander in chief" is the prohibition against Congress acting in that capacity.

Much confusion results from trying to compare the constitutional separation of powers in domestic affairs with that in foreign affairs. They are *different*. In domestic affairs, where Congress "delegates" authority to the President, it has a wide range of flexibility to direct—by conditional appropriations or otherwise—the manner in which those powers are to be exercised. The cases relied upon by Mr. Celada were of this character. But in foreign affairs, with respect to powers vested directly and exclusively in the President by the American people through the Constitution—Congress may not seize control of those powers by placing "conditions" on appropriations.

If the use of conditional appropriations measures allowed Congress to direct the manner in which the President exercised his discretionary responsibilities under the Constitution, the same vehicle could be used to deprive the third branch of its independent powers as well. The same logic which would permit Congress to deny funds (either directly or for payment of staff salaries) to the President to control the deployment of American military forces other than as dictated by the legislative branch could be turned on the Supreme Court with equal ease to shut down its operations if any measure (any statute on a lengthy list of new legislation) were held to be unconstitutional. Article III, section 1, of the Constitution protects judges from having their "Compensation . . . diminished during their Continuance in Office," but it does not expressly guarantee them sufficient funds to hire clerks, pay their rent, publish their opinions, or provide for numerous other essentials without which their effectiveness would cease. To argue that the "power of the purse" permits Congress to seize either Executive powers or Judicial Review is to argue that the Founding Fathers did not establish three co-equal, independent branches of government, but ultimately vested all powers of government in the legislature. Such a view is both wrong and dangerous.[266]

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[265] *United States v. Lovett*, 328 U.S. 303 (1946).

The issue is not all that different from the situation addressed by Jefferson in 1790, with respect to the power of the Senate to control the destination or grade of diplomatic nominations. Jefferson wrote:

> **It may be objected that the Senate may by continual negatives on the person, do what amounts to a negative on the grade, and so, indirectly, defeat this right of the President. But *this would be a breach of trust; an abuse of power confided to the Senate, of which that body cannot be supposed capable.* So the President has a power to convoke the Legislature, and the Senate might defeat that power by refusing to come. This equally amounts to a negative on the power of convoking. Yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the Constitution had meant to give the Senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not let it to be effected by a sidewind. *It could never mean to give them the use of one power through the abuse of another.*[267]**

V

Conclusion and Policy Recommendations

Mr. Chairman, I began my testimony by noting that we meet here this morning on the fiftieth anniversary of the infamous Munich Conference of 1938, and by quoting from some of the statements by some of your Senate and House predecessors half-a-century ago about the importance of tying the President's hands in the field of foreign policy as a means of preserving peace and keeping America out of World War II. In so doing, I realize that some of you may find the analogy a bit strained.

Lest I be accused of appropriating someone else's work, full disclosure is in order. The analogy is not mine. Among the other sources from which I borrowed it was a highly respected gentleman who spent more than thirty years on the staff of this distinguished Committee—ending his service as your Chief of Staff. I am speaking, of course, of Pat Holt—an expert on the War Powers Resolution and the author of several books and monographs dealing with the subject—who in his book *Invitation to Struggle* (coauthored by Professor Cecil Crabb) wrote:

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[266] I am currently engaged in researching a book on this subject. For some preliminary views, *see supra*, note 263 and sources cited therein.

[267] 3 THE WRITINGS OF THOMAS JEFFERSON 17-18 (Mem. ed. 1903) (emphasis added).

> **The problem that the War Powers Resolution addressed was in many respects analogous to the situation confronting the United States during the 1930s, when Congress sought to keep the nation out of World War II by passing the neutrality legislation. In the end, that effort failed, primarily because legal efforts to keep America out of hostilities were inadequate to protect the security of the United States in an increasingly dangerous external environment. Supported by public opinion, Franklin D. Roosevelt frequently circumvented and, in some instances, ignored legal constraints upon his diplomatic freedom of action — and in the process placed the blame on Congress for the nation's lack of preparedness after the Japanese attack upon Pearl Harbor in 1941! As in the pre-World War II period, perhaps the only effective constraints upon the president's reliance upon the armed forces for national security and diplomatic ends is the creation of external conditions that make such reliance unnecessary.**[268]

I have stressed on more than one occasion that I do not doubt the sincerity of most of the isolationist legislators who sought to "legislate peace" in the 1930's. Many of them learned an important lesson during that period, and in the years immediately following the War people like Arthur Vandenberg—a distinguished chairman of this Committee—helped forge a successful bipartisan foreign policy which served the nation and the cause of international peace very well.

In the mid-1950's, internationalists like Senator John F. Kennedy, Senator Mike Mansfield, Senator Hubert Humphrey, and Senator J. William Fulbright took up the cause of South Vietnam and pressured the Eisenhower Administration to help the people of that small country resist communist aggression. The Senate overwhelmingly consented to the ratification of the SEATO Treaty, which embodied that commitment. As the level of North Vietnamese aggression increased, the entire Congress voted by a margin of more than 500 to 2 to authorize the President to use American military force in Indochina. In so doing, Congress fulfilled its proper constitutional role in authorizing "war."

Sadly, as the war became less popular members of Congress sought to avoid accountability for their decisions—and the War Powers Resolution was enacted to deceive the American people into believing that Congress was not responsible for Vietnam. Over the years, Congress has demonstrated time and again that it is far more concerned with political expediency and avoiding accountability of policy fails than with constitutional principles. The differing congressional response to the *Mayaguez* and Iran rescue efforts illustrates this well, as does the shift in congressional attitude toward the Grenada operation following the release of public opinion polls. And I would note that a similar conclusion was reached by your former colleague, Senator Thomas F. Eagleton, when he told this subcommittee on July 13 of this year that he would "seriously consider repealing the whole damned thing." After watching example after example of congressional unwillingness to be held accountable in use of force situations, Senator Eagleton explained:

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[268] C. Crabb & P. Holt, *Invitation to Struggle — Congress, the President, and Foreign Policy* 54-55 (1984). I am also indebted to Professor Whittle Johnston of the Woodrow Wilson Department of Government and Foreign Affairs at the University of Virginia for the metaphor.

> **Finally . . . I came to the conclusion that Congress really didn't want to be in on the decision-making process as to when, how, and where we go to war. I came to the conclusion that Congress really didn't want to have its fingerprints on sensitive matters pertaining to putting our armed forces into hostilities. I came to the conclusion that Congress preferred the right of retrospective criticism to the right of anticipatory, participatory judgment. . . . If the Persian Gulf exercise blows up, Senators and Representatives will be free to point out how things went wrong---how erroneous policies were executed of which they were not a part. If there had been a Congressional vote authorizing a Persian Gulf undertaking with some Congressional limitations, then Congressional fingerprints would be on the job and failure would be a shared result.**
>
> **I harbor the notion that most Senators and House members don't have the political stomach for decision-making involving war.**

As I said, the implementation of the War Powers Resolution demonstrates time and again that Congress is far more concerned with avoiding political accountability than with constitutional principles. But Constitutional principles *are* important. The reason that Locke and other thinkers on the subject of of separation of powers argued for Executive control over foreign affairs was not that these matters were not of vital *importance* to the society, but that they were not *capable* of being regulated in advance by law. Locke wrote:

> **[A]lthough this . . . Power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good.**[269]

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[269] LOCKE, *supra* note 117 § 147.

This same theme was picked up by John Jay in the *Federalist Papers*—explaining the need for Executive discretion in the negotiation of treaties.[270] With an obvious criticism of the conduct of foreign affairs by the Continental Congress under the Articles of Confederation, Jay went on to observe:

> They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore [under the Articles of Confederation] suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.[271]

What I am saying—or, if you will, what Locke, Jay, Hamilton, and others have told us—is that legislative bodies simply lack the *competence* to manage the details of war and foreign affairs. The Founding Fathers realized that trying to regulate such matters with statutory constraints would leave the nation weak and incapable of preserving its freedom. And yet, with the War Powers Resolution the Congress seems intent on doing exactly that. You are demanding that the President submit detailed reports, telling you (and, in the process, our nation's adversaries) such details as how many troops he is deploying, what their "mission" is, what weapons they will carry, how many days they will remain in the danger zone, and so forth.[272] An enemy intelligence officer or military commander could not normally dream of such a gold mine of information.

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[270] FEDERALIST No. 64 at 434-35, quotes *supra* note 195 and accompanying text.

[271] *Id.* at 435. Many in Congress clearly do not understand that a major impetus for the new Constitution was the almost universally held belief that the conduct of foreign affairs under the Articles of Confederation had been a disaster. Consider, for example, Senator Dale Bumper's confident reliance upon the instructions of the Continental Congress to General Washington that he "observe and follow such orders and directions from time to time as you shall receive from this or any future Congress of these United Colonies or a committee of Congress for that purpose appointed," after which Senator Bumpers confidently remarked: "That sheds a little light on the role of the Commander in Chief from the perspective of our Founding Fathers." 113 CONG. REC. S 12358 (daily ed., September 18, 1987).

[272] *See e.g., supra*, note 78 and accompanying text.

And, sadly, the situation has been made even worse by the *politically expedient* (and not infrequently *partisan*) manner in which Congress has reacted to the implementation of the Resolution. Once the President is on record as saying he intends to deploy **X** number of troops with the mission of **Y**, he may well have lost all flexibility to respond to unforeseen changes in the enemy's conduct. If the enemy escalates its own activities, and the President tries to counter by moving in an additional warship or modifying a unit's original mission, he can expect that at least one of his congressional critics will be on the evening news denouncing him for having "lied" to Congress and for "violating the law of the land." It is hard enough for the President to defend the nation against foreign aggressors, without having to fight a cowardly and irresponsible Congress at the same time.

Most of the most bitter fights over the War Powers Resolution have had nothing to do with "war" in a constitutional sense. When the President deployed Marines as part of an international peace force in Lebanon—at the specific request of the Government of that country—it was not even *arguable* that he was committing an act of "war." Sending the Navy to protect innocent victims of possible armed attack in the Persian Gulf is similarly not an act of "war." It may be *risky*, and it may even arguably be *bad policy*—but under the Constitution the American people have vested such decisions in the exclusive discretion of the individual they have elected to be their President.

One of the saddest side-effects of the War Powers Resolution has been the signal Congress has given to the world's aggressors and terrorists. By tying the trigger of the statute to "hostilities," you have gone a good way toward surrendering the initiative to the most radical anti-American forces around the world. Whereas once they knew that killing an American Marine would likely bring down the wrath of God (supported by a few thousand Marines and whatever other force might be necessary to accomplish the mission), today they know that by killing American soldiers they can possible start the clock ticking to force a withdrawal of all American soldiers in the area. At minimum, they can start a divisive controversy between Congress and the President—which by itself weakens the United States in the eyes of much of the world. It may well have been unintentional, but it seems to me that Congress has put a "bounty" on the lives of American servicemen around the world. As I have already mentioned, I think you deserve substantial responsibility for the tragic terrorist attack which killed 241 fine young Marines in Beirut in October 1983.

As you continue with your examination of the War Powers Resolution, I would make one final point. The original statute was essentially shoved down the throat of an unpopular President by an angry Congress which at least *pretended* to believe that he had usurped its constitutional authority in Indochina. In reality, I would argue, that was not an accurate summary of the facts. Congress was a full constitutional partner in the decision to commit U.S. forces to combat in Indochina—and at that point its constitutional role under its power to "declare war" was complete.

The spirit of the War Powers Resolution, and literally hundreds of additional constraints placed on the President in the national security realm in the wake of Vietnam, is one of *confrontation.* Congress is treating the President as if he were simply its misbehaving minion—subject always to the whim of its dictates. But under the Constitution, that is not the President's status. He is a co-equal representative of the American people, and in the field of foreign affairs he is vested with vast authority which is beyond the control of Congress.

Mr. Chairman, having seen legislative-executive relations from diverse perspectives over nearly fifteen years, I am convinced that the absence of a genuine bipartisan foreign policy is one of the major impediments to peace in the modern era. I believe it is important for both political branches of government to work closely together in an effort to reestablish such a relationship, and to that end—as a matter of comity—I believe it is desirable for the President to provide adequate national security information to Congress to assist it in its important work.

During my service in the Department of State I was a frequent critic of the all too common practice of "notifying" Congress of Executive decisions in the guise of "consultation." Genuine consultation ought to involve a sincere solicitation of views about broad policy options and specific problem areas, with a summary of congressional views and recommendations being shared with the President, the Secretary of State, or other decision makers *prior* to the formulation of policy. This is not to say that the President should yield ultimate decisionmaking authority in the Congress (beyond that already contained in the Constitution), but that he should have the benefit of congressional thinking and should carefully evaluate it with the realization that major policies which do not have the support of Congress and the American people are unlikely to succeed. Thus, regardless of the constitutional prerogatives of the two branches, there are strong prudential considerations which mitigate in favor of keeping a responsible Congress informed about national security policy issues.

Obviously, these considerations must be weighed against the risks of congressional irresponsibility. Ideally, an informal sort of "checks and balances" should exist based on these principles:

(1) Both Congress and the President should recognize the dangers to the nation which are present in the modern world, and should in the name of peace insist that "politics" stop at the water's edge.

(2) Although he has a great deal of independent constitutional discretion in national security affairs which is beyond the direct control of Congress, the President should recognize a self-interest in cooperating with Congress and keeping a *responsible* Congress adequately informed to facilitate rational cooperation and support.

(3) The Congress should recognize the importance and special nature of national security problems, should insist that these be handled on a higher level than simply "politics as usual," should display a due respect for the independent constitutional powers of the President—even in circumstances where individual members believe they might well exercise that discretion differently and more effectively were they President—and should recognize that responsible congressional behavior is a *precondition* for substantial Executive cooperation with respect to sensitive national security information.

The benefits to both branches—and, more importantly, to the Nation—of a genuine bipartisan cooperation in the national security field should be so obvious as to require no elaborate discussion. However, a president who is virtually *under siege* from a Congress which seems determined to grab all powers of government for itself is hardly in a position to make further concessions to improve the overall relationship. The primary fault for the overall deterioration of legislative-executive relations in the national security field lies with Congress, and it is Congress which must, of necessity, make the first steps if the situation is going to be corrected. Repealing the War Powers Resolution would be an excellent first step.

To provide a rough idea of how active Congress has become in trying to micro-manage foreign affairs in the post-Vietnam era, in the less than twenty-five years since the Gulf of Tonkin Resolution was enacted into law in August 1964, this committee's compilation of *Legislation on Foreign Relations* has increased from a single volume of 659 pages to three volumes averaging about 1,500 pages *each*. The Founding Fathers would be *shocked* at this development. They placed great value on unity of decision in foreign affairs, and this simply is not possible when we have 536 individuals who want to play Secretary of State.[273]

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[273] The modern effort by Congress to enact the most detailed laws to "protect" the nation against every conceivable form of executive misconduct is reminiscent of a short-lived proposal by Elbridge Gerry, in the Constitutional Convention, to fix the maximum size of the peacetime army in the nation's fundamental law. As described by Harvard Professor Charles Warren: "[Gerry] thought an army in time of peace to be dangerous, and he moved that 'in time of peace the army shall not consist of more than _____ men', suggesting that 2,000 or 3,000 should be sufficient. Luther Martin supported him. At this point in the Convention, as later narrated by General Mercer, General Washington, who was in the Chair and therefore could offer no motion, turned to a delegate who stood near and in a whisper made the satirical suggestion that he move to amend the motion so as to provide that 'no foreign enemy should invade the United States at any time, with more than three thousand troops.' . . . Gerry's motion was unanimously rejected." C. WARREN, THE MAKING OF THE CONSTITUTION 482-83 (1937).

Even if the attempt by Congress to limit the President's constitutional power as commander in chief were not in conflict with the Constitution, it has had detrimental consequences for the security of the nation. To mention just one example, early in the Reagan Administration, Ambassador-at-Large Vernon Walters was sent on a secret mission to Havana to put Cuban President Fidel Castro on notice that his efforts to engineer the forcible overthrow of El Salvador and other Latin American States would not be tolerated. After listening quietly, Castro responded: "I understand how your government works, and I know that none of your congresses will allow any of your presidents to do to me what they would like to do to me."[274] As a result, Castro was not deterred and Cuban efforts to overthrow non-communist governments in Latin America continued. A similar effort in Nicaragua—which as a matter of law[275] Congress has found to be guilty of unlawful international aggression against its neighbors—to provide incentives for peace has also been undermined by legislative micromanagement. If not ultimately deterred, the United States may soon find itself forced to choose between watching one country after another to our south fall to external aggression or sending in another generation of young men to repurchase our national credibility with their lives.

Mr. Chairman, I don't wish to be misunderstood. I am not suggesting that members of Congress who seek to restrict the constitutional authority of the President are evil or that they intend to do other than promote "peace." They are no less honorable than was Prime Minister Chamberlain fifty years ago today, or the isolationists in the Congress of the 1930's who thought that if they could just get handcuffs on the adventurist President Roosevelt America need not fear the expansionist regimes in Germany and Japan. What I am suggesting is that—like similar critics of the past—you are mistaken; and your misguided actions are endangering world peace and freedom.

Obviously, I may be wrong. But you invited me to give you the benefit of my thinking, and given the seriousness of the stakes involved—and because of my great respect for this institution and this Committee—I concluded that I would serve you best by being fully candid.

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[274] I first learned of this conversation in a personal conversation with Ambassador Walters during my service in the Department of State. I include it here because it has now appeared in print. *See* "Now you understand," *Washington Times*, July 31, 1985, p. 3A col. 1.

[275] Congress has found that Nicaragua "[h]as committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention." International Security and Development Cooperation Act of 1985, sec. 722(c)(2)(vi), Pub. L. 99-83, 99 Stat. 149. For a detailed account of Nicaraguan aggression, *see* R. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS (1987).

Let me conclude by returning to the underlying constitutional issues. I have argued that recent legislative initiatives to constrain the President's independent constitutional powers are unlawful and in violation of the oath of office each of you took upon assuming your present station. I have urged that Congress restore the "rule of law" by repealing provisions of law which are in conflict with the Constitution.

I am well aware that there are those in both political branches of the Government who say that "what is done, is done," and—regardless of the intent of the Founding Fathers and the text of the Constitution--the President must simply accept the new congressional role and try to reach an accommodation with the Congress under new ground rules. But I would leave you with the thought that for the President to continue to acquiesce to congressional efforts to seize his independent constitutional powers would be a violation of his oath of office to "defend the Constitution," and his constitutional obligation to "take care that the Laws be faithfully executed."[276] But here I've used the wrong pronoun. The powers of the presidency are not really "his," at all, if by "his" we mean Ronald Reagan. These are powers of the American people. And if the President—any President, whether he be Democrat or Republican, Liberal or Conservative—is to uphold the "rule of law" he must defend his constitutional powers.

Let me close with a short quotation from the distinguished Harvard Law School Professor Charles Warren:

> **Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. . . . Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights—defense of power which the people granted him. . . . In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.**[277]

Mr. Chairman, this concludes my prepared remarks.

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[276] After all, the first "law" mentioned in the supremacy clause is the Constitution itself.

[277] Warren, *Presidential Declarations of Independence*, 10 BOSTON U. L. REV. 1, 35 (1930).

Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York

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SUMMARY

The Committee on Federal Legislation of the Association of the Bar of the City of New York has reviewed the mechanisms of the War Powers Resolution in light of separation of powers and justiciability concerns. We have focused in this report on underlying constitutional and legal issues, reserving to a later date our comments as to specific amendatory provisions. For the reasons stated below, we recommend that any proposed legislation to modify the Resolution:

(1) amend Section 5(c) of the Resolution to provide for troop withdrawal by joint rather than concurrent resolution in light of the substantial constitutional issues raised by INS v. Chadha as to current Section 5(c);

(2) leave intact as constitutionally appropriate the 60-90 day cutoff provisions of Section 5(b) of the Resolution;

(3) reject the concept of inserting an authorization to institute judicial proceedings as a substitute for Sections 5(b) and 5(c), but consider such authorization as an alternative open to Congress; and

(4) consider expanded consultation provisions as supplemental to, but not replacements for, Section 5(b) and an amended Section 5(c).

INTRODUCTION

The War Powers Resolution[1], passed in 1973 over President Nixon's veto, represents an effort by Congress to right by procedural means a perceived imbalance in the exercise of warmaking power between the Congress and the Executive. Proponents of the Resolution have urged that the legislation reflects the intent of the Framers in giving Congress a concurrent role with the President in decisions to commit and sustain U.S. forces in hostilities or imminent hostilities.[2] Opponents have asserted that the Resolution's provisions, most notably Section 5(b), under which the President is to terminate use of the Armed Forces in hostilities within 60 days unless such use is specifically authorized by Congress, and Section 5(c), under which Congress can require termination of such use by concurrent resolution, are an unconstitutional limitation on the President's Commander-in-Chief power and his prerogative to defend the national security.[3]

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[1] Pub. L. 93-148, 87 Stat. 55, codified at 50 USC §§1541-58 (1987) (hereinafter "War Powers Resolution" or "Resolution").

[2] War Powers Resolution Section 2(a). See also 119 Cong. Rec. 36,187 (statement of Sen. Javits), cited in Lowry v. Reagan, 676 F.Supp. 333, 334 (D.D.C. 1987), appeal pending, No. 87-5426 (D.C. Cir.); War Powers:S. Rep. No. 220, to accompany S.440, 93d Cong., 1st Sess. (1973) (hereinafter "S. Rep. 220")(S. 440, as discussed below, was the 1973 Senate version of war powers legislation. The 1973 House version, H.J.Res. 542, amended in conference in certain respects to coincide with or incorporate concepts from, the Senate version, became the final legislation); Statement of Prof. Archibald Cox, War Powers, Libya and State-Sponsored Terrorism: Hearings before the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs, 99th Cong., 2d Sess. (1986)(hereinafter "1986 House Hearings), reprinted in T. Franck & M. Glennon, Foreign Relations and National Security Law (1987 ed.)(hereinafter "Foreign Relations Law") at 616-618.

The Resolution has now been tested in practice for fifteen years. Presidents have sent reports to Congress under the Resolution in connection with the evacuations of Pnomh Penh, Danang, and Saigon, the Mayaguez incident, the Iranian hostage rescue, the 1981 multinational peacekeeping force in the Sinai, Lebanon in 1982, Chad, Grenada,[4] the 1986 bombing of Libya,[5] and the engagement of U.S. forces in the Persian Gulf.[6] In the cases of Lebanon[7] and El Salvador[8], Congress passed supplemental legislation addressing the circumstances of introduction of U.S. armed forces into those particular regions and circumstances.

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[3] See, e.g., Minority Views of Representatives Frelinghuysen, Derwinski, Thompson & Burke, War Powers Resolution of 1973: Report to Accompany H.J.Res. 542, House Rep. No. 93-287, 93d Cong., 1st Sess.(1973) (hereinafter "House Report"); President Nixon's veto message of October 24, 1973, 9 Weekly Comp. Pres. Doc. 1285, reprinted at 119 Cong. Rec. 34,990; Statement of Sen. Barry Goldwater, Review of the Operation and Effectiveness of the War Powers Resolution: Hearings before the Comm. on Foreign Relations, 95th Cong., 1st Sess. (1977)(hereinafter "1977 Senate Hearings") at 20-21; Statement of Hon. Monroe Leigh, 1977 Senate Hearings at 78-83; Statement of Mr. Abraham Sofaer, 1986 House Hearings, reprinted in Foreign Relations Law at 618-19.

[4] For summaries and analyses of these incidents, see, e.g., Vance, Striking the Balance: Congress and the President under the War Powers Resolution, 133 U.Pa. L. Rev. 79 (1984); Note, the Future of the War Powers Resolution, 36 Stanford L. Rev. 1407 (1984) (hereinafter "Wald"); Note: A Defense of the War Powers Resolution, 93 Yale L.J. 1330 (1984); Ratner and Cole, The Force of Law: Judicial Enforcement of the War Powers Resolution, 17 Loyola L. Rev. 716 (1984) (hereinafter "Ratner"); Franck, After the Fall: The New Procedural Framework for Congressional Control over the War Power, 71

Throughout this period, discussions as to the constitutionality of the Resolution have continued, and both the Resolution and its implementation have remained the subject of controversy. In addition to the constitutional issues raised at inception as to the proper allocation of warmaking power between the legislative and executive branches, the Supreme Court's 1983 decision in INS v. Chadha[9] raises the issue of whether Sections 5(c) and 5(b) violate the presentment clauses in Article I, Section 7 of the Constitution. Legislation has been introduced at various

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Am.J.Int'l L. 605 (1977).

[5] See generally Rep. Robert Torricelli's commentary, The War Powers Resolution After the Libya Crisis, 7 Pace L.Rev. 661 (1987) (hereinafter "Torricelli").

[6] For a summary of Persian Gulf notices, see Lowry, supra, 676 F.Supp. at 336-37.

[7] Pub.L. 98-119, 97 Stat. 805, October 12, 1983.

[8] Pub. L. 98-525, Title III, §310, 98 Stat. 2516, October 19, 1984; Pub.L. 98-473, Title I, §101(h), 98 Stat. 194, October 12, 1984.

[9] 462 U.S. 919 (1983).

times to amend, modify or wholly replace the Resolution; most recently, S.J.Res. 323, introduced on May 19, 1988 by Senators Byrd, Nunn, Warner and Mitchell, would delete current Sections 2(c), 5(b) and 5(c) entirely, substituting detailed procedures for consultation between President and Congress and reliance on judicial enforcement.

In the judicial arena, Congressmen have challenged the adequacy of the President's compliance with the requirement of Section 4 (a) of the statute that reports be made to Congress of the nation's military involvement in El Salvador and the Persian Gulf and have raised other war powers issues with respect to the Grenada invasion and U.S. involvement in Nicaragua.[10] The latest such action, Lowry v. Reagan, is currently pending before the Court of Appeals of the District of Columbia. Citing considerations of justiciability, the courts to date have declined to rule on whether any given Executive Branch response is in compliance with the requirements of the Resolution.

It is the intent of the Committee to comment not on the merits of the foreign policy issues which the War Powers Resolution has been invoked to address, but rather on certain constitutional and legal issues raised by the Resolution in its present form, in particular:

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[10] Lowry, supra (Persian Gulf); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. Cir 1985)(Nicaragua); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985)(Grenada); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C.Cir. 1983), cert. denied, 467 U.S. 1251 (1984)(El Salvador).

(i) Whether Sections 5(b) and 5(c) of the Resolution are constitutionally appropriate in light of separation of powers concerns as expressed in Chadha and subsequent cases;

(ii) Whether enforcement of the Resolution in the courts is a viable substitute for Sections 5(b) and 5(c); and

(iii) Whether the consultation provisions of Section 3 of the Resolution should be expanded so as to serve as a substitute for Sections 5(b) and 5(c).

I. Constitutional authority, the Resolution and the Chadha decision

In order to analyze any proposed revisions to the Resolution, it is critical to examine the underlying Constitutional positions of the executive and legislative branches; the background of the statute itself; and the nature of the separation of powers analysis in Chadha and subsequent Supreme Court decisions touching on separation of powers.

A. Constitutional Sources of Authority

The Constitutional grants of authority to Congress and the President relevant to the war powers and the legislative veto can be briefly summarized. Congress has the power to legislate, provided that legislation shall be presented to the President, and if vetoed, passed by two-thirds of each house; to declare war; to raise and support armies and a navy; to appropriate funds for these purposes; and to make all laws necessary and proper to carry out these powers, and all other powers vested in the U.S. government. The President is to have the executive power; to be the Commander-in-Chief of the Army and Navy; to make treaties and to send and receive ambassadors; and to faithfully execute the laws.[11]

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[11] Article I, § 1 provides "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Article I, § 7 cl. 2 and 3, provide that every bill which has passed the House of Representatives and the Senate, and every order, resolution or vote "to which the concurrence of the Senate and House of Representatives shall be necessary" shall be presented to the President; if he disapproves, it shall become a law only upon approval by a two-thirds majority in both houses. Article I, § 8 gives Congress the power to collect taxes, pay debts and provide for the common welfare, cl. 1; to regulate commerce with foreign nations, cl 3; to declare war, cl. 11; to raise and support armies, cl. 12; to provide and maintain a navy, cl. 13; to make rules to govern the land and naval forces, cl. 14; to provide for calling forth, organizing, arming and disciplining the militia, cl. 15, 16; and to "make all laws which shall be necessary and proper for carrying into execution

Aside from matters textually committed to one branch or the other and the critical political objective of the Framers to create a balance of authority among the branches of government[12], it is difficult to discern original intent as to how the war powers would actually be exercised in war, near war and the placement of troops for security purposes. The motion of Madison and Elbridge Gerry to substitute "declare war" for "make war" in Article I,

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the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof", cl. 18. Article I, § 9 includes the requirement that no money may be drawn from the Treasury "but in consequence of appropriations made by law."

As to the President, Article II, § 1 provides that the executive power shall be vested in a President. Article II, § 2, cl. 1 declares that the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into service of the United States. Article II, § 2, cl. 2 gives the President the power, by and with the advice and consent of the Senate to make treaties (with the consent of two-thirds of the Senate), and to appoint ambassadors and consuls; Article II, § 3 empowers the President to receive ambassadors and other public ministers, and to take care that the laws be faithfully executed.

[12] The Federalist Papers, No. 51 (Madison) (Mentor ed. 1961): "the great security against a gradual concentration of the several powers in the same department consists of giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The importance of the checks and balances on each branch has been reemphasized by the Supreme Court in Bowsher v. Synar, 478 U.S. 714, 721-27 (1986); Chadha, supra, 462 U.S. at 951; Buckley v. Valeo, 424 U.S. 1 at 120-124 (1976).

Section 8, "leaving to the executive power to repel sudden attacks,"[13] has been used by advocates of both Presidential and Congressional authority to bolster a view that their branch has preeminent authority in the war powers area.[14] It is clear that the Framers were concerned by the potential for overreaching by both the executive ("Mr. Gerry never expected to hear, in a republic, a motion to empower the executive alone to declare war")[15] and the legislative branch, insofar as the conduct of a war was perceived to be an executive function,[16] and wished to encourage the maximum amount of deliberation before the nation entered into war.[17] Debate remains, however, over the intent of the Framers as to procedures to be followed in the area between the clear grant to Congress of the power to declare war and the clear grant to the executive of the power to defend the nation against attack.[18]

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[13] 5 Elliot, Debates on the Adoption of the Federal Constitution 438-39 (1845) (hereinafter "Elliot"), reprinted in Lungren and Krotoski, The War Powers Resolution after the Chadha Decision, 17 Loyola of Los Angeles L. Rev. 767 at 770 (1984) (hereinafter "Lungren").

[14] For a discussion of the varying interpretations, see, e.g. Lungren, supra at 771-72.

[15] Elliot supra. As to the concerns of the Framers as to overreaching by the executive, see The Federalist No. 69 (A. Hamilton) (Mentor ed. 1961): "The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature."

The historical record similarly provides arguments for both Presidential and Congressional authority to exercise war powers. Proponents of a strong view of Presidential power have argued that the taking of Presidential initiative in hundreds of actions involving use of U.S. troops abroad is a gloss giving the President constitutional authority to respond to circumstances independently of Congress[19]; others have argued that an unconstitutional act cannot be sanctioned by repetition; that early authorities support the view that the entry into offensive wars was solely the prerogative of Congress; and that in fact in many of the instances cited, Congress acquiesced in or subsequently ratified the President's initiative.[20]

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[16] As to the concerns of the Framers as to overreaching of the legislature, see The Federalist No. 48 (Madison) (Mentor ed. 1961) at 310; The Federalist No. 71 (A. Hamilton) (Mentor ed. 1961) at 433 ("the tendency of the legislative authority to absorb every other has been fully displayed and illustrated...")

[17] Elliot, _supra_ note 13 (statement of George Mason); The Federalist No. 69; see also Thomas Jefferson's statement that "We have already given in example one effectual check to the dogs of war by transferring the power of declaring war from the Executive to the Legislative body, from those who are to spend to those who are to pay," 7 _Writings of Thomas Jefferson_ at 461 (Lipscomb & Bergh ed. 1903), reprinted in Statement of Myron P. Curzan, 1977 Senate Hearings at 141.

[18] Compare for instance, the constitutional arguments advanced in Statement of Hon. Monroe Leigh, 1977 Senate Hearings at 77, with those in Statement of Prof. Raoul Berger, 1977 Senate Hearings at 304.

Finally, there are strong constitutional arguments for a shared concept of Presidential and Congressional authority, based on the concept both of checks and balances and the concept of "clogging rather than facilitating war."[21] As the Supreme Court indicated in Buckley v. Valeo, "the Constitution by no means contemplates total separation of [the three] branches of Government.[22] Citing Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, the Court observed:

> "'While the Constitution diffuses power the better to serve liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy, but

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[19] See, e.g., Statement of Sen. Barry Goldwater, 1977 Senate Hearings at 19-54.

[20] See, e.g., Statement of Myron P. Curzan, 1977 Senate Hearings at 117; statement of Prof. Raoul Berger; id. at 304.

[21] Elliot, supra note 13 (statement of George Mason).

[22] 424 U.S. at 121.

reciprocity.'"[23]

The Buckley Court noted for example that President participates in the lawmaking process by virtue of his authority to veto bills enacted by Congress (foreshadowing Chadha) and that the Senate participates in the appointment process by virtue of its authority to refuse to confirm persons nominated to office by the President (foreshadowing the "inaction" argument raised as to Section 5(b) of the Resolution).

In Youngstown, Justice Jackson states the thesis that Presidential powers are not fixed, but fluctuate, depending upon the related powers of, and actions taken by, Congress[24]:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

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[23] 424 U.S. at 121, citing 343 U.S. 579, 635 (1952)

[24] 343 U.S. 579 at 635 (1952).

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[25]

The shared powers concept has been applied to the war powers by numerous commentators as consistent with the intent of the Framers.[26] With respect to the historical record, future State Department Legal Advisor Abraham Sofaer testified before the Senate Foreign Relations Committee in 1977 that the existence of mixed powers comported with his detailed study of practice under the Framers, and that he had found no instance in this study in which a President had ignored an unambiguous legislative prohibition.[27]

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[25] 343 U.S. at 635-36: The Court ruled in Youngstown that President Truman's seizure of the steel mills during the Korean War by Executive Order was unconstitutional. Justice Jackson found the seizure to be in the third category, inconsistent with three legislative pronouncements, and unjustified by the President's inherent powers as Commander-in-Chief. His three-part analysis of Presidential warmaking powers was recently adopted by Justice Rehnquist in Dames & Moore v. Regan, 453 U.S. 654 at 674 (1981).

B. The War Powers Resolution

The provisions of the Resolution critical to our review are Section 2(c), which provides:

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[26] See, e.g., Statement of Prof. Abraham Sofaer, 1977 Senate Hearings at 84-116; L. Henkin, Foreign Affairs and the Constitution (1972 ed.) at 101 ("Presidents cannot use the armed forces for long in substantial operations without Congressional cooperation; surely any action that can be properly called war depends on Congressional appropriations and other forms of approval, expressed or implied"); Wald, *supra* at 21; Glennon, The War Powers Resolution: Sad Record, Dismal Promise, 17 Loyola of Los Angeles L. Rev. 657, 661 (1984) (hereinafter "Glennon"); *but see* Turner, The War Powers Resolution: Unconstitutional, Unnecessary and Unhelpful, 17 Loyola of Los Angeles L. Rev. 683, 695, (1984) citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (note however that the broad statement in Curtiss-Wright that the President is the "sole organ of the Federal government in the field of international relations" was distinguished by Justice Jackson in Youngstown as based on a factual situation in which the President had received Congressional authorization, 343 U.S. at 635, Note 2.)

[27] 1977 Senate Hearings at 91-92.

> "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces,"

Section 3, which provides:

> "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations,

Section 4(a), which provides:

> "In the absence of a declaration of war, in any case in which United States Armed Forces are introduced --
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) In numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;
>
> the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth --

> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement,"

Section 5(b), which provides:

> "(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces,"

and Section 5(c), which provides:

> "(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."

A concurrent resolution, unlike joint resolutions and bills, is not presented to the President for his signature.

Sections 6 and 7 of the Resolution establish expedited procedures for consideration of, respectively, joint resolutions or bills introduced pursuant to Section 5(b) and concurrent resolutions introduced pursuant to Section 5(c). Section 8(a) provides that authority to introduce U.S. armed forces into hostilities shall not be inferred from any provision of law, including any provision in any appropriation act or from any treaty unless the act or treaty specifically states that it is intended as such an authorization.[28] Section 8(d) provides:

"Nothing in this joint resolution --

> (1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or
>
> (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution."

Section 9 is a separability clause.

There are two critical points to note about the Resolution as enacted. First, the Resolution followed a series of efforts by Congress, including repeal of the Tonkin Gulf Resolution and the adoption by the Senate in

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[28] This section of the Resolution attempts to close off certain theories relied on by the executive branch to justify involvement in hostilities (the treaty power relied on by President Truman in the Korean War, see Henkin, supra, Ch. IV, Note 27) and by courts in justifying the constitutionality of the Vietnam war (e.g. the ruling in Orlando v. Laird, 443 F.2d 1039 (1971); cert. denied, 404 U.S. 869 (1971) that Congressional approval of U.S. involvement in Vietnam could be inferred from defense appropriations).

1969 of the National Commitments Resolution,[29] to control or halt the continued U.S. presence in Vietnam, which efforts were resisted by the Johnson and Nixon administrations.[30] This history explains both the Congressional anxiety to regain a sense of participation in the process and the reliance on enforcement mechanisms such as the 60-day cutoff and the concurrent resolution procedure to influence an executive reluctant to consult.

Second, the legislation is a compromise between two distinct schemes. The House version provided, *inter alia*, for prior consultation "in every possible instance"; reporting by the President in three situations (commitment of troops to hostilities[31] outside the U.S., to a foreign nation, or as an increase to troops already stationed in a foreign nation); a 120-day automatic cutoff requiring removal of troops with respect to which *any* report was submitted unless Congress declares war or specifically authorizes the troops; and a cutoff within a lesser time period by concurrent resolution.[32] The Senate version listed situations in which the Armed Forces could be introduced without a declaration of war; required reporting of any introduction of troops in such circumstances; cut off use of troops in such circumstances in 30 days unless authorized by Congress, or unless the President certified that safety of the troops required more time for the process of disengagement; and provided for termination by act or joint resolution of use of troops prior to the 30 day period unless the President had made a safety certification as above described.[33]

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[29] S. Res. 85, 92nd Cong., 1st Sess. (1969), a sense of the Senate resolution that the executive branch and legislative branch must jointly make national commitments to a foreign power, see discussion in S. Rep. 220, reprinted in 1977 Senate Hearings at 220.

[30] S. Rep. 220, reprinted in 1977 Senate Hearings at 241.

[31] Hostilities is defined in the House Report as follows:
"The word **hostilities** was substituted for the phrase **armed conflict** during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, **hostilities** also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "**Imminent hostilities**" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict."

The legislative compromise reached in the Resolution shows the inconsistency of its parts in some respects. Section 2(c) of the Resolution adopts the Senate concept of listing Presidential authority, but omits certain obvious items included in the Senate bill (rescue of nationals abroad, forestalling an imminent attack)[34] and is set forth as a nonbinding statement disconnected from the Resolution's mechanics. Section 4 of the Resolution requires reporting in three instances (like the House bill), but provides for the 60-day cutoff to apply only to reports submitted in connection with the introduction of troops into hostilities or imminent hostilities (Resolution Section

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[32] H.J. Res. 542, supra.

[33] S. 440, supra.

[34] See, e.g., statement of Hon. Monroe Leigh, 1977 Senate Hearings.

4(a)(1)), a fact taken advantage of by successive Presidents in refusing to specify the section under which reports are submitted to Congress, thus avoiding an explicit triggering of the 60 day cutoff provisions of Section 5(b).[35] Finally, the disconnection of Section 2(c) from the enforcement mechanisms of the 60-90 day cut off in Section 5 (b) (and absence of any other binding description of what Congress sees as the type of instances in which the President can introduce troops into hostilities without a Congressional declaration of war) gives rise to the argument that despite the language to the contrary in Section 8(d), the Resolution as enacted is an authorization to the executive branch to freely take action independent of Congress for such 60-90 day period,[36] -- a position with which the Committee disagrees, but which becomes relevant in assessing the impact of Chadha on the Resolution.

C. The Chadha decision

In Chadha, the Supreme Court considered the constitutionality of Section 244(c)(2) of the Immigration and Nationality Act[37] which authorized either the Senate or the House of Representatives, by resolution, to invalidate a decision of the Executive Branch with respect to the immigration status of an alien. Chadha, a Kenyan holding a British passport, had overstayed a student visa and was eligible for deportation. The Attorney General, acting under authority delegated by Congress in Section 244(a)(1) of the Act, carried out a character investigation, conducted a hearing to determine Chadha's eligibility under defined statutory criteria for a suspension of deportation, and determined that Chadha's deportation should be suspended on hardship grounds. Pursuant to Section 244(c)(1), the Attorney General reported this action to Congress. Eighteen months later, as the time period for Congressional action under Section 244(a)(2) was about to expire, the House, acting on the basis of an unprinted resolution passed without debate or recorded vote, reversed the Attorney General's decision. Chadha then challenged the constitutionality of the legislative veto. The Court of Appeals determined that Section 244(a)(2) was unconstitutional and the Supreme Court affirmed.[38]

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[35] See Lowry, supra; and discussion of Presidential reports in Ratner, supra, Wald, supra and Lungren supra; for a discussion of the consultations which have actually occurred, see also Statement of Thomas M. Franck, 1977 Senate Hearings at 61-71; Torricelli, supra.

[36] The point was raised in Congress at the time of passage of the Resolution by, among others, Sen. Eagleton, see generally discussion in Ratner, supra, and Torricelli, supra, and was one of the concerns underlying proposed amendments to the Resolution considered by the Senate Foreign Relations Committee in 1977, see 1977 Senate Hearings.

In reviewing the constitutionality of the legislative veto, the Court laid out some important guidelines: first, that the efficiency, usefulness or convenience of the procedure "will not save it if it is contrary to the Constitution";[39] second, that the appearance of the veto in numerous statutes over a fifty-year period would not be dispositive of its constitutionality;[40] and third, that where the Constitution explicitly prescribes and defines the respective functions of the Congress and the Executive in a process in which they each participate, those explicit definitions will be given full effect. The Court proceeded to analyze the presentment clauses in Article I with particular emphasis on the desire of the Framers to circumscribe the broad powers given to the Legislature, first to protect the constitutional role of the executive branch itself, and further to protect the community at large from hasty, inadvertent or designedly bad laws. The Court noted also the importance of the bicameral legislature as protecting the smaller states and further splitting the concentration of power. The Court found that the Article I requirements for legislative enactment represented a "single, finely wrought and exhaustively considered, procedure."

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[37] 8 USC §1254(c)(2).

[38] The Court let stand the remainder of the statute, relying on the Immigration and Naturalization Act's severability clause, 462 U.S. at 931-32.

Having considered the constitutional mechanism at issue, the Court then analyzed the nature of Section 244(c)(2) and the actions taken under it in light of the constitutionally required procedure. The Court acknowledged that there would be institutional pressures to modify the procedure, but cautioned:

> The hydraulic pressure inherent
> within each of the separate

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[39] 462 U.S. at 944.

[40] Id. at 944-45.

> Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[41]

The Court noted that when any branch acted, it is presumptively acting within its sphere i.e. that the House's action in overruling the Attorney General could be presumed to be legislative. The Court then reviewed in full the nature of the House's action and determined that this veto was legislative in character and effect because it "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha."[42] The Court concluded that a legislative delegation by Congress to a coordinate branch such as that found in Section 244[43] cannot be subsequently altered except by further legislative enactment, and that the one-house legislative veto enacted by the House was therefore unconstitutional.[44]

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[41] 462 U.S. at 951.

[42] Id. at 952.

[43] Note that Article I, § 8, cl. 4 gives Congress the power within its legislative authority to "establish a uniform rule of naturalization." Since the Constitution does not textually provide for a sharing of the authority in this area between branches, Congress' departure from its earlier practice of passing private bills governing waivers of deportation orders amounts to a delegation of a power textually committed to Congress to the Attorney General to make such determinations.

[44] The Court further observed that when the Framers had intended either House to act alone, they had specifically so provided, noting such instances, 462 U.S. at 955-56. Note, however, that while the reach of Chadha is to one house legislative vetoes, the Court subsequently disapproved on Constitutional grounds a two house veto in U.S. House of Representatives v. FTC, 463 U.S. 1216 (1982).

The Court specifically noted that durational limits on authorizations and formal reporting requirements would lie within Congress' constitutional power,[45] as would a "report and wait" provision of the type used with respect to the Federal Rules of Civil Procedure and Rules of Evidence (giving Congress an opportunity to review the rules before they became effective and to pass legislation barring their effectiveness if the rules were found objectionable).[46]

The Court did not specifically apply its holding on the Immigration and Naturalization Act to any other statute; however, Justice White's dissent, in listing legislative veto provisions which he considered invalidated by the majority opinion, specifically listed Section 5(c) of the War Powers Resolution.[47]

Cases subsequent to Chadha have reaffirmed the importance of separation of powers analysis in reviewing legislatively-directed interaction between Congress and the Executive Branch. In Bowsher v. Synar[48] , the Court ruled that the specification in the Gramm-Rudman-Hollings Act that spending reductions be specified by the Comptroller General violated separation of powers principles in that Congress cannot execute the laws and cannot grant to an officer under its control the authority to execute the laws. In Morrison

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[45] 462 U.S. at 955, note 19.

[46] Id. at 935, note 9.

[47] Id. at 971. Note that Justice White did not include Section 5(b).

[48] 478 U.S. 714 (1986).

v. Olson[49], the Court considered a challenge to the independent counsel provisions of the Ethics in Government Act on two separation of powers issues: whether the removal provisions, which limited removal of a special counsel to instances where "good cause" can be shown, interfere impermissibly with the President's Article II functions; and whether the Act as a whole violates separation of powers by reducing the President's control over the powers of the independent counsel. On the first issue, the Court, relying on Humphrey's Executor v. United States[50] and Weiner v. United States[51], determined that a "good cause" standard for removal does not by itself unduly trammel executive authority.[52] With respect to the second issue, the Court reaffirmed that the Constitution does not require "absolute independence" of the three branches,[53] decided that the special prosecutor legislation was not an attempt by Congress to increase its own powers at the expense of the Executive Branch,[54] and ruled that under the Act, the President retained sufficient control, including the "good cause" removal authority conferred on the Attorney General, to perform his constitutionally assigned duties.[55]

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[49] _____ U.S. ______, ______ S. Ct. _______, 56 U.S.L.W. 4835 (No. 87-1279, decided June 29, 1988).

[50] 295 U.S. 602 (1935).

[51] 357 U.S. 349 (1958).

[52] 56 U.S.L.W. at 4845.

[53] 56 U.S.L.W. at 4846, citing United States v. Nixon, 418 U.S. 683 at 707 (1974).

[54] 56 U.S.L.W. at 4846.

[55] Id. at 4846-47.

III. Analysis of Sections 5(b) and 5(c) of the Resolution in light of Chadha

We believe that read in light of the specific holding in Chadha as to the validity of the legislative veto mechanism, Section 5(c)'s authorization of removal of troops at the direction of Congress by concurrent resolution in less than the 60-90 day period set forth in Section 5(b) is so questionably constitutional that its procedures should be amended or replaced to provided for passage of a bill or joint resolution in the "report and wait" pattern approved in Chadha. Section 5(b), on the other hand, when analyzed with separation of powers concerns in mind, creates a valid durational limit after which Congress must be seen to have disapproved of the use of troops in hostilities.

In Chadha, the Court's analysis looks to the textual commitment of authority between the branches and the importance of separation of powers in the political theory underlying the work of the Framers. The Court, echoing Buckley v. Valeo, recognized that separation of powers between Congress and the President is not total, but emphasized the need to resist encroachment by any one branch on the authority and responsibility of another. If the textual commitment test in Chadha is strictly applied, both the Resolution and any concurrent resolution passed under Section 5(c) are legislative in character, as each affect the rights, powers and duties of both the President and any troops committed by the President to hostilities or imminent hostilities; Congress cannot take a legislative act or reverse previous legislation without presentment; and Section 5(c) is therefore unconstitutional. If Chadha is read more broadly as a separation of powers decision that the legislative veto device (but not other Congressional oversight mechanisms) is an undue encroachment on the Executive Branch's constitutional authority, a Section 5(c) concurrent resolution, involving no presentment to the President, is either unconstitutional or so arguably unconstitutional that its constitutional weakness must inevitably detract from the substance of any position taken by Congress in any resolution passed in accordance with its procedures.

We note that there are substantial arguments to be made for a narrower reading of Chadha's application to the Resolution and a different conclusion as to how the separation of powers concept would be applied to Section 5(c). First, a concurrent resolution passed under Section 5(c) could be analyzed as an expression of Congressional intent as per Justice Jackson's formulation in Youngstown, and as such need be in no particular form to have constitutional effect.[56] Second, the Chadha decision could be restricted in subsequent effect to the type of delegation found in the Immigration and Naturalization Act, whereas the Resolution necessarily involves shared powers whose implementation is not delegated by the express terms of the Resolution. We are not convinced, however, that these arguments conclusively rebut a strict application of Chadha's analysis to Section 5(c).

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[56] In Dames & Moore v. Regan, the Court determined Congressional intent as to suspension of claims by U.S. citizens against Iran in a Youngstown-based analysis from both the general tenor of Congressional statutes giving the President broad latitude in the area of hostage negotiations and a history of congressional acquiescence in similar types of settlements entered into by executive agreements, 453 U.S. at 677-680. In Youngstown, Justice Frankfurter suggested that in addition to specific legislation, Congressional approval could be inferred from "long-continued acquiescence by

As to the first argument, we agree that the form of Congressional authorization or lack of authorization recognized in Youngstown and Dames & Moore is varied and could include a concurrent resolution as well as legislation formally presented to the President. But what is offensive about Section 5(c) under Chadha's separation of powers analysis is that it provides for Congressional decision without presentment to the President in an area where Congress does not have exclusive constitutional authority, but rather shares the warmaking powers of the nation with the President.

With respect to the delegation argument, for the Resolution to be distinguished from the Immigration Act it would in effect have to be determined that Congressional authority to declare war and regulate troops is nonlegislative in character, an interpretation which we think is unlikely in light of Chadha[57]. Further, we think the question of whether the Resolution delegates power to the

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Congress," 343 U.S. at 613.

[57] In this respect, we note that the Congressional plaintiffs in Lowry, supra, conceded that Section 5(c) does not have the force and effect of law after Chadha, 676 F. Supp. at 333.

President to engage the armed forces of the nation in hostile acts is only relevant to the issue of whether the authority to approve or disapprove engaging the United States in hostilities is Presidential or Congressional[58], an issue we think must be answered, in light of the textual commitment in the Constitution of war-related powers in both Article I and Article II, that constitutionally the authority is shared, in the sense that each branch has a number of powers which impact on such military engagements.

We believe that a better view of the Resolution, and Sections 3, 4 and 5(b) in particular, is that Congress has required reporting, a requirement specifically approved in Chadha's separation of powers analysis, followed by a 60-90 day breathing space in which both Congress and the President can consider their respective constitutional functions in reviewing the wisdom and efficacy of a military initiative. The 60-90 day period is consistent with Congress' constitutional responsibility to authorize war, the President's constitutional responsibilities of national defense recognized in Resolution Section 2(c) and the additional Presidential constitutional responsibilities such as rescue and efforts to forestall imminent attack asserted elsewhere by the President. If the President has terminated the use of troops by the end of the 60-90 day period, no conflict will arise between the shared powers of the branches. If it appears that the use of troops will not be terminated, and Congress approves such use and/or grants a further extension of time, as occurred with the 1983 Lebanon legislation, each branch has carried out its constitutional function. If such use is not terminated and Congress has not spoken, the President must constitutionally justify the use of the troops on grounds of national emergency, rescue of nationals, military necessity, etc. and with the heavy burden of falling within the third category in Youngstown, i.e. one in which the President is acting in conjunction with Congressional disapproval. We view this as the equivalent of a durational limit, not on a power delegated by Congress to the President, but rather on the period of time within which Congressional inaction could be argued to be approval or acquiescence[59]. This durational limit was presented to the President and passed by Congress over the President's veto. We do not believe this interpretation is unconstitutional in light of Chadha.

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[58] See, e.g., Wald, supra.

This is not to imply that Section 5(b), if given full effect, would be constitutional in all respects. We strongly disagree with the constitutionality of the statute if read to mean that Congress can in all instances direct the removal of troops after expiration of an arbitrary time period[60]. But we similarly reject the argument that Section 5(b) is the equivalent of an unconstitutional legislative veto, or unconstitutional "action by inaction", or unconstitutional per se because it limits the President in an area where as Commander-in-Chief he has sole or predominant authority.[61] Congress under the Constitution has the sole authority to declare war.[62] Where the decision involves considerations of national defense, the President's duty as Commander-in-Chief and under the executive power to preserve the nation coincides with Congress' obligation to debate, consider and authorize a sustained military engagement. Any unilateral decision by the President would be made at the lowest ebb of his authority, difficult to justify constitutionally and in practical terms virtually impossible to sustain over any period of time.[63]

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[59] We do not mean to imply that Section 5(b) nor Congressional inaction during the 60-90 day period amounts to authorization of any Presidential military initiative.

[60] We note also the questionable wisdom of such an application in all instances of military engagement and the obvious military difficulties raised by a pre-set cutoff period.

We also reject the argument that Congress cannot legislate procedural requirements in an area of concurrent responsibilities. The Constitution _is_ procedural: it is informed throughout by the viewpoint that procedural mechanisms can form a safeguard against self-aggrandizement and overreaching by those in power. Congress has an obligation no less than the President to uphold the Constitution, and we think Congress may validly indicate to the Executive how Congress intends to carry out its constitutional functions.[64]

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[61] Arguments for the President's sole or predominant authority in the warmaking area have been based predominantly on readings of the historical record and on considerations of military necessity and efficiency. While recognizing the usefulness of these factors in the analysis, we note that _Chadha_ emphasizes the preeminence of analysis of the intended political function of each branch under the Constitution.

[62] A position recognized by the courts which considered challenges to the U.S. presence in Viet Nam, see, e.g., _Orlando v. Laird_, 317 F. Supp. 1013 (E.D.N.Y. 1970), _aff'd_, 443 F.2d 1039 (2d Cir. 1971), _cert denied_, 404 U.S. 869 (1971), _supra_; _Massachusetts v. Laird_, 327 F. Supp. 378 (D. Mass. 1971), _aff'd_, 451 F.2d 26 (1st Cir. 1971).

[63] See, e.g., statements of Rep. Steven Solarz and Lt. Col. David Graham, City Bar Forum, _supra_.

Whether Congress can enforce its view on the President is another matter. In practice, the procedural requirements set forth in the Resolution requirements have been complied with only in part[65] and the Executive has reserved its position on the constitutionality of such procedure.[66] However, we see no constitutional defect in Congress' setting forth its view of how shared power is in practice to be shared, especially since, as required by Chadha, Congress' view was fully presented to the Executive Branch in accordance with Article I procedures.

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[64] This can be analogized to the setting of standards for removal viewed as a constitutional limit on the President's removal authority in Morrison, supra, and Humphrey's Executor, supra.

[65] The only Presidential report which specifically referenced subsection 4(a)(1) was the report filed by President Ford with respect to the Mayaguez, reprinted in 1977 Senate Hearings at 332. Of the 13 publicly available reports sent to Congress by President Reagan, only one, the Sinai report, refers to a specific section of the Resolution (Section 4(a)(2)), and most contain only a general reference that the report is being submitted "consistent with the War Powers Resolution".

Speaking at the City Bar Forum on April 27, 1987, Lt. Col. David Graham of the Judge Advocate General's office gave it as his personal opinion that the reference in any President's report to Section 4(a)(1) of the Resolution was a mistake and would not happen again, City Bar Forum at 55.

[66] See statement by President Reagan in his September 24, 1987 Persian Gulf report to Congress, 23 Weekly Comp. Pres. Doc. 1066; Statement of Abraham Sofaer, State Department Legal Advisor, 1986 House Hearings; President Reagan's signature message with respect to the Multinational force in Lebanon Resolutions, 19 Weekly Comp. Pres. Doc. 1422 (October 12, 1983).

Finally, we note that in practice, the triggering mechanism of Section 5(b) has not proved self-executing, despite clear legislative intent to the contrary. Whether the courts will make determinations as to when the 60-90 day period commences, as sought by members of Congress, unsuccessfully to date, in Crockett v. Reagan and Lowry v. Reagan[67] or whether triggering of Section 5(b) will require a Congressional statement as in the Multinational Force in Lebanon Resolution is not at the present time clear. The need for a "second trigger" may not be in accord with the statute or its legislative history.[68] Its existence, however, further mutes the concerns raised with respect to Section 5(b) that the President could unconstitutionally be forced to withdraw troops on the basis of Congressional inertia or inefficiency. Because they do not violate Chadha or broader separation of powers concerns, we recommend that the 60-90 day cutoff provisions of Section 5(b) be left intact as constitutionally appropriate.

IV. Judicial Enforcement and Consultation

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[67] Notes 2 and 10, supra.

[68] See Zablocki; The War Powers Resolution: Its Past Record and Future Promise, 17 Loyola of Los Angeles L. Rev. 579 (1984); Berdes & Huber, Making the War Powers Resolution Work: The View from the Trench (A Response To Professor Glennon), 17 Loyola of Los Angeles L. Rev. 671 (1984); Glennon, supra,; Ratner, supra.

The Byrd bill proposes the substitution of enhanced consultation procedures, provisions for passage of subsequent authorizing legislation and an authorization to Members of Congress to bring enforcement actions in the courts as a substitute for present Sections 5(b) and 5(c) of the Resolution. We have discussed above our recommendations as to previous Sections 5(b) and 5(c). We turn now to a discussion of judicial enforcement and enhanced consultation procedures.

A. Judicial enforcement

Section 4 of the Byrd bill would authorize any Member of Congress to bring an action for declaratory judgment and injunctive relief on the ground that the President or the armed forces have not complied with any joint resolution passed by Congress authorizing the use of forces or requiring the President to disengage forces from hostilities. Such an action would be a derivative one on behalf of Congress,[69] and because of the prior legislative authorization, different in type from the suits brought by Members of Congress to date.[70] Despite this difference, however, we believe the instances in which courts will reach the merits of any such action will be limited at best.[71] We therefore do not recommend such authorization to bring actions in the courts as a substitute for Section 5(b) and an amended Section 5(c).

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[69] See, e.g., the analysis in Dessem, Congressional Standing to Sue, 62 Notre Dame L. Rev. 1 (1986) (hereinafter "Dessem") and cases cited therein, including Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

[70] See, e.g., Synar v. United States, 626 F. Supp. 1374 (D.D.C.), aff'd sub. nom. Bowsher v. United States, 478 U.S. 714 (1986), and discussion at note 88 infra.

Since the enactment of the Resolution, two cases have reviewed direct challenges to the Executive Branch's compliance with the Resolution, two others have raised war powers issues and one has raised related issues of the allocation of foreign policy authority between the Executive and Legislative branches. In Crockett v. Reagan, congressional plaintiffs sought, among other things, a declaratory judgment that the presence of U.S. troops in hostilities in El Salvador violated Article I, § 8, Cl. 11 and the Resolution. Judge Joyce Green concluded that the factfinding necessary to determine whether troops were engaged in hostilities in El Salvador was beyond the expertise of the Court, but would be appropriate for congressional determination;[72] the Circuit Court affirmed, describing Judge Green's decision as based on the equitable discretion doctrine counselling judicial restraint where a congressional plaintiff's dispute is primarily with his or her fellow legislators.[73]

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[71] For the suggestion that such cases will be heard in the event of a constitutional impasse, see Crockett, supra, 558 F. Supp. at 899, citing Goldwater v. Carter, 444 U.S. 996 (1976) (concurrence of Justice Powell). Judicial resolution may, however, be avoided in this area on political question grounds, see Goldwater, supra, (concurrence of Justice Rehnquist) and war powers cases discussed infra.

[72] 558 F.Supp. at 848. Judge Green also ruled that the issues presented to the court were not nonjusticiable due to potential interference in foreign affairs, since plaintiffs sought to "enforce existing law concerning the procedures for decisionmaking" rather than relief that would dictate foreign policy, id.; and that the 60-day automatic termination provision of Section 5(b) is not operative unless a report has been submitted or required to be submitted by Congress or a court, id. at 896.

In Conyers v. Reagan, the district court declined to consider the merits of a claim by certain Congressional plaintiffs that the invasion of Grenada violated the war powers clause of the Constitution, Article I, § 8, Cl. 11, on the basis that collegial remedies, including the War Powers resolution, were available to members of Congress, that two of the members of Congress had in fact unsuccessfully initiated Congressional action adverse to the Grenada situation, and that in such circumstances, legislators should not be heard in court.[74] In Sanchez-Espinoza v. Reagan, the court declined to exercise its jurisdiction on equitable/remedial grounds in a challenge by Congressional plaintiffs to assistance to the contras in Nicaragua.[75]

In Lowry v. Reagan, members of the House sought a declaration that the President was required to file reports concerning certain incidents in the Persian Gulf and an injunction directing the President to file such reports as to ongoing escorts of Kuwaiti oil tankers in the Gulf, and the district court declined to rule on both equitable/remedial discretion and political question grounds. As to equitable discretion, the court noted the numerous bills introduced to compel the President to invoke Section 4(a)(1) in connection with the Persian Gulf activity, as well as the introduction of bills to alternatively repeal and strengthen the Resolution,[76] and determined that the lawsuit was a "by-product of political disputes within the Congress."[77] On the political question issues, the court determined that a decision on the issue of whether U.S. forces were engaged in hostilities or imminent hostilities in the Persian Gulf could potentially contradict legislative statements and impact on statements by the Executive and thus under the Baker v. Carr analysis risk the embarrassment of multiple pronouncements of the various departments on one question.[78]

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[73] 720 F.2d. at 1355.

[74] 578 F. Supp. at 326-27.

[75] 770 F.2d at 210.

In Dornan v. U.S. Secretary of Defense,[79] the Circuit Court for the District of Columbia reviewed the district court's dismissal of a complaint brought by fifteen members of the House and one Senator of an action seeking a declaratory judgment that the President had unconstitutionally abdicated his Article II foreign policy responsibilities by failing to support the contras in Nicaragua and an injunction against further compliance by the President with the Boland Amendments. The court affirmed the dismissal on standing grounds,[80] suggesting that even if the court were to abandon the equitable discretion formulation, the plaintiffs should seek to influence the President by seeking relief in Congress, not the Courts.

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[76] 676 F. Supp. at 336-338.

[77] Id. at 338.

[78] Id. at 340, citing Baker v. Carr, 309 U.S. 186 at 217 (1962).

[79] 851 F. 2d 450 (D.C. Cir. 1988), summarily affirming the decision of the district court at 676 F. Supp. 6 (D.D.C. 1987).

These cases illustrate that the courts are reluctant to exercise authority in this area on both Article III and prudential[81] grounds, and that, if the Lowry decision is any guide, the courts will continue to decline to exercise jurisdiction until they determine that a constitutional issue within their province has been presented to them.[82] It is not clear that specific legislation on the point by Congress will ensure judicial resolution of disputes between the executive and legislative branches over the war powers. An action seeking enforcement of a joint resolution passed by Congress directing troop withdrawal would presumably not raise concerns that a Congressional plaintiff had avoided collegial resolution of the policy issue involved, since first, the action would have been brought by the member of Congress pursuant to authorization specifically granted by an act of Congress,[83] and second, the action would be brought to enforce a bill passed by both houses of Congress. Issues of compliance by the President with the statute, including timing and military necessity of protecting the troops, however, might be ruled by the courts to be nonjusticiable on political question or prudential grounds,[84] and the President might well challenge the constitutionality of the judicial enforcement section itself on separation of powers grounds.[85] Moreover, given the time necessary to perfect appeals, any enforcement action by Congress which did not in the first instance reach the merits might become moot.[86]

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[80] For other cases on the issue of Congressional standing, see Burke v. Barnes, 479 U.S. 361, 55 U.S.L.W. 4103 (1987) (the Court avoided a ruling on the standing of Members of Congress to bring the action, since it dismissed the action on mootness grounds; the footnote at 55 U.S.L.W. at 4104 assumes arguendo that a House of Congress has a judicially cognizable injury if a statute is nullified by action of the Executive Branch); Bowsher, supra, 478 U.S. at 719-21 (avoiding a decision on Congressional standing); Goldwater v. Carter, supra (avoiding a decision on Congressional standing); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982), cert. denied, 464 U.S. 823 (1983)); Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C Cir.), cert. denied, 454 U.S. 1082 (1981); Crockett, supra, 720 F.2d at 1357 (dissent of Judge Bork). In Lowry, the Court did not decide the issue of standing, analyzing first the other justiciability challenges raised, 676 F. Supp. at 337, n. 26.

[81] That is, judicially self-imposed limits on the exercise of Federal jurisdiction rather than the constitutional component of standing, mootness, ripeness and the political question doctrines; see e.g., Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. , 454 U.S. 464, 475 (1982); Synar v. United States, 626 F. Supp. 1374, 1382 (D.D.C), aff'd.sub.nom.Bowsher v. Synar, 478 U.S. 714 (1986).

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[82] Lowry, supra at 341. On the issue of caution in exercising Article III authority over disputes as to executive power in the foreign affairs area, see Dames & Moore, supra, 453 U.S. at 660-662; Goldwater v. Carter, supra, at 997 (concurrence of Justice Powell).

[83] Making the action a derivative one on behalf of Congress itself, see Dessem, supra.

[84] As in Crockett, supra, and Lowry, supra.

[85] E.g. as interfering unduly with the carrying out of the Executive Branch function by forcing political disputes into the courts.

We do not mean to suggest that Congress should in no event consider a statutory provision authorizing suits by Members of Congress with respect to violations of the Resolution. Congress can delegate authority to act on its behalf in judicial actions to a member or committee so long as this delegation does not impinge on separation of powers concerns,[87] and courts will recognize the standing of such plaintiffs so long as the requisite Article III and separation of powers considerations are satisfied.[88] We do suggest, however, that judicial enforcement provisions directed at future legislation mandating troop withdrawals are not the most effective means with which Congress can seek to enforce the Resolution.

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[86] As in Burke v. Barnes, supra.

[87] In Synar v. United States, 626 F. Supp. 1374, 1382 (D.D.C.), aff'd. sub. nom. Bowsher v. Synar, 478 U.S. 714 (1986), the court recognized that Section 274 of the Gramm-Rudman-Hollings Act, providing for suits by Members of Congress seeking declaratory and injunctive relief, eliminated the court's equitable discretion to deny relief to Members, leaving only Article III considerations. Congress or its delegated representatives have frequently intervened in cases contesting constitutionality of legislation, as did the Senate and the House in Chadha, 462 U.S. at 930, note 5.

[88] For the concept that standing includes Article III considerations, see Allen v. Wright, 468 U.S. 737, 750-52 (1984); Valley Forge Christian College v. American United for Separation of Church and State, 454 U.S. 464, 471-76 (1982). For the concept that standing includes separation of powers concerns, see Dornan, supra; Crockett, supra, 720 F.2d at 1357 (dissent of Judge Bork); cf. Melcher v. Federal Open Market Committee, 836 F.2d 561, cert. denied, _____ U.S. _____, 108 S. Ct. 2034, 56 U.S.L.W. 3831 (1988) (concept that "equitable discretion" includes separation of powers concerns).

For summaries and analysis of the many cases in which individual Members of Congress have sought individual relief, see Dessem, supra; Note, The Burger Court's Unified Approach to Standing and its Impact on Congressional Plaintiffs, 60 Notre Dame L. Rev. 1187 (1985); Note, The Justiciability of Congressional-Plaintiff Suits, 82 Colum. L. Rev.

B. Consultation

There is no doubt under Chadha that requirements of the type found in Section 4 of the Resolution are a valid expression of a Congressional wish to be kept informed as to actions taken by the Executive Branch[89], and we believe this would apply *a fortiori* to the consultation requirements of Section 3 of the Resolution. The issue raised by Section 3 is rather whether its procedures are sufficient to lead to meaningful consultation between the branches.[90] Procedures suggested to augment Section 3 include the suggestion in S.J. Res. 323 that Congress specify two consultative groups, a smaller group consisting of the Speaker of the House, the President *pro tem* of the Senate, and the Majority and Minority Leaders of both houses, and a larger group including the chairman and ranking minority members of the House Committee on Foreign Affairs, Committee on Armed Services and Permanent Select Committee on Intelligence and the Senate

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526 (1982).

[89] 462 U.S. at 935,n. 9 and 955, n.19.

[90] Other nonconstitutional concerns include the security of communications made to Congress and the practicality of attempting to communicate with Congressional leaders: see, e.g., President Ford's description in connection with evacuations from Da Nang and Lebanon, 1977 Senate Hearings at 328.

Committee on Foreign Relations, Committee on Armed Services and Select Committee on Intelligence, with the smaller of the two groups to establish a schedule of regular meetings with the President. Other proposals to amend the Resolution have also included the establishment of a defined group to consult with the Executive Branch on fast-breaking developments.[91]

As a matter of general principle, the Committee endorses the concept of regular meetings between designated members of Congress and the Executive Branch, accompanied by appropriate security measures, but notes that these are not substitutes for the carrying out by each branch of its assigned constitutional functions. As noted by Professor Henkin, the Congress must authorize--not simply consult, or receive reports--when the nation goes to war.[92]

CONCLUSION

The exercise of war powers by the President and the Congress is a matter which necessarily involves constitutional issues as well as political choices. We have reviewed the enforcement mechanisms of the Resolution and conclude that while Section 5(b), the 60-90 day cutoff, is not an invalid legislative veto under the Supreme Court's decision in INS v. Chadha, the concurrent resolution mechanism of Section 5(c) is cast into doubt and should be modified or removed from the Resolution. The inclusion of authorization for actions brought in the courts by Members of Congress does not seem to us to be a satisfactory substitute for Section 5(b) or an amended 5(c) due to the constitutional and prudential reluctance of the courts to hear such disputes. The Committee would additionally favor the modification of the Resolution to include more detailed consultation procedures, but does not see such measures as a substitute for the enforcement mechanisms contained in Section 5 of the Resolution.

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[91] See, e.g., proposals reviewed in 1977 Senate Hearings.

[92] City Bar Forum, supra, at 94-95.

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LESSONS OF LEBANON: A GUIDELINE FOR FUTURE U.S. POLICY

Between 1981-1984 the United States became deeply involved in an effort to resolve the Lebanon crisis. The policy ended in failure. The political goals that the Administration sought to accomplish in Lebanon were never met. These included the withdrawal of all foreign forces, the establishment of a strong central government with control over all Lebanese territory and good relations with Israel, and the reform of the Lebanese political system.

The Administration's efforts collapsed in the spring of 1984 when U.S. marines were "redeployed" from Beirut International airport to U.S. navy ships, thereby ending an eighteen month presence on shore as part of a U.S.-European multinational force (MNF).

The reasons for failure included divisive leadership and bureaucratic conflict, strategic misjudgment, poorly executed military operations, ambiguous signals to allies and adversaries alike, and bad luck. The experience was a personal defeat for the secretary of state, George Shultz, and was to influence in a negative way his views on Middle East policy for the next three years. The consequences of the Lebanon encounter may not have been as disastrous as some thought at the time but there are lessons to be learned from the experience which a new Administration should take into account when venturing into the dangerous waters of Middle East diplomacy.

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Background

When the Reagan Administration came into office in January 1981, the Middle East did not rank high on the White House agenda; and the problems of Lebanon were on few advisor's minds. The priorities were to rebuild the U.S. economy and strengthen U.S. military forces. In order to delay a procession of Mideast leaders to Washington, Secretary of State Alexander Haig decided to visit the region in April. His itinerary included Egypt, Israel, Jordan and Saudi Arabia, but not Lebanon or Syria. Syria was left off the agenda primarily for logistical reasons, but Haig's failure to visit Damascus was seen by many, including Syria's leader, Hafez el-Assad, as a deliberate snub.

While Haig was in the region, on April 1, 1981, the Syrians launched a massive bombardment of the Christian town of Zahle in the Bekaa Valley which Phalangist forces under Bashir Gemayel had infiltrated. The Syrians feared that Israel, in cahoots with Bashir Gemayel, would be able to threaten Damascus from Lebanon as well as across the Golan Heights if they established a "presence" in Zahle. Haig denounced the Syrian shelling while he was in Jerusalem. In addition, Haig asked U.S. Ambassador to Lebanon, John Gunther Dean, to confer with Lebanese President Sarkis and to inform him that the U.S. was intent on helping the country. In Europe, Haig expressed his support for a French proposal to send French troops to Lebanon under the cover of a multinational force in order to separate the Phalange and Syrian forces.

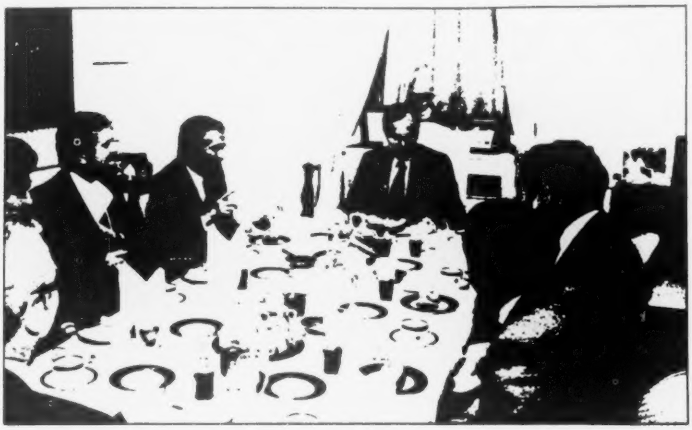
Concrete steps by the U.S. Administration were not taken until a Syrian-Israeli military confrontation became imminent. On April 28, Israel shot down two Syrian helicopters and Syria responded by deploying Soviet surface-to-air missiles near Zahle. The United States made urgent appeals to Israel to show restraint and to allow for diplomatic means to resolve the so-called "missile crisis." President Reagan appointed Philip Habib as a special U.S. envoy to try to prevent an Israeli-Syrian war.

The reasons for failure included divisive leadership and bureaucratic conflict, strategic misjudgment, poorly executed military operations, ambiguous signals to allies and adversaries alike, and bad luck.

The United States had two concerns regarding the Syrian-Israeli crisis. First, the Administration desired a peaceful settlement of the crisis, and secondly, it sought to reinstate the status-quo-ante in the region. A cease fire between Gemayel and the Syrians was reached on June 8 and the siege of Zahle ended three weeks later. However, this was followed by escalating encounters between Israeli forces and PLO positions in southern Lebanon. On July 17, Israel conducted a major raid against PLO headquarters in Beirut. Alarmed by the urgency of the situation, Habib's mandate was changed. He now had to arrange a cease fire between the PLO and Israel. This was done quickly and Habib received important help from Saudi Arabia. The cease fire took effect on July 24.

The lull in fighting lasted nearly a year. Then, on June 6, 1982, Israel invaded Lebanon following a resumption of hostilities between the PLO and Israeli forces along Israel's northern border. The magnitude and extent of the Israeli invasion took everyone by surprise. The immediate U.S. concern was to stop the war. This was not easy. The Israeli advance continued and there was fear that the war would fatefully damage U.S. relations with the Arab world. During the first days of the war, Israeli aircraft swept the Syrians from the skies in one of the most stunning air victories of modern times. Habib was dispatched to Damascus to arrange a cease fire but his arrival coincided with Israel's decision to move beyond the 30 kilometer line towards Beirut. Hafez el-Assad was convinced Habib had misled him as to Israel's intentions and from then on he was persona non grata in Syria, even though he remained Mideast envoy for another year.

In August 1982 the United States, in cooperation with France and Italy, dispatched a peacekeeping force to Lebanon to assist in the evacuation of the PLO and their leader Yasir Arafat from Beirut and thereby forestall an Israeli invasion of the city. This mission was successfully accomplished and all the multinational forces had departed Beirut by early September. This action coincided with the launching, on September 1, 1982, of the Reagan Mid-East peace initiative on the Arab-Israeli conflict, and the election of Bashir Gemayel to the Lebanese presidency. In the early days of September there was cautious optimism in the White House that the crisis might be coming to an end and would be replaced by a more constructive phase in Mid-East politics.


(MEI)

Geoffrey Kemp (left center) at a White House meeting on the Middle East headed by Vice President George Bush.

This was not to be. On September 14, Bashir Gemayel was assassinated. The next day, September 15, Israel's Minister of Defense, Ariel Sharon, ordered his troops to enter West Beirut to "prevent chaos." Under the cover of Israel's military presence Christian gunmen entered the Palestinian camps of Sabra and Shatila in West Beirut and massacred men, women and children. Television cameras brought the pictures to a global audience and because of the appearance of Israeli complicity, the outrage was particularly intense, including in Israel itself.

After a series of meetings in the White House over the weekend of September 18 and 19 it was decided to send the MNF back into Beirut. There was little argument about this decision. It was an immediate and reactive response to a tragic event and was strongly influenced by the belief that the United States had assumed responsibility for the safety of the Palestinians and that our friends, the Israelis, had allowed the worst to happen.

Anger against the Israeli government in general, and General Sharon in particular, was shared by all senior Administration officials. Sending back the MNF was the least the United States could do.

Thus began the second, and ultimately disastrous mission of the MNF in Lebanon. The period of the second MNF deployment, from September 1982 to March 1984, can be broken down into five distinct time frames during which key decisions or events occurred:

1. September 19, 1982 - October 1982
2. November 1982 - May 17, 1983
3. May 17, 1983 - August 29, 1983
4. August 30, 1983 - October 23, 1983
5. October 23, 1983 - March 1984

September 19, 1982 - October 1982

In the immediate aftermath of Sabra-Shatila three conditions were present which might have led to a different outcome to the Lebanon tragedy if the United States had responded in a different way. First, the Lebanese were extremely weak and vulnerable; the election of Bashir's brother Amin to the presidency as his successor was more an act of desperation than resolve. Because of the traumas of the past six years and the special horrors of the past summer, Lebanese politicians of all confessions seemed prepared to give Amin a chance, at least for a few months or so. Amin, however, was weak and inexperienced and was strongly influenced by his Christian advisors and, most especially, by the United States.

Second, Syria, which had the greatest stakes in Lebanon, was also in a very weak position. It had lost a high percentage of its air force during the fighting with Israel and was in no position to launch a strong counter-offensive against the forward Israeli positions. Third, Israel's morale and leadership was weakened as a result of Sabra-Shatila and the increasingly bitter domestic arguments over the wisdom of the Lebanon war.

For a few weeks a serious, and at times heated, debate took place within the Administration over how the U.S. should exploit this opportunity and use its clout as a superpower to put Lebanon together again and secure the withdrawal of all foreign forces. Several strong points of view were voiced. The NSC staff was in favor of attempting a bold move to assert American influence. This required putting great pressure on Israel and Syria to agree to troop withdrawals and for Amin Gemayel to agree to internal reforms in Lebanon. Furthermore, quick Israeli and Syrian withdrawals from Lebanon were considered essential if the Reagan Peace Plan was to stand a chance.

The problem was that such a posture could not be implemented unless the U.S. and its MNF partners were to assume a much wider peacekeeping role throughout Lebanon. It would have meant introducing U.S. army units, as distinct from Marines, and being prepared, if necessary to give an ultimatum to the Syrians and the Israelis to withdraw. A key element to the proposals was close cooperation among the allies in order to establish a fair and sensible division of labor for extending the role and mission of the MNF.

This viewpoint was strongly opposed, but for very different reasons, by the Departments of State and Defense. The State Department's position, vigorously pressed by Phil Habib, was that negotiations between the local parties for troop withdrawal had to be the priority, beginning with an Israeli-Lebanese agreement. Inserting more U.S. presence at this time would be counterproductive, and, anyway, would be resisted by the Congress.

The Defense Department officials also opposed any expansion of the U.S. mission since their priorities were elsewhere; they had always been the most reluctant partners in the MNF concept. They believed that the most sensible U.S. approach was to get tough with Israel and demand unilateral Israeli withdrawal from Lebanon. Denial of arms aid should be used as a lever to get the Israelis out. The Defense Department felt that close U.S. association with the Israelis was compromising our relations with the moderate Arabs whose support was so necessary for our expanded defense plans for the Persian Gulf and the protection of oil supplies. It was also clear that the Republican leadership in Congress was opposed to any expansion of the MNF mission.

In these circumstances it was impossible for the President to override the wishes of these powerful parties. Yet in retrospect this was the one window of opportunity the United States had to make a bold initiative. Instead, what happened laid the foundation for the eventual tragedy: the priority established by the end of October 1982 was to secure a quick agreement on Israeli withdrawal "in a matter of weeks" and then proceed to negotiate with the Syrians. If this had been done in weeks, the future might have been very different but, predictably, the diplomatic negotiations got into deep trouble from the very start.

November 1982 - May 17, 1983

Throughout the fall of 1982 the mood in the White House was one of intense frustration. The Reagan peace initiative had received a good hearing among most of the Arab countries and visits from Arab leaders to Washington led to expectations that the Reagan plan might have a future provided, of course, Lebanon was settled. Until the Israelis were out of Lebanon no Arab leader was going to invest capital in the Reagan plan. But since the Begin government had angrily rejected the Reagan plan, it became clear that the longer the Lebanon problem lingered, the less the chances for its adoption. At numerous White House meetings that fall the question of a date for Israeli withdrawal was raised with increasing irritation at what appeared to be Israeli stalling. This was a very low period in U.S.-Israeli relations. They did not significantly improve until early 1983 when Sharon was fired as a result of the Kahane Commission Report on Sabra and Shatila and Moshe Arens, the Israeli Ambassador to Washington, returned to become Minister of Defense.

The Israeli government, under increasing pressure to justify its actions in Lebanon and the high number of casualties, obviously wished to make the best possible deal with Amin Gemayel. Israel presented a list of demands that undermined Gemayel's fragile political consensus and infuriated Hafez el-Assad. While Habib was engaged in intensive negotiations with the Israelis and the Lebanese, the only contact the U.S. government had with Syria was through the U.S. Ambassador, Bob Paganelli.

By the fall of 1982 two important events had occurred concerning Syria. First, the Soviet Union had decided to quickly resupply and rebuild the Syrian air defenses. Second, Hafez el-Assad, playing upon the confessional conflicts within Lebanese society, had manipulated the Druze leader, Walid Jumblatt, to the point where his cooperation with the Gemayel regime was non-existent. At the same time, Assad was sending mixed signals to Gemayel, saying, in effect, negotiate the best deal you can.

As the weeks of negotiations with the Israelis dragged into months, the inevitable happened. So much human capital and so many egos had been invested in the Israeli-U.S.-Lebanese negotiations that any alternative policy approach was ruled out by the State Department as "counterproductive," even though most U.S. Mideast specialists were convinced the Syrians would never accept the agreement. The State Department negotiators believed there had to be a withdrawal agreement between Israel and Lebanon before anything else could happen. Furthermore, by the time Sharon had gone, the expectation was that the Israelis would be more accommodating and sensitive to Lebanese needs and therefore a speedy agreement could be reached. However, it was not until April 1983, when Shultz made his first visit to the Mid-East as Secretary of State, that a final piece of paper was agreed upon.

By now the political landscape had changed for the worse: The U.S. Embassy in Beirut was bombed by terrorists on April 18, 1983, and 17 Americans, including Shultz's close adviser, CIA specialist Bob Ames, were killed; the Reagan plan stagnated; the Syrians rearmed; and Gemayel seemed incapable of rebuilding domestic consensus as he attempted to satisfy the Israelis, the Americans, and his own constituents. This last point is especially poignant because throughout the Fall of 1982, up to and including Christmas, there had been genuine hope in Lebanon for the first time since the civil war broke out. The manifestation of this was the mood in Beirut during the Christmas holidays: expatriates came home; there were parties. No one underestimated the difficulties ahead but it looked as though there might be a silver lining.

(MEI)

President Reagan with Prime Minister Begin at the White House in 1982.

When George Shultz arrived in the Middle East in April, Syrian opposition to the proposed agreement was becoming more and more vocal. The two basic Syrian concerns were, first, that Syria and Israel were being treated as "co-equal" occupiers of Lebanese territory when, in fact, Syria had been invited in 1975 (with tacit U.S. and Israeli support at the time) to protect the Christians. The Syrian "peace-keeping" role had been authorized ex post facto, by the Arab League. The second Syrian concern was that Israel not be allowed to profit from its invasion of Lebanon by undermining the essentially Arab character in Lebanon and its close historic ties with Syria.

Syria's hostile reaction to the Lebanese-Israeli negotiations was made abundantly clear to Shultz when he visited Damascus on May 7, the day after the Israeli cabinet agreed "in principle" to the proposed agreement. On May 17 the agreement was signed. The Syrians rejected it out of hand and sought to influence other Arab countries, especially Saudi Arabia, to do likewise. Syria now did everything in its power to make life difficult for the Gemayel government and put pressure on the regime. This included violence.

Syrian forces in Beirut.

(MEI)

May 18, 1983 - August 31, 1983

The situation in Lebanon continued to worsen during the summer. The major issues were: continued Syrian hostility to the May 17 agreement; growing tension within Lebanon as the Lebanese armed forces prepared to expand their role in anticipation of a tactical Israeli redeployment; growing frustrations in Israel over the coolness and lack of cooperation between themselves and the Gemayel government. By July it was clear that without some level of cooperation from Syria there was no hope of reconciling the various conflicts between the Lebanese confessional groups, especially the rivalry between the Druze and the Maronites in the Shuf mountains. The Druze militia, armed by Syria, but also courted by the Israelis, held the high ground in the mountain overlooking Greater Beirut. The only force that stood between them and other anti-Gemayel forces in West Beirut was the IDF.

As the summer wore on the Israelis found themselves acting as "peacekeepers" between the Druze, the Phalange militias and the LAF. This was not a role that Israel had in mind when the May 17 agreement with Gemayel was reached. Israel's patience with Lebanon was beginning to wear thin, especially since the Israelis themselves realized that Hafez el-Assad was right and that the May 17 Agreement was "stillborn."

Against a back-drop of a deteriorating military situation in the Shuf mountains, Shultz visited Beirut and Damascus on July 5 and 6 for meetings with Gemayel and Assad. The Lebanese cabinet was preoccupied with security issues and the Syrian threat. Assad, on the other hand, was calm and reasoned in his approach to the U.S. delegation. He knew that the Israelis were no longer in the mood to stay indefinitely and that in the absence of a strong LAF capability the Gemayel government would become increasingly reliant upon the United States to protect it. This meant that direct U.S.-Syrian negotiations would be necessary to resolve the impasse.

The next significant event was the replacement of Phil Habib as the U.S.-Mid-East negotiator by Robert McFarlane, Bill Clark's deputy at the NSC staff. Unlike Habib, McFarlane was acceptable to the Syrians and during his brief tenure in the job had several long meetings with them. However, by the end of August dialogue with Syria was not enough to prevent the War in the Mountain which took place in September.

The immediate cause of the War in the Mountain was the precipitous, unilateral withdrawal of the Israeli army from the Shuf Mountains. It had been McFarlane's hope that an agreement between Jumblatt and Gemayel could be reached which would allow the LAF to gradually replace the IDF in the peacekeeping role in the Shuf without posing a direct threat to either the Druze or Phalange militias. For this to work, close, detailed cooperation between the IDF and LAF was necessary. For a host of reasons, many of them personal, Gemayel and Arens never got to meet each other. Exasperated, angry and conscious of the unpopularity of the occupation at home, Arens decided to pull back and bring many of the Israeli soldiers home for the Yom Kippur High Holiday without coordination with the LAF and in spite of U.S. pressure to delay the process. Fighting began almost immediately as the Druze and Phalangists sought to control the mountain. At this point the American MNF contingent began to take its first casualties.

September 1 - October 23, 1983

The United States' role in Lebanon now changed significantly due to the escalation of the confessional fighting and the direct involvement of U.S. forces in retaliatory military action. The period climaxed with the bombing of the Marine headquarters at Beirut airport on October 23, 1983, an event which virtually assured that the MNF would be withdrawn at an early date.

The immediate U.S. response to attacks on the MNF in late August was to step up efforts to get a cease-fire among all the parties. This could not be done without the help of the Syrians. One interesting twist was that at this point the Saudis decided to become actively involved and dispatched Prince Bandar Sultan to act as a go-between and broker for the various Syrian and Government of Lebanon proposals for a cease fire. This took place against a backdrop of increasing Druze and Shia attacks on the MNF and stories about the impending massacre of Christians at a village called Deir el Qamar.

This, in turn, generated fear for Christian reprisal against Gemayel for not doing enough to protect his own supporters. On the ground the most salient feature of the fighting was the vulnerable forward position of the LAF which was located on a high ridge line in the foothills of the Mountain about three miles from Ba'abda and Yarze, the locations of the Presidential Palace and the American Ambassador's residence, which served as McFarlane's headquarters.

The battle for this ridge line centered on a small village called Suq el Gharb and as cease fire negotiations accelerated in pace and content so did the intensity of the fighting. On the evening of September 10th there was a fierce battle and the military report the next morning suggested that the LAF line might collapse leaving an open road and a 20 minute drive to Yarze and the Presidential Palace. McFarlane urged the NSC to consider modifying the rules of engagement to include the use of firepower to protect the Americans and MNF presence (including the Residence) from hostile acts.

On September 19 the U.S. navy began to use naval gunfire support to protect the LAF and the American residency from the attacks along the ridge line which were intensifying day by day. This was a crucial decision and clearly represented a major change in the rules of engagement. To those in the residence under constant artillery and rocket attack, it was regarded as a minimal effort to protect Americans. To the world, however, it was seen as a deliberate military move to protect Gemayel and a dangerous escalation in the U.S. involvement in Lebanon.

> “If a strong president were to be elected in Lebanon, the United States should recommit itself to help rebuild Lebanon's institutions.”

Nevertheless a cease-fire was arranged and went into effect on September 26. It was seen as a sincere effort by the Americans, the Saudis and the Syrians to prevent a more dangerous conflict. The problem now was to monitor it and for this purpose McFarlane sought to establish a wider peacekeeping role for the MNF by bringing in an observer team and to help organize reconciliation meetings between the Lebanese factions.

When McFarlane finally left Lebanon in mid-October to replace Bill Clark as National Security Advisor there was a glimmer of hope that the cease-fire would hold and the Lebanese would get their domestic act together. However, it was clear that without the MNF presence to supervise protection for meetings nothing would happen. The unanswered question is to what extent the cease-fire could have held if Gemayel had been more imaginative about power-sharing and the eventual disaster to the MNF on October 23 had not occurred.

It is risky to speculate in situations like this but an argument can be made that up until October, 1983, the MNF had played a useful role in holding Lebanon together. However if it is believed that the MNF itself, especially the American action in September automatically led to October 23, another interpretation is possible. The point is that the scale and magnitude of the attacks on October 23 against the U.S. and French MNF virtually assured that it was only a matter of time before they left. At that point the Syrians knew that time was in their favor. Had October 23 not been so murderous it might have been another story.

October 24, 1983 - March 1984

From the U.S. perspective the bombing of the Marines meant that it was not a question of would the MNF leave, but when? The domestic pressure in the U.S. to pull the marines out coincided with the Defense Department's long standing wish to re-deploy the troops back to ships. It was clear to the President's domestic advisors that when the Congress returned in January from the long Christmas recess grass roots support for keeping the marines in Lebanon would be zero. Hence if any use was to be made of the interim time period it had to be well thought out. By now Donald Rumsfeld had replaced McFarlane as Mid-East negotiator and it was his unfortunate role to preside over the demise of the MNF and to be part of the exceedingly acrimonious argument that took place in Washington over the wisdom of continuing to use American military power to influence events in Greater Beirut.

Syria and Iran denied any involvement in the October 23 attack. On October 27, President Reagan said that the United States would stay in Lebanon and that it would be dishonoring the dead marines to engage in an untimely pull-out. But the bombings led to growing tension, including Syrian anti-aircraft fire against U.S. reconnaissance aircraft.

A climax of sorts occurred on December 4 when four U.S. fighter bombers were shot at while attacking Syrian anti-aircraft positions. Two of the aircraft were downed; one pilot was killed and the navigator of one aircraft, Lieutenant Robert Goodman, was captured by the Syrians.

On December 13, the Syrians again fired at U.S. aircraft but there were no casualties. American warships retaliated by opening fire on Syrian anti-aircraft batteries. On December 14, two more U.S. aircraft were fired on. This time the *USS New Jersey* opened fire for the first time in retaliation for the Syrian actions.

Much the same action/reaction involving reconnaissance missions and anti-aircraft fire and U.S. warship response with gunfire continued throughout December and the war of words between Syria and the United States persisted. Then, on December 30, Hafez el-Assad agreed to meet with the Reverend Jesse Jackson to discuss the fate of Lieutenant Goodman, who was in Syrian custody. Four days later on January 3, the Syrians released Lieutenant Goodman "in response to the humane appeals of the Reverend Jesse Jackson."

On January 14, Hafez el-Assad said that Syria would not move out of Lebanon until the United States did. Within the U.S. Congress, there was growing concern about the vulnerability of the marines and increasing pressures by democrats to force legislation or other action to bring home or withdraw the marines from the airport. On February 8, the *New Jersey* opened fire on Druze positions in the heaviest shelling yet. The 16-inch guns were used and the targets were "in Syrian-controlled Lebanon" where guns had been firing on the city of Beirut. This was interpreted as a new definition of the rules of engagement since U.S. forces were now permitted to hit at any units attacking the city of Beirut.

On February 14, the Lebanese army began to suffer serious defeats as concerted pressure both around the perimeter of Beirut and

There are lessons to be learned from the experience which a new Administration should take into account when venturing into the dangerous waters of Middle East diplomacy.

within West Beirut itself mounted. By this time, U.S. warships were openly firing into Syrian-controlled territory leading Secretary of the Navy John Lehman to say that the ships were firing in support of the Lebanese army. This was denied by the White House and other Pentagon officials. The White House was still insisting that "whatever we do is in support of the marines" and the Pentagon spokesman Michael Busch said "we are not providing fire in support of the Lebanese armed forces." Such misunderstanding and confusion between the services and the officials in the Pentagon and the White House as to what we really were doing in Lebanon was now common. The fact of the matter was that the rules of engagement had been changed and the net effect was to support the Lebanese army.

The collapse of the Lebanese army positions in West Beirut meant that the marines were now surrounded on three sides and on February 16 it was announced by the White House that they would begin redeploying in two or three days to ships at sea. While the Administration still claimed that there was a role for them to play in Beirut and that they might indeed go back, the reality was that the change in the military situation on the ground had forced the Administration to advance its timetable for withdrawal, in face of imminent collapse of the position.

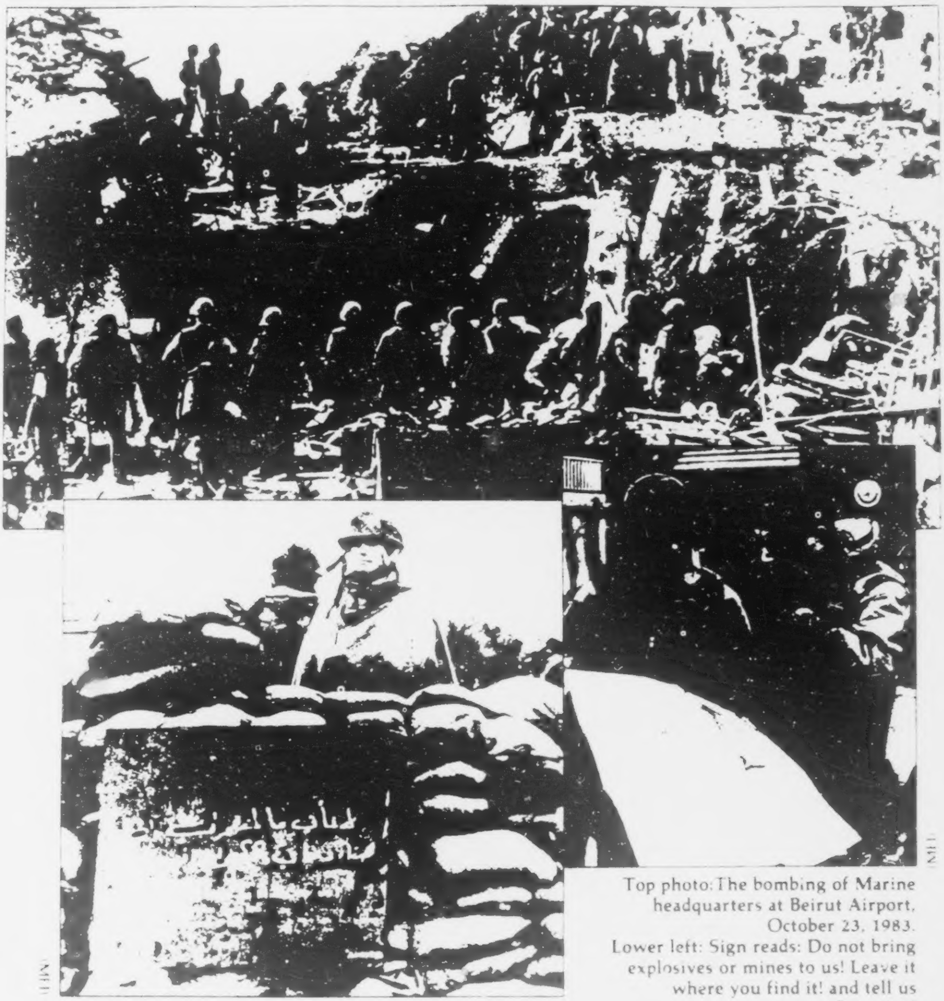
As the marines withdrew, the *USS New Jersey* opened up massively in the largest barrage yet. *The New York Times* reported on February 25 that military officers had found that shelling by 16-inch guns of the battleship *New Jersey* was far less effective than hoped. The biggest problem according to them was that the political leaders did not clearly enough define the military mission.

By the middle of March the United States was, in effect, out of Lebanon and the Administration policy had collapsed. The reasons were not only because of the collapse of the Lebanese army, but because, in the last resort, the U.S. Congress and the Pentagon were not prepared to outwait the Syrians and increase military pressure to the point where Syria would withdraw its forces.

The Six Lessons of Lebanon

The list of things that went wrong with the U.S. operation in Lebanon is long. Strategic and tactical mistakes have been well documented in Congressional hearings and the Long Commission Report (the official investigation into the bombing of the Marine barracks). Though most of the mistakes are by now of interest primarily to historians, six lessons can be identified that have relevance for future American policy.

- The first lesson concerns basic military strategy. If the United States contemplates the use of force in a hostile environment, military commanders must be given clear, specific military objectives and provided with enough resources to win any likely encounters with the enemy. They must feel confident in the political judgement of the President and his advisors. In the case of Lebanon the military commanders and the Secretary of Defense were convinced that the operation was flawed. Their cooperation was not whole-hearted and put many obstacles in the way of extending or protracting the mandate of the MNF. U.S. military leaders have learned the lessons of Vietnam and are reluctant to endorse new commitments that involve open-ended deployments of U.S. ground forces.



Top photo: The bombing of Marine headquarters at Beirut Airport, October 23, 1983.
Lower left: Sign reads: Do not bring explosives or mines to us! Leave it where you find it! and tell us where it is!
Lower right: Two marines look at a Lebanese map.

the mandate of the MNF. U.S. military leaders have learned the lessons of Vietnam and are reluctant to endorse new commitments that involve open-ended deployments of U.S. ground forces.

- The second lesson is that the American defeat in Lebanon did not end the U.S. military role in the Middle East or mortally weaken the credibility of American power. Consider, for instance, what has happened in the Gulf since the U.S. withdrawal from Lebanon. On March 30, 1984, vessels of the Sixth Fleet carrying the U.S. marines who were committed to the MNF force in Lebanon withdrew from Lebanese waters to resume duties elsewhere in the Mediterranean.

The departure from Lebanon coincided with a dramatic escalation of the Iran-Iraq war. While the *New Jersey* was firing its 16-inch guns into the foothills of Greater Beirut, U.S. ships in the Persian Gulf were firing warning shots at Iranian ships and aircraft deemed to be sailing and flying too close to U.S. vessels.

On May 13 the Tanker War erupted in

earnest in the Gulf with Iranian attacks against commercial shipping. On May 23, in response to "an urgent request from Saudi King Fahd for military aid to defend against the Iranian threat to Saudi shipping", the United States notified Congress it would be asking for approval for the sale of Stinger surface-to-air missiles for the Kingdom.

It was clear that whatever humiliation the United States may have suffered in Lebanon, the Iranian threat to the Gulf Arab states was far too serious to allow the Gulf Cooperation Council (GCC) countries to "distance themselves" from America's protective shield. The Gulf Arabs realized that the only country that had the capacity to protect them was the United States. Bemoaning the fate of the Gemayel regime might be understandable but when the chips were down one still had to rely on the Americans. The continued U.S. role in the Gulf suggests there has been no wish by the Arab regimes for the United States to go home.

- The third lesson is that Syria has the capacity to upset any U.S. initiatives in Lebanon or on the broader issue of an Israeli-Arab peace. Ignoring Syria from deliberations that have a vital impact on Syrian interests is bound to encourage Syrian intransigence and belligerence and assures that Syria will play a spoiler role in any negotiations that require its concurrence. The corollary—that no agreement on Lebanon, or for that matter the Arab-Israel conflict, is possible without Syrian approval—is not necessarily true, as Camp David bears witness. But unless there is an important Arab player such as Egypt or perhaps the Soviet Union who can block the more negative effects of a Syrian veto, dealing Damascus out of regional negotiations is poor policy.
- The fourth lesson concerns U.S. relations with Israel. Between the summer of 1981 and late 1982 the Administration was at logger-heads with the government of Menachem Begin concerning many Mideast issues including arms sales to the Arabs, Lebanon, and the peace process. Within the executive branch there were different opinions as to how to handle the relationship and, as a result, mixed and ambiguous signals were sent to the Begin government as to what U.S. preferences and goals were. This resulted in a most divisive and acrimonious atmosphere and impinged on the entire range of Mideast policy.

The lesson is that the more united the U.S. government's own position on policy questions that concern Israel, the less chance for misunderstanding and lengthy political squabbles over the relationship. The most healthy situation is one when both parties know exactly where the other stands and can adjust policy accordingly. Ambiguity creates its own demons and has never served either side well.

- The fifth lesson concerns domestic politics and crisis management. Once a risky but important policy initiative reaches a point when the egos and prestige of senior advisors are on the line, it is difficult to change direction irrespective of what the intelligence community and common sense may say, unless the president himself plays a strong role. In the case of Lebanon the President never once ordered the Secretary of Defense to play a more assertive role in supporting U.S. policy in Lebanon. Indeed, at the height of the debate within the White House over whether or not the marines should be redeployed to ships in February 1984, Reagan's own viewpoint was difficult to discern. The decision in favor of withdrawal was made by a simple majority within the inner circle of advisors. Once it became clear that the only way for the United States to stay in Lebanon was to embark on an agonizing public debate, the president had the wisdom to cut losses and not be swayed by apocalyptic visions of the collapse of American power and prestige throughout the Arab world.

Lebanon has left its mark on the White House in other ways. The experience convinced some senior NSC staff that because George Shultz and Caspar Weinberger had such basic disagreements on how to use American power, especially military power, there would always be gridlock if risky policy initiatives were to be considered. It was this concern that helped to create the conditions for the Iran-Contra scandal and the reported conversations between Oliver North and William Casey about creating an organization for conducting covert operations "outside the system".

- The sixth lesson relates to future U.S. relations with Lebanon itself. Both countries have presidential elections this year. Lebanon's president is chosen by the sitting members of parliament, not by popular ballot. By tradition the president is always a Maronite Christian.

If a strong president were to be elected in Lebanon, the United States should recommit itself to help rebuild Lebanon's institutions. A new American effort should capitalize on one of the few benefits to have emerged from George Shultz' recent visits to the region, namely the beginnings of a better U.S.-Syrian dialogue on Lebanon. So long as the United States and Syria have sought opposite goals in Lebanon, no progress has been possible. But if Syria and the United States can work to end Lebanon's divisions, the Lebanese economy could be revived which, in turn, would be a great benefit to Syria, whose own economy is in deep trouble.

There remains the problem of Israel's continued military occupation of an enclave in Southern Lebanon. Israel, too, has elections this year, but it is doubtful if any new government will withdraw forces until the authority and power of the legitimate leaders of the various Lebanese communities is enhanced.

The tragic experience of 1981-84 is that no outside power—Syria, Israel or the United States—has been able to impose its will on Lebanon. What is equally true is that no one group within Lebanon is capable of using paramilitary force or terrorism to dominate the country. Unless one's goal is the partition of Lebanon or the promotion of another Syrian-Israeli war—goals the United States, Syria, and Israel should strongly resist—reconciliation must be given another chance. Whether this can happen may well depend on how the new governments in Lebanon, the United States, and Israel manage relations with Syria in the early months of 1989. ■

PREPARED STATEMENT OF REPRESENTATIVE DANTE B. FASCELL

Mr. Chairman, I am honored to appear before the Special Subcommittee on War Powers to discuss the War Powers Resolution. Your hearings are timely and important. What emerges from this scrutiny of the War Powers Resolution will greatly influence preservation of the delicate balance of war powers between the executive and legislative branches as demanded by our Founding Fathers in the Constitution.

The War Powers Resolution of 1973 was the product of three years of debate and the passage of several predecessor bills. This law is no stranger to us on Capitol Hill. It has been exhaustively examined since 1973 by the Congress and by legal scholars. The Committee on Foreign Affairs and the Committee on Foreign Relations have consistently exercised their oversight responsibilities, including frequent hearings. This particular set of hearings, as well as the hearings which the House Committee on Foreign Affairs will hold later this month, demonstrate that commitment. (Appendix 1 lists the war powers hearings held by the House Committee on Foreign Affairs and its subcommittees since 1973. Appendix 2 is a press statement released by the Committee on Foreign Affairs relating to the publication of "The War Powers Resolution--Relevant Documents, Correspondence, Reports", May 1988.)

I want to commend Senator Biden for his continuing dedication to the rule of law in this country and join my colleagues in wishing him a full recovery. He, along with Chairman Pell and a decisive bipartisan majority in both the Senate and the House, has upheld that principle courageously in the face of unprecedented efforts by the executive branch to unilaterally reinterpret the Anti-Ballistic Missile Treaty of 1972. In a similar fashion, various efforts to reinterpret the War Powers Resolution of 1973 have distorted the public's understanding of the law, which nonetheless has had a powerful impact on the use of military force overseas.

Along with my distinguished colleagues at the witness table today, I hope to offer you a perspective on the original purpose of the War Powers Resolution and on how that purpose has been served during the last 15 years. I also intend to examine some of the common misperceptions and misinterpretations of this law which continue to plague its effective implementation.

18 years ago I introduced the first war powers resolution in Congress. It was May 1970 and President Nixon had committed U.S. Armed Forces to combat in Cambodia without prior congressional consultation or authorization. For five years

this country had been racked with one of the most divisive debates ever waged over the commitment of U.S. Armed Forces overseas. Despite, or perhaps because of, that controversy, President Nixon took the extraordinary step of ordering the invasion of a foreign country without any recognition of Congress' responsibilities under the Constitution. We were not consulted; we were excluded from making any contribution to the Executive's judgment. The time had clearly arrived to re-educate ourselves on the constitutional allocation of war powers and to obtain the executive branch's commitment to that cherished principle.

My intention in introducing H.R. 17598 on May 13, 1970, was to clarify the respective responsibilities of Congress and the President under the Constitution to initiate, to conduct, and to conclude armed hostilities with other nations. H.R. 17598 served, as I hoped it would, as the starting point. The bill was soon eclipsed by other legislation and, after three years of debate in the House of Representatives and the Senate, the War Powers Resolution of 1973, which I co-sponsored, was enacted over President Nixon's veto.

It is very important to recognize that the purpose of the War Powers Resolution never was to change the constitutionally-mandated powers of either the President or the Congress. The purpose was to affirm these powers and to clarify the procedures under which the President and the Congress would exercise their respective powers.

I find it ironic today that the debate so often centers on whether the War Powers Resolution grants Congress a broad, unconstitutional allocation of war powers. That focus in the debate has encouraged the executive branch to evade the requirements of the law.

Yet during the war powers debates of the early 1970's, the perspective was quite different. We were not aiming to create power for the Congress where none existed under the Constitution. We were trying to reaffirm, in fact rediscover, the war powers that the Constitution allocates to the Congress and to establish procedures that would help implement those powers. The Vietnam War and, in particular, the Cambodian incursion had left many on Capitol Hill wondering whether Congress would have any role to play in committing U.S. Armed Forces in armed conflicts in the future.

Far from attempting to expand Congress' war powers, we had to rebut strongly-held convictions of many members that the War Powers Resolution, as finally passed, expands the war powers of the president. The Senate bill, S. 440, listed actions that the president could take absent a declaration of war. Senator Eagleton made a strong case for defining those circumstances where the president could commit U.S. troops, an exercise which he believed would properly limit the president's authority. I argued against such a list because I believed it would further expand the president's authority as commander-in-chief. Specifically defining the president's authority, as the Senate bill did, would have given the president statutory authority he did not have then and does not have now. The War Powers

Resolution avoids that checklist and specifically provides, in section 8(d), that the law is not intended to alter the constitutional authority of the Congress or the president or to add to any existing powers of the president.

Nonetheless, the debate focussed then, as it often does now, on the procedures set out in section 5(b) of the War Powers Resolution. You may recall that former Congresswoman Elizabeth Holtzman (D-N.Y.) believed that section 5(b) would grant the president a power he does not have under the Constitution, namely to commence hostilities and to continue those hostilities for up to 90 days even if they are unconstitutional and illegal. She felt so strongly about this point that she voted against the conference bill and against overriding President Nixon's veto. She was joined on the Senate side by Senator Eagleton, who also voted, for similar reasons, against the conference bill and against overriding the veto.

I emphasize this because there was strong sentiment in Congress at the time that compliance with the War Powers Resolution would expand the president's constitutional power as commander-in-chief, rather than the growing perception today, even on Capitol Hill, that compliance with the law would restrain and even diminish the president's constitutional power as commander-in-chief and his authority to conduct the foreign relations of the United States. That latter perception has encouraged non-compliance by the president and has led to proposals to amend the law.

What procedures does the War Powers Resolution establish to guide the Congress and the president in the exercise of their respective powers under the Constitution? I want to reexamine sections 3, 4 and 5 and explain their purpose and practical operation.

Section 3, the consultation provision, is, in my opinion, the most critical procedure established by the War Powers Resolution. It offers the opportunity for building and sustaining a consensus between the executive and legislative branches for a bipartisan policy on the commitment of U.S. Armed Forces overseas.

On the floor of the House in 1973 I said, "I have urged throughout our committee's consideration that the strongest possible provision be made requiring consultation. It serves a twofold purpose. Not only do we have the benefit of all the facts, but I believe, we as members of Congress could make a significant contribution to the Executive's judgment."

I am even more convinced in that viewpoint today. Appearing before you today are Mr. Broomfield, the ranking Republican on the House Foreign Affairs Committee, and myself, the chairman of that committee. We have worked together on the Foreign Affairs Committee for 27 consecutive years. We were young Congressmen in 1958 when U.S. troops were deployed in Lebanon. We were still here when a terrorist bomb killed hundreds of U.S. Marines at Beirut airport in 1983. In the 1970's we imposed and then later removed an arms embargo against Turkey in connection with the invasion of Cyprus. Together we supported arms control--from John Kennedy's atmospheric test ban treaty to Richard Nixon's SALT I agreement to President Reagan's INF accord.

For nearly three decades, Bill and I have served together in a genuinely bipartisan fashion. Together we have lived through the terms of seven presidents, nine secretaries of state, and more than a dozen national security advisers--all of whom come and go while we remain.

Far more than any senior executive branch official today, Bill and I have lived through and participated in the conduct of American foreign policy during the last 30 years. The purpose of section 3 of the War Powers Resolution is to tap that experience. Our Founding Fathers were quite insightful and wise when they incorporated into the Constitution the principle of advice and consent between the executive and legislative branches of government. The War Powers Resolution embodies and honors that principle.

Before 1973 there was no effective consultation between the president and the Congress prior to or even during the introduction of U.S. Armed Forces into hostile situations overseas. It was the absence of consultation prior to the Cambodian incursion that concerned so many of us. It was the absence of any statutory requirement for consultation which encouraged the president to ignore the Congress.

Since 1973 the president has had to recognize and respond to a statutory requirement to consult with the Congress before introducing U.S. Armed Forces into hostile situations. I am the first to acknowledge that no president has fully complied with the consultation requirement as it was originally conceived. In no instance, with the possible (though qualified) exception of the Persian Gulf, has the Congress been consulted in the manner which the original authors of the War Powers Resolution envisaged when section 3 was drafted, debated and enacted.

"Consultation" does not mean notification immediately prior to military engagement. We paid considerable attention to the meaning of "consultation" during the deliberations on the War Powers Resolution. The report from the Committee on Foreign Affairs (House Report No. 93-287) put it succinctly: "Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available."

Everyone knows that intention has never been fully honored by any president, Democrat or Republican. But progress has been made, and we are in far better shape today than we were before 1973. The degree of consultation we have had on our military commitments in the Persian Gulf since mid-1987 has been good. It could and should have been better, especially in the early stages last year, but the consultative process was recognized and implemented, and it continues. It is a far cry from the dog days of Vietnam.

I believe that the consultative process can be improved, but that we do not necessarily have to amend the War Powers Resolution to achieve that improvement. For over a year I have called for the establishment of a leadership consultative group. (Appendix 3 describes the structure and purpose of such a group.) This group, which could be established ad hoc tomorrow by the president and the Congress, would: consist of senior foreign policy advisers within the administration and senior members of the Congress; meet informally but regularly to discuss major foreign policy developments and ideas; and serve as an informal consultative mechanism as envisioned in the War Powers Resolution.

The president not only would consult regularly with the leadership group to forge a bipartisan foreign policy, but the group would be readily identifiable and available for consultation in connection with war powers incidents. The frequency of its meetings with the president would permit consultation on short notice without necessarily signalling the press that a crisis is pending.

I have noticed that recent legislation to amend the War Powers Resolution proposes the creation of a congressional leadership consultative group. I simply would emphasize that you do not have to legislate the creation of such a group. It is in the interests of both the executive branch and the Congress to form a consultative group in a collaborative spirit, because consultation cannot be forced down anyone's throat.

Both branches have to recognize the necessity and benefits of consultation both for purposes of the long-term foreign policy of this country and for building a consensus on the introduction of U.S. Armed Forces into hostile situations.

Section 4 of the War Powers Resolution, the reporting provision, unfortunately has become the procedural obstacle to effective implementation of the law. This is a very straight-forward set of procedures designed to inform the Congress of the facts relating to the introduction of U.S. Armed Forces into one of three types of situations. Yet it has been distorted by every president in a word-game.

The Speaker of the House of Representatives and the President pro tempore of the Senate, which section 4 designates as the duly-authorized recipients of a war powers report, have received 18 reports since the first one was submitted on April 4, 1975, in connection with the evacuation of Danang. The latest report was submitted only last week in connection with the actions taken by the USS VINCENNES in the Persian Gulf on July 3, 1988. Every report (except one submitted on March 26, 1986, describing a military engagement in the Gulf of Sidra) states that it is being submitted "consistent with" the War Powers Resolution (or section 4 thereof) or "taking note of" section 4 or 4(a)(1) or 4(a)(2) of the War Powers Resolution. No report states that it is being submitted "pursuant to" the War Powers Resolution or any particular subsection of section 4.

These war powers reports merit close scrutiny. Every president has diligently submitted war powers reports following war powers incidents. They have done so within 48 hours after the introduction of U.S. Armed Forces into section 4(a)(1) situations. That in itself is an improvement over the situation we found ourselves in before 1973 when the president was under no statutory obligation even to communicate with the Congress.

Both the president and many members of Congress maintain that these reports do not constitute formal war powers reports submitted pursuant to section 4(a)(1), and therefore the provisions of section 5 remain inapplicable with respect to such reports. The president usually argues that the requisite circumstances do not exist to classify the report as a formal section 4(a)(1) report; members of Congress usually argue that those circumstances do exist but that the president has not followed proper form or included required information or evidenced clear intent when submitting the report.

Several senators have taken a different point of view in connection with the Persian Gulf and considered the president's reports as sufficient to activate the provisions of Section 5. Rep. Howard Berman, who sits on the Committee on Foreign Affairs, also has argued that form should not dictate substance in these reports, and that they should be read for what they are under the law.

I do not consider these war powers reports to be mere scraps of paper. The president is responsible for complying with both the form and substance of the law. He cannot use the cloak of the War Powers Resolution to baptize his reports in an effort to appease the Congress, and then turn around and deny that the reports have any consequence under the law. If these are not war powers reports, then what are they, and why are they always submitted within the statutory time-limit of 48 hours?

In this connection, I think it would be useful to insert in the record two recent documents: the memorandum of law filed on September 29, 1987, in the U.S. District Court (D.C. Circuit) by the plaintiffs (110 Members of Congress) in _Lowry et al. v. Reagan,_ which is currently on appeal to the U.S. Court of Appeals (see Appendix 4), and Rep. Berman's _amicus curiae_ brief in the same case (see Appendix 5). They should provide this subcommittee with an enlightening discussion on the dilemma posed by the reporting requirement.

The War Powers Resolution, then, is not really the problem when it comes to enforcement of the requirements of section 4. I note, for example, that S.J.Res. 323 does not propose any amendment to section 4. The real problem is the president's unwillingness to affirmatively comply with both the form and substance of the law, and Congress' reluctance to recognize the reports as legally significant documents.

Section 5 of the War Powers Resolution, which pertains to congressional action in response to a section 4(a)(1) situation or other engagement in hostilities outside the United States, has evoked unwarranted concern by both the president and many members of Congress. The common misinterpretation of this provision is that first, a section 4(a)(1) war powers report must be submitted by the President, and second, that any such submission would trigger a 60-day period at the end of which

U.S. Armed Forces must be withdrawn from the area of hostilities.

The wording of section 5(b) is clear. It refers not only to the actual submission of a section 4(a)(1) report but also to a report which "is required to be submitted pursuant to section 4(a)(1)". The Committee on Foreign Affairs was quite specific in 1973 as to what the latter requirement means. The committee reported that "[t]he language '***or is required to be submitted***' takes into account a situation in which the President for whatever reason may decide not to submit a report. In that case, the 120-day period [up to 90 days in the conference report] would begin after the 72-hour period [48-hour period in the conference report] referred to in section 3 [section 4 in the conference report]."

Nor did the conferees state that the 60-day period begins only after the president has submitted a section 4(a)(1) report. Rather, "[t]he conferees agreed on a 60-day period following the 48-hour period in which the president is required to report under section 4." Whether or not the president reports is not the determinative factor. The requirement to report is the determinative factor.

I never discerned any intention on the part of the conferees in 1973 (and Bill Broomfield and I were there) that the Congress was supposed to remain impotent and blind to all reality simply because the president refused to submit a section 4(a)(1) report. I simply cannot interpret the language "***or is required to be submitted***" in any way other than that it covers those situations where the president, for whatever reason, chooses not to submit a section 4(a)(1) report.

Perhaps the greatest fallacy that distorts our understanding of the War Powers Resolution is the notion that it mandates automatic withdrawal of U.S. Armed Forces from hostilities within 60 days. The language of section 5(b) requires that "the President shall terminate any use of United States Armed Forces with respect to which such [section 4(a)(1)] report was submitted (or required to be submitted)," unless one of several exceptions exist, including the enactment of specific authorization for such use.

The language "***shall terminate any use***" is not synonymous with withdrawal. To "terminate any use" may require partial or full withdrawal of U.S. Armed Forces, but it is a much more flexible choice of words than has been understood by proponents and critics alike of the War Powers Resolution. If we had intended to mean complete withdrawal, we would have used those words in 1973.

Further, to "***terminate any use***" is directly tied to the circumstances described in the section 4(a)(1) report, or those circumstances which should have been described in a section 4(a)(1) report where one is required to be submitted. That report, like so many that have been received from the president, could describe hostilities which commence and end in one day, and which therefore do not continue for any 60-day period. We cannot translate every military incident overseas into a war powers imbroglio. Many of them will merit war powers reports submitted under section 4(a)(1). But our experience has shown that only occasionally will those initial incidents persist for 60 days or more.

The Congress has acted under the War Powers Resolution in two significant situations where the U.S. military presence promised to last for more than 60 days. First, after the situation began to deteriorate in Lebanon in 1983 and the Congress received a report from President Reagan on August 30th of that year, we exercised our authority under section 5 of the War Powers Resolution and authorized continued participation by U.S. Armed Forces in the Multinational Force in Lebanon. Although the law worked, the President's policy in Lebanon suffered crippling setbacks. We need to remember that the War Powers Resolution is no substitute for a wise execution of foreign policy by the executive branch.

The second significant situation was Grenada. Following submission of President Reagan's October 25, 1983, report on the U.S. invasion of Grenada, the House and the Senate passed similar measures declaring that the requirements of section 4(a)(1) became operative on October 25 (the date of the U.S. action). But all U.S. combat troops were removed from Grenada within 60 days (by December 15, 1983), and therefore the Congress was not confronted with the choice presented by section 5 of the War Powers Resolution. Nonetheless, the law (and its 60-day requirement) clearly influenced the president's decision to restrict the Grenada operation to the prudent objectives of protecting American lives, restoring stability, and enhancing the self-government of Grenada.

I believe, however, that the Persian Gulf is a classic war powers situation that has persisted for far more than 60 days. But how the Congress has responded to the situation in the Persian Gulf has far more to do with the character of the President's policies in that region and domestic public opinion than it has to do with any perceived weaknesses in the War Powers Resolution.

The War Powers Resolution has not prevented nor is it intended to prevent the president from using his constitutional power as commander-in-chief to exercise the right of self-defense in hostile situations. Its intent is to insure that the Congress is properly consulted, that it is properly informed, and that its approval is properly rendered in those circumstances where such approval is required.

Finally, a word of caution about section 5(c). Following the Supreme Court decision in Chadha v. I.N.S., a common point of view has evolved that section 5(c) must be unconstitutional because it provides for a "legislative veto".

First, the Supreme Court, indeed no court, has ruled that section 5(c) of the War Powers Resolution is unconstitutional. Second, the concurrent resolution described in section 5(c) is not, strictly speaking, a "legislative veto". A legislative veto occurs when the Congress has granted the president explicit statutory authority and then seeks to revoke that authority through the instrument of a concurrent resolution. The War Powers Resolution does not grant the president, explicitly or implicitly, any authority he does not already have under the Constitution. In fact, section 5(c) is operative only if there has been no prior legislative grant of authority (i.e., the absence of a declaration of war or specific statutory authorization).

Since the Congress has never tested its power under section 5(c), I would be very cautious about abdicating that power simply because of a presumption held by some that it may be in error.

I would submit that the War Powers Resolution is a worthy law, carved out of years of debate and consideration in the Congress during the early 1970's. What some perceive as weaknesses in the War Powers Resolution has more to do with issues that reach far beyond this particular statute. Those issues involve distrust between the executive and legislative branches and the great difficulty we have had in this country with efforts to create a bipartisan foreign policy.

In a sense, these are intangible issues that cannot necessarily be remedied with legislative tinkering. The breakdown in trust and even credibility between the two branches of government, and the failure to forge a bipartisan foreign policy reach far beyond the exercise of war powers.

In four other major areas of foreign policy--arms control, foreign aid, human rights, and international trade--we have had major difficulties over the years in developing a collaborative, bipartisan relationship between the executive and legislative branches, and even within the Congress. Where we do succeed it is the result of consultation and mutual recognition of each branch's proper constitutional role in foreign policy and national security policy. The Marshall Plan, our participation in NATO, our commitment to the security of Israel, our support for the Afghan resistance, and the INF Treaty attest to the potential for a constitutionally-sound approach to the making of foreign policy.

Fortunately, the War Powers Resolution already provides the procedures for consultation and collaboration in the exercise of war powers by this government. Those procedures are well-suited for the making of bipartisan foreign policy, but only if those intangible elements of trust and credibility are also present. No amendment to the War Powers Resolution can inject those characteristics into the process. Before we rush to amend the War Powers Resolution, we should look long and hard at the broader problem that confronts this government: the making and sustaining of a bipartisan foreign policy.

A bipartisan foreign policy is exactly what former Secretaries of State Henry Kissinger and Cyrus Vance call for in their article in the summer issue of Foreign Affairs. Relevant to this hearing, they astutely observe: "The legislative branch has clearly defined constitutional responsibilities in overseeing and funding U.S. foreign and defense policies. Congress must be well informed about the plans and actions of the executive branch, and no foreign policy is sustainable if a majority of the Congress, reflecting public opinion, is adamantly opposed."

That being said, I view with keen interest legislation to amend the War Powers Resolution. The Committee on Foreign Affairs will continue to examine proposals as they evolve. We also will follow closely what is said in these hearings which are serving such an important purpose.

Appendix

1. Oversight of War Powers Resolution: Hearings by House Foreign Affairs Committee and Subcommittees, U.S. House of Representatives, 1974-1987.

2. Press statement dated June 5, 1988, by the Hon. Dante B. Fascell, announcing the release of the May 1988 edition of "The War Powers Resolution--Relevant Documents, Correspondence, Reports".

3. Proposal for the Creation of a Leadership Consultative Group, by the Hon. Dante B. Fascell, Chairman, Committee on Foreign Affairs, U.S. House of Representatives, March 1987.

4. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Michael E. Lowry, et al. v. Ronald W. Reagan, United States District Court for the District of Columbia, Civil Action No. 87-2196-GHR, September 29, 1987.

5. Brief Amicus Curiae of Representative Howard Berman, Michael E. Lowry, et al. v. Ronald W. Reagan, United States District Court for the District of Columbia, Civil Action No. 87-2196-GHR, November 9, 1987.

Appendix 1

July 11, 1988

OVERSIGHT OF WAR POWERS RESOLUTION

HEARINGS BY HOUSE FOREIGN AFFAIRS COMMITTEE AND SUBCOMMITTEES

War powers: a test of compliance relative to the Danang sealift, the evacuation of Phnom Penh, the evacuation of Saigon, and the Mayaguez incident. Hearings, 94th Cong., 1st sess. May 7 and June 4, 1974. Washington, U.S. Govt. Print.Off., 1975. 136 p.

Seizure of the Mayaguez. Hearings, 94th Cong., 1st sess. Washington, U.S. Govt. Print. Off., 1975-1976. 4 v. Hearings held May 14-Sept. 12, 1975.

Deaths of American military personnel in the Korean demilitarized zone. Hearing, 94th Cong., 2d sess., September 1, 1976. Washington, U.S. Govt. Print. Off., 1976. 40 p.

Congressional oversight of war powers compliance: Zaire airlift. Hearing, 95th Cong., 2d sess. August 10, 1978. Washington, U.S. Govt. Print. Off., 1978. 38 p.

The U.S. Supreme Court Decision concerning the legislative veto. Hearings, 98th Cong., 1st sess. July 19, 20, and 21, 1983. 371 p.

Statutory authorization under the War Powers Resolution--Lebanon. Hearing and Markup, 98th Cong., 1st sess., September 21 and 22, 1983. 120 p.

Grenada War Powers: Full compliance reporting and implementation. Markup, 98th Cong., 1st sess., October 27, 1983. 40 p.

War Powers, Libya, and State-sponsored terrorism. Hearings, 99th Congress, 2nd sess. April 29, May 1 and 15, 1986. Washington, G.P.O. 1986. 382 p.

Overview of the Situation in the Persian Gulf. Hearings and Markup, 100th Cong. 1st sess. May 19 and June 2, 9, 10, 11 and 23, 1987. 334 p.

U.S. policy in the Persian Gulf. Hearing, 100th Cong., 1st sess., Dec. 15, 1987. Washington, G.P.O., 1988. 62 p.

Appendix 2

Committee on Foreign Affairs

FOR RELEASE
Sunday, June 5, 1988

FOR FURTHER INFORMATION
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FASCELL RELEASES 1988 WAR POWERS RELEVANT DOCUMENTS

ANNOUNCES COMMITTEE AGENDA

Representative Dante B. Fascell [D. Fla.], Chairman of the House Committee on Foreign Affairs, today released the May 1988 edition of "The War Powers Resolution-- Relevant Documents, Correspondence, Reports," and observed:

> This committee print is being released as part of the Foreign Affairs Committee's active oversight of the applicability of the War Powers Resolution to U.S. military operations in general and in the Persian Gulf in particular.

In view of the recent and significant expansion of the U.S. Rules of Engagement in the Persian Gulf and persistent attacks against U.S. and other shipping in the region, Chairman Fascell said:

> Congress recognizes our long-standing strategic, economic and political interests in the Persian Gulf and supports our commitment to ensuring the freedom of navigation through international waters in the Persian Gulf, as well as our diplomatic efforts to bring the Iran/Iraq war to an end. Congress also realizes that our presence in the Persian Gulf has resulted in circumstances in which U.S. military personnel are confronted with situations in which imminent involvement in hostilities is a harsh reality. Consequently, it is time for the Congress and the administration to act together and decisively in support of our interests in the Persian Gulf and the law of the land.

Accordingly, Chairman Fascell instructed Committee staff to:

- review all legislative initiatives relative to U.S. military activities in the Persian Gulf and the War Powers Resolution;
- update the comprehensive "War Powers: A Special Study," [last released in April 1982] to include materials relevant to U.S. military actions and naval escort operations which have occurred in the Persian Gulf since the U.S. decision to reflag 11 Kuwaiti oil tankers;

Section 3 of the War Powers Resolution envisions the establishment of a joint Congressional-Executive consultative group in its provision that the President shall consult with Congress before introducing U.S. armed forces into hostilities or into situations in which imminent involvement in hostilities is indicated. In describing the utility of such a group, which Chairman Fascell has been encouraging the development of since the May 1987 Stark incident Fascell stated:

> The War Powers Resolution is a living document whose importance to the conduct of United States foreign policy cannot be dismissed, discounted, or denied. Its elegant simplicity restores the Constitutional balance that was created between the President and Congress on questions of peace and war, and affirms our mutual partnership in such matters. Under present circumstances, the need is not necessarily for Congress to amend the War Powers Resolution but rather for the executive branch to comply more fully with the spirit and intent of its provisions.

In its oversight capacity, the Subcommittee on Arms Control, International Security and Science has periodically published committee prints of relevant documents, pertinent correspondence and applicable reports submitted by the President in compliance with the War Powers Resolution. The last edition of this committee print was issued in December 1983 and included six reports related to the Sinai, Lebanon, Chad and Grenada. Noting the case of Lebanon, Fascell stated:

> As a direct result of U.S. participation in Lebanese peacekeeping operations, the executive branch for the first and only time to date, engaged in consultations with Congress to gain legislative authorization for the deployment of U.S. military forces under the provisions of the War Powers Resolution. That process-- consultations-- is especially relevant to present U.S. operations in the Persian Gulf and ultimately to the success of those operations.

Commenting on both the release of the 1988 edition of the committee print on the War Powers Resolution and the committee's planned agenda, Fascell concluded:

> Our most successful foreign policy efforts have been those in which the President and Congress have worked together in developing. The implementation of such policies has enjoyed bipartisan support in Congress and gained broad support with the American people. Those policies have commanded the attention and respect of both our friends and adversaries. Authorization of U.S. military activities in the Persian Gulf under provisions of the War Powers Resolution and establishment of the Joint Consultative Group would underline the continued vitality of the War Powers Resolution, as well as ensure the successful implementation of such policies in the future.

Copies of the May 1988 edition of "The War Powers Resolution-- Relevant Documents, Correspondence, Reports" can be obtained through the Subcommittee on Arms Control, International Security and Science at 225-8926 in Room 2401-A Rayburn Building.

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Appendix 3

Committee on Foreign Affairs

PROPOSAL FOR THE CREATION OF A LEADERSHIP CONSULTATIVE GROUP
BY HON. DANTE B. FASCELL
March 1987

As one reflects upon the formulation and implementation of our country's national security and foreign policy -- be it the use of U.S. military forces and capabilities, or arms control, or anti-terrorism activities -- there is an urgent need to restore an effective and meaningful consultative relationship between the executive and legislative branches of our Government.

It is critical for us to restore and sustain a national security and foreign policy that has bipartisan support in Congress. Such a development would then have the support of the American people and command respect from our friends and adversaries alike around the world.

Accordingly, I propose the establishment of a Leadership Consultative Group to serve as a structure for executive branch consultations with Congress on major foreign policy and national security issues that impact on our constitutionally-granted foreign policy and national security obligations and rights.

This Leadership Consultative Group would:

- Consist of a maximum of 18 senior Members from both the House and the Senate;
- Hold regular (quarterly) closed meetings with the senior policy decisionmakers within the executive branch;
- Engage in discussions on major foreign policy ideas and developments and not day-to-day management considerations; and
- Serve as an informal consultative mechanism offering both senior congressional and executive branch personnel opportunities for candid exchanges and assessments on the direction of our country's national security and foreign policy.

Two common characteristics of foreign policy initiatives that go astray are (1) secrecy; and (2) lack of congressional involvement and concurrence.

As a practical matter, secrecy in international affairs is simply a necessity and that option must be preserved. This reality, however, cannot and should not preclude a congressional role in major foreign policy initiatives.

Avoiding congressional involvement is inconsistent with our Constitution, our traditions, and our democratic form of government.

A Leadership Consultative Group could help avert foreign policy fiascoes. How? In three different ways:

- By convincing the President that it is not a viable policy;
- By concurring with it and standing behind it thereby enhancing its ultimate success; or
- By modifying it to reflect congressional concerns.

An informal Leadership Consultative Group would:

- Enable the Congress to give its advice and consent;
- Preserve secrecy; and
- Avoid the establishment of a new legal structure.

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL E. LOWRY, a Representative)
from Washington, *et al.*,)
)
Plaintiffs,) Civil Action
v.) No. 87-2196-GHR
) (Revercomb, J.)
RONALD W. REAGAN, President of the)
United States,)
)
Defendant.)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The question presented in this case is whether the President of the United States is obligated to file a report with the Congress pursuant to section 4(a)(1) of the War Powers Resolution regarding the escort activities of the United States Armed Forces for reflagged Kuwaiti ships in the Persian Gulf. Because all of plaintiffs' evidence in this case comes directly from high Administration officials or official government reports, there can be no doubt about any of their factual assertions, thereby making the case ripe for summary judgment. Therefore, the only question in the case is whether, on these undisputed facts, the President was required to file a report under section 4(a)(1) when he, in effect, took sides in a war in which the United States was offically neutral, by offering military protection to ships of a close ally of one of the belligerents.

FACTS

On November 7, 1973, Congress overrode the veto of then-President Richard Nixon and passed the War Powers Resolution, Public Law 93-148, 87 Stat. 555, 50 U.S.C. §§ 1541 *et seq.* The constitutional authority under which the Resolution was passed included Article 1, section 8, clause 11, which empowers Congress to declare war, and Article 1, section 8, clause 18, which empowers Congress to make such other laws as it deems necessary and proper to carry into execution its enumerated powers, including the power to declare war, as well as other powers granted to the government in the Constitution. As stated in section 2(a) of the Resolution, its purpose is

> to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances and to the continued use of such forces in hostilities or in such situations. 50 U.S.C. § 1541(a).

The Resolution contains several provisions which will be more fully described in the argument section of this memorandum, along with their relevant legislative histories. The key provision here is section 4(a), 50 U.S.C. § 1543(a), which provides as follows:

> (a) In the absence of a declaration of war, in any case in which the United States Armed Forces are introduced --
>
> > (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> . . . .
>
> the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth --

> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

Thus, if the Court agrees with plaintiffs that United States Armed Forces were "introduced ... into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," then the President was required to file a report under section 4(a)(1) within 48 hours of the introduction of the Armed Forces.

The trigger language of section 4(a)(1) -- the introduction of U.S. Armed Forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" -- is identical to that in section 3, which provides that the President "in every possible instance shall consult with Congress" before such introduction. Therefore, in determining Congress' intent regarding section 4(a)(1), the legislative history of both provisions will be helpful.

There are two other provisions of the War Powers Resolution which, while not involved in the present lawsuit, are necessary to an understanding of the reporting requirement and its evolution. The first is section 5(b), 50 U.S.C. § 1544(b), under which the President is required to terminate the use of Armed Forces engaged in hostilities within sixty days "after a report is submitted or required to be submitted under section 4(a)(1)," unless Congress declares war, approves an extension, or is unable to meet due to an attack upon the United States.[1] Second, section 5(c), 50 U.S.C. § 1544(c), requires the President to remove the Armed Forces from the area of hostilities if Congress so directs by a concurrent resolution, for which the President's signature is not required, passed prior to the expiration of the sixty days provided in section 5(b). However, this provision has been effectively nullified as a result of the ruling in INS v. Chadha, 462 U.S. 919 (1983), although its precise effect on the rest of the Resolution is not clear in view of the severability provision in section 9. In addition, although President Nixon and others have contended that both the sixty day limitation and the required withdrawal of the Armed Forces based on a concurrent resolution are unconstitutional, there has never been such a claim regarding the reporting provision.

Plaintiffs' principal contention is that the reporting requirement under section 4(a)(1) of the War Powers Resolution was triggered by the commencement of escort activities on July 22, 1987. The facts supporting that claim, along with plaintiffs' claim that the U.S. attack on an Iranian Navy ship on September 21, 1987, also required a report under section 4(a)(1), are contained in the accompanying statement of undisputed facts under Rule 108(h) and may be briefly stated.[2]

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[1] The final sentence of section 5(b) allows the President to extend the sixty days by no more than thirty days if he certifies that "unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

On September 22, 1980, the Republic of Iraq invaded the Islamic Republic of Iran. Since that date, a state of war has existed between the two countries in which the United States is officially neutral. In addition to incursions by the belligerents into each other's territory, the war has led to numerous military incidents in and around the body of water partly shared by the two countries known as the Persian (Arabian) Gulf, which has become a war zone. In 1984, Iraq began to attack tankers carrying Iranian oil, and Iran retaliated with actions to make the Gulf unsafe for non-Iranian shipping.

International shipping in the Gulf primarily carries petroleum from such Middle East producing centers as Kuwait, to Europe, Asia, and the Western Hemisphere. Ships transporting both petroleum and other commercial products have been menaced by one side or the other since early in the war, whether such traffic is going to or from the belligerents, or to and from other countries in the Gulf. As of July 22, 1987, more than 300 vessels carrying the flags of various nations had been attacked in the Gulf by one side or the other. Among the most dangerous areas is the Strait of Hormuz, which is the narrow entrance to the Gulf in which mines can be easily placed and from which passing ships are subject to attack from weapons based in Iran.

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[2] For additional background, plaintiffs have also included in this memorandum quotations from press accounts of certain persons involved in these matters, together with the source of the quotation. None of the facts in the statement under Rule 108(h) is based on such press accounts.

Kuwait has been a particular target for the Iranians in their protracted war with Iraq because of Kuwait's financial support of Iraq and its willingness to use its territory for the trans-shipment of Iraqi war material. Since 1984 when the tanker war began, ships bound to and from Kuwait have been special targets of the Iranian military forces, and between September 1986 and May 1987, Iran attacked at least 24 vessels serving Kuwaiti ports.

On December 10, 1986, Kuwait made an informal request of the United States for reflagging or other protection for its petroleum tankers from the hazards in the Gulf arising from the Iran-Iraq war, and on January 13, 1987, Kuwait formally requested U.S. protection for its tankers. Reflagging is a process by which a nation (here the United States) confers its flag on a vessel that was formerly registered under the flag of another nation (here Kuwait), and thereby confers on that vessel all of the attributes of sovereignty to which a vessel of that nation is entitled, including protection by the navy of that nation. After U.S. authorities informed Kuwait that the reflagging of its tankers would take up to six months, Kuwait then approached the Soviet Union, which agreed to Kuwait's request for some form of protection for Kuwaiti ships in the Gulf. The President then formally offered to reflag eleven Kuwaiti tankers on March 7, 1987, and Kuwait accepted the offer.

Since the announcement of U.S. plans to provide military escorts for Kuwaiti tankers, Iranian leaders have made a number of threats, stating that, in effect, the U.S. is protecting the ships of Kuwait, which Iran views as allied with the enemy Iraq. For example, the speaker of Iran's parliament Ali Akbar Hashemi Rafsanjani, reiterated on July 27, 1987, his country's plans to attack the "installations of Iraq's partners," or regional allies of Iraq, including Kuwait, on the Persian Gulf. Washington Post, July 28, 1987, p. A7. In addition, on July 28, 1987, Iran's Foreign Minister, Ali Akbar Velayati, reiterated Iran's plans to attack Gulf shipping, saying that "Any country which supports Iraq is subject to our retaliatory measures." New York Times, July 29, 1987, p. A10. Iran has also acquired and moved into place near the Strait of Hormuz SILKWORM anti-ship missiles with a range of 50 nautical miles that are capable of covering the entire Strait and of sinking or, at a minimum, causing serious damage to a ship.

In addition, in the interim, on May 17, 1987, an Iraqi warplane attacked the USS STARK with an Exocet-type missile while the STARK was patrolling in the Persian Gulf. Since the attack on the STARK, in which thirty-seven U.S. seamen were killed, U.S. military patrols in the Gulf have been ordered to shoot first when potentially hostile forces act in a threatening manner.

On July 22, 1987, at the direction of the defendant, and without a declaration of war by Congress, three United States Navy warships, in a state of military readiness prepared for attack, began escorting the first two of the reflagged tankers through the Persian Gulf to Kuwait. On July 24, 1987, the S.S.

Bridgeton, one of the reflagged tankers being escorted by U.S. warships in the Gulf, struck a mine and was seriously damaged. The captain of the destroyer USS KIDD, one of the warships accompanying the Bridgeton, stated that "If we had hit that, it would have done enormous damage to the Kidd." New York Times, July 26, 1987, § 4, p. 1. Administration officials have stated that they believe Iran intentionally laid the mine which damaged the Bridgeton directly in the sea lane being used by the ships in that first Navy escort convoy. On July 25, 1987, the commander of the first convoy escort, Capt. David Yonkers, stated, "I'm very thankful now that we managed to get out safely. . . . Right now, certainly, I wouldn't want to go back through the area." New York Times, July 28, 1987, p. A22.

Following the Bridgeton mine incident, the President and others acting under his direction ordered a substantial number of activities to take place which confirm that U.S. Navy and other U.S. Armed Forces personnel in the Gulf are in a situation of hostilities or where their imminent involvement in hostilities is clearly indicated by the circumstances and that therefore the reporting requirements of section 4(a)(1) of the War Powers Resolution apply. Among the confirmatory activities are the following:

> (a) urgent efforts to locate and destroy mines, including the ordering into the Gulf of U.S. minesweeping ships and helicopters and appealing to other nations to send minesweepers to the Gulf;
>
> (b) the awarding of "imminent danger" pay pursuant to 37 U.S.C. § 310, effective August

> 25, 1987, for an indefinite period of time to approximately 10,000 U.S. Armed Forces personnel in the Gulf and in the Strait of Hormuz at a cost of approximately $1 million per month;
>
> (c) ordering, as of early September, at least twenty warships and more than 10,000 U.S. Armed Forces personnel to the Gulf to conduct and support the U.S. escort operations; and
>
> (d) ordering that U.S. warships in the Gulf be at a high state of readiness at all times, that all ships be at General Quarters, which is the highest condition of battle readiness, when passing through the Strait of Hormuz, and that no announcements be made of the dates and hours of escort operations, in order to protect the safety of U.S. Armed Forces personnel.

The Defense Department estimates that the increased military activities arising from the escort operations for the reflagged Kuwaiti ships will cost taxpayers an additional $70 million beyond the regular costs of maintaining the Armed Forces by the end of September 1987, and that these additional costs will average $15-20 million per month for as long as the escort operations continue at current levels.

On August 7, 1987, the complaint in this action was filed by 113 members of Congress. It sought declaratory and injunctive relief under section 4(a)(1) of the War Powers Resolution and in the alternative a declaration that the reflagging was unlawful. On September 29, 1987, an amended complaint was filed, with jurisdiction based on 28 U.S.C. § 1331, retaining only President Reagan as a defendant, and dismissing the action against the two other defendants, Caspar Weinberger and Elizabeth Dole.

Prior to the filing of the amended complaint, several significant events occurred. The most important of these took place on September 21, 1987, when two U.S. helicopters, using machine-gun fire and rockets, attacked an Iranian Navy ship that was laying mines in the Persian Gulf. As a result of the attack, three Iranian sailors were killed, and the ship was disabled. The next day, as a direct follow-up of the attack, the U.S. Navy seized the Iranian ship and the 26 surviving Iranian sailors, including four who were wounded. This U.S. attack is the third instance in which U.S. military units in the Gulf have opened fire since the escort operations began on July 22, 1987. In the first episode, a U.S. Navy F-14 Tomcat fighter fired two missiles at what appeared to be a hostile warplane, and in the second, a U.S. Navy destroyer fired machine-gun blasts across the bows of two small sailing vessels that were approaching the Navy ship. In addition to these acts by U.S. Armed Forces, on August 15, 1987, a supply ship was sunk by a mine in the Gulf of Oman, which is just outside of the Strait of Hormuz, killing six people.

The amended complaint contains two causes of action. The first alleges that the President was required, pursuant to section 4(a)(1) of the War Powers Resolution, to submit a report to Congress under that provision, relating to the U.S. Navy's escort operations for reflagged Kuwaiti ships in the Persian Gulf, no later than 48 hours after that escort operation began on July 22, 1987. The complaint further alleges that the plaintiffs (now 110 Representatives and one Senator) have been injured by the refusal of the President to submit the required report, because they and other members of Congress have been denied the information, analysis, and judgments which the President is required to include in that report, and which are needed by them to carry out their official duties and responsibilities. Thus, while they, along with members of the public, are generally aware of the circumstances surrounding the hostilities in the Persian Gulf, Congress has still not been provided with the President's analysis of "the circumstances necessitating the introduction of Armed Forces" into the Gulf (subparagraph (A) of section 4(a)), nor has it been provided the "constitutional and legislative authority under which such introduction took place," or the "estimated scope and duration of the hostilities involved," as subparagraphs (B) and (C) of section 4(a) also require.

The second cause of action is similar to the first, except that it focuses on the September 21 attack by two U.S. helicopters on an Iranian Navy ship which was laying mines. In that claim, plaintiffs assert that, once the September 21 attack took place, there can no longer be any doubt that the President is required to submit a report to Congress containing the information required by section 4(a). In addition to seeking a declaratory judgment regarding the President's obligation to file a report under section 4(a)(1), they also seek an order requiring the President to file such report within 48 hours of the Court's judgment, the same time frame provided in section 4(a).[3]

The President is plainly aware of the requirements of the War Powers Resolution and of the contention of plaintiffs that section 4(a)(1) applies to the situation in the Persian Gulf, as evidenced by the brief letter that he sent to Congress on September 23, 1987. Nonetheless, he has refused to submit the report which plaintiffs contend is required under the law. Accordingly, the question before this Court is whether on the facts and circumstances in this case, in which the President has voluntarily taken sides in the Iran-Iraq war by agreeing to escort reflagged Kuwaiti ships, the reporting requirement of section 4(a)(1) has been triggered. In order to answer that question, we will first review the legislative history of the War Powers Resolution to make clear what Congress sought to accomplish overall and how section 4(a)(1) fits into the process. Thereafter, we will demonstrate that section 4(a)(1) applies to the undisputed facts in this case.

ARGUMENT

THE PRESIDENT IS REQUIRED TO SUBMIT A REPORT TO CONGRESS UNDER SECTION 4(a)(1) OF THE WAR POWERS RESOLUTION CONCERNING THE ESCORT ACTIVITIES OF UNITED STATES ARMED FORCES IN THE PERSIAN GULF.

A. History of the War Powers Resolution.

The application of the reporting requirements of section

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[3] In plaintiffs' view, in order to be of maximum utility to Congress and to comply with the purpose of the War Powers Resolution to keep Congress fully informed, the report to be filed should be comprehensive and contain the requisite information as of the date of filing, not just as of the date on which the report should have been filed.

4(a)(1) of the War Powers Resolution is the sole issue in this case. However, in order to understand what Congress intended in that provision, it is necessary to understand the context in which the Resolution was passed and its evolution through the legislative process. While prior to 1973, both Houses of Congress had passed their own versions of War Powers Resolutions, they had been unable to reach agreement between the different versions. But in 1973, with the increased pressure on President Nixon from Watergate, and the increased congressional dissatisfaction with the war in Vietnam and the bombing of Cambodia, war powers legislation became a priority in both Houses. Despite their unity in recognizing the necessity of such legislation, and their determination to avoid open-ended commitments like the Tonkin Gulf Resolution, the bills that were approved in the two Houses had quite different structures, and this affected the reporting requirements contained in each.

Under the provision entitled "Emergency Use of the Armed Forces," the Senate bill, S. 440, 93rd Cong., 1st. Sess., specified only four situations in which the President could, in the absence of a declaration of war by Congress, introduce United States Armed Forces "in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances." See 119 Cong. Rec. 25119 (1973)(§3). Three of these involved what can fairly be characterized as defensive measures -- two of which dealt with repelling armed attacks and the other with rescuing U.S. citizens -- and the last involved a prior specific statutory authorization from Congress, which also contained rules precluding the President from inferring such authority based on laws or treaties that had been relied on in the past. Thus, under the Senate approach, all involvements of Armed Forces in hostile circumstances required some form of explicit congressional approval, a requirement which would not have been satisfied here if S. 440 had become law.

Furthermore, even if the introduction of Armed Forces was authorized, the President was required under section 4 to report such involvement "promptly in writing" with information similar to, although different in form from, that now required in section 4(a). However, under S. 440, Congress could still require the President to pull out the Armed Forces in less than 30 days if it passed a joint resolution to that effect which would, in effect, require the vote of two-thirds of both Houses in the face of an almost certain presidential veto. See S. 440 § 6. Furthermore, with two narrow exceptions, the President could continue the involvement of the U.S. Armed Forces without additional congressional approval for only 30 days. Id. § 5.

The bill was reported favorably on June 14, 1973, by the Foreign Relations Committee. S. Rep. No. 93-220, 93rd Cong., 1st Sess. (1973) ("Senate Report").[4] It was debated on the floor of the Senate on July 18 and July 20, 1973 (119 Cong. Rec. 24531-96 and 119 Cong. Rec. 25051-120), and was approved by a vote of 72-18, with ten members not voting. Id. at 25119. The principal contentions in opposition to S. 440 were that it improperly tied the President's hands and in certain respects was an unconstitutional restraint upon his powers as the Commander-in-Chief. E.g. 119 Cong. Rec. 25098-100 (remarks of Sen. Griffin); id. at 25103-04 (remarks of Sen. Tower); id. at 25109-11 (remarks of Sen. Hruska). But there were also those who opposed it because they believed it gave the President too much authority to wage war without congressional approval. E.g. Senate Report at 33-38; 119 Cong. Rec. 25094-96 (remarks of Sen. Fulbright).

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[4] The Senate Report contains the fullest statement of the basis for congressional action, as well as a detailed explanation of the constitutional justifications for the limitations placed on the power of the President to engage in hostilities.

The House bill, H.J. Res. 542, 93rd. Cong., 1st Sess., which was reported out by the Committee on Foreign Affairs on June 15, 1973, H.R. Rep. No. 93-287, 93rd Cong., 1st Sess. (1973) ("House Report"), took a different approach. It began with the requirement of presidential consultation with the leaders and the appropriate committees of Congress "in every possible instance . . . before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent . . .," as well as continuing consultation thereafter. See 119 Cong. Rec. 24681 (1973)(§2).[5]

Unlike the Senate, the House did not limit the introduction of Armed Forces to specific circumstances, but set forth three categories in which, if the President did use U.S. Armed Forces without a declaration of war, he was required to report that fact to Congress within 72 hours. Thus, under section 4 the President would have had to report when he

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[5] The version printed as pages 24681-82 is as introduced: immediately thereafter, the House approved the Committee's amendments which are set forth on page 24682.

> (1) commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories;
>
> (2) commits United States Armed Forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair, or training of United States Armed Forces; or
>
> (3) substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation.

As the Committee stated, the President is required to report "whenever . . . he takes significant action committing U.S. Armed Forces to hostilities abroad or the risk thereof . . .," House Report at 5, or "where there is reasonable expectation that American military personnel will be subject to hostile fire." Id. at 7.

A report under the House bill would have been required to contain four specific categories of information. The first three are similar to those set forth in subparagraphs (A)-(C) of section 4(a) of the War Powers Resolution as enacted. The fourth -- an estimate of the cost of the commitment of forces -- was eliminated by a voice vote on the floor of the House, because of concerns about providing important information to the enemy and doubts about the ability of the Administration to provide meaningful figures within 72 hours after the engagement had commenced. 119 Cong. Rec. 24695 (col. 1). As explained by the

Committee, a "central purpose of the reporting requirement is to cause the President, in the process of decisionmaking, to take into account the legal and constitutional foundation for his actions, as well as the constitutional role of the Congress in warmaking." House Report at 7.[6]

The House then gave the President 120 days to obtain congressional approval to continue the use of the Armed Forces (the Senate had given only 30 days), with the time running from the time that the report was required to be filed. See section 4(b). On the other hand, the House provided for a different mechanism for requiring earlier presidential disengagement than the statutory time frame: under H.J. Res. 542, disengagement of Armed Forces was required if both Houses of Congress voted to do so by concurrent resolution (section 4(c)), whereas the Senate allowed for early termination of the use of Armed Forces only if a joint resolution could be enacted. S. 440, section 6. Finally, while the Senate bill allowed the President to keep troops in hostile situations beyond the normal 30 days with no further congressional authorization, provided that he certified that it was necessary "in the course of bringing about a prompt disengagement from such hostilities" (id.), the House bill contained no such escape clause.

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[6] There was an additional provision that told the President to submit such other information as he "may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the nation to war and to the use of United States Armed Forces abroad." That provision, which was neither a requirement nor a necessity since the President could always provide that added information if he chose, was ultimately dropped in conference.

Because the House bill had no provision limiting the President's right to initiate involvement of U.S. Armed Forces in hostilities, some of the opposition came from those who said that it created a presidential license to declare war, when that function was the sole right of Congress under the Constitution. E.g. 119 Cong. Rec. 24697-98 (remarks of Rep. Abzug); id. at 24698 (remarks of Rep. Holtzman). However, other House opponents believed that the bill unduly restricted the President. E.g. House Report at 18-20; 119 Cong. Rec. 24662-63 (remarks of Rep. Ford, including telegram from President Nixon). The House first considered the bill on June 25, 1973 (119 Cong. Rec. 21205-36) and continued debate and voted on July 18. Id. at 24653-708. The vote on final passage was 244-170, with 19 not voting. Id. at 24707.

The matter then went to conference where the two different approaches had to be reconciled. Ultimately, agreement was achieved by taking the House approach, which did not contain substantive limitations on initial involvement of U.S. troops, but taking other elements from the Senate bill to provide greater protection for Congress. See H.R. Rep. No. 93-547, 93rd Cong., 1st Sess. (1973) ("Conference Report"); 119 Cong. Rec. 33549 (col. 3, remarks of Sen. Javits); id. at 33859 (col. 1, remarks of Rep. Zablocki). One of the changes adopted by the conferees directly bears on this lawsuit. A report to Congress under section 3(a)(1) of the House-passed bill was required only when the President "commits United States Armed Forces to hostilities. . . ." See 119 Cong. Rec. 24681. However, as enacted, section 4(a)(1) of the War Powers Resolution not only applies when "United States Armed Forces are introduced . . . into hostilities" but also when they are introduced "into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ." This is the same language used in section 3 of the conference agreement setting forth the requirements for Presidential consultation with Congress, which is important because of the history of that provision discussed infra at 23-24.

The conferees also agreed to shorten the reporting time to 48 hours from the 72 hours contained in the House bill and rejected the Senate's requirement that the report only be made "promptly." They further compromised on a period of continued engagement without congressional approval to 60 days, which falls between the 30 in the Senate bill and the 120 in the House, but accepted the Senate's desire to accord the President some leeway before terminating all use of Armed Forces. However, the additional time was limited to 30 days, and it may be used only if the President certifies that "unavoidable military necessity respecting the safety of U.S. Armed Forces" requires a slower withdrawal of U.S. Armed Forces. Section 5(b)(final sentence). Finally, in conformity with the House bill, the conferees retained in section 5(c) the right of Congress to require the President to remove Armed Forces immediately if Congress passes a concurrent resolution to that effect.

One other feature of the conference agreement is worthy of note. The House version had no provision setting forth the purpose and policy behind the bill, whereas section 2 of the Senate bill contained such provisions. The conferees decided to include two provisions from the Senate bill -- a brief statement of policy and purpose -- which became section 2(a), and the constitutional basis for the legislation, which became section 2(b). Then in section 2(c) they included a statement describing the situations in which the President was authorized to involve United States Armed Forces in hostilities in a format more like a statement of law than a declaration of policy and purpose.

The Conference Report, H.R. Rep. No. 93-347, 93rd Cong., 1st Sess., was filed on October 4, 1973. See 119 Cong. Rec. 33036-38 (1973). It is only ten pages, including the agreed upon statutory language, and four pages of it contain the joint explanation by the managers, which merely describe the changes made, but offer little additional guidance. The compromise was described by one of the conferees as "fair and practical" in part because it was opposed "by one group claiming it shackles the President while another says it gives him expanded powers ...." 119 Cong. Rec. 33860 (col. 1, remarks of Rep. Broomfield); id. at 33868 (col. 1, remarks of Rep. Fascell). The report was debated in the Senate on October 10, 1973 (119 Cong. Rec. 33548-69) and was adopted by a vote of 75-20, with five not voting. Id. at 33569. The House then considered the matter on October 12 (119

Cong. Rec. 33858-74), and approved it with a final vote of 238-123, with 73 not voting. Id. at 33873-74.

On October 24, 1973, President Nixon vetoed the War Powers Resolution. In his veto message to Congress, which appears at 119 Cong. Rec. 34990-91, the President underscored the two provisions that he regarded as unconstitutional and which he strongly opposed: the automatic termination of the use of Armed Forces in hostile circumstances after 60 days and the provision authorizing Congress to terminate U.S. troop involvement by a concurrent resolution. He did not suggest any constitutional infirmities in the reporting provisions, and indeed referred to the Resolution as including "certain constructive measures which would foster this process [of cooperation between Congress and the Executive] by enhancing the flow of information from the executive branch to the Congress," specifically citing the consultation section, which has triggering language identical to that in the reporting provision. 119 Cong. Rec. 34991 (col. 2). On November 7, 1973, both Houses voted to override the veto. The House debated the matter first (119 Cong. Rec. 36202-22), and voted in favor of the override by 284-135, with 14 not voting. id. at 36221-22. Thereafter, the Senate debated the issue (Id. at 36175-98) and voted to override by 75-18, with seven not voting. Id. at 36198.

Several points are worth noting about this history as it bears on the reporting requirement at issue in this case. First, there was never an objection by the President or anyone else on constitutional or other grounds to any reporting requirement. Everyone agreed that Congress has the right and the need to be informed, both early and often, about U.S. involvement in hostile situations. Indeed, President Nixon in his veto message specifically referred to the information-sharing provisions as "constructive measures."

Second, as noted at page 16-17, supra, the House Report did give a number of indications that it considered the reporting provision to be a very important one and that actual hostilities are not required before a report is mandated. Thus, the "risk" of hostilities or a "reasonable expectation" that there will be hostile fire were seen as enough to trigger the reporting requirement. House Report at 5, 7. Indeed, the Committee's section by section analysis observed that there "may be instances when a report is filed on a relatively minor action," id. at 9, a threshold plainly met here.

The issue was also discussed in the House by, among others, Representative Findley who was a member of the Committee and, eventually, a conferee. In describing the reporting provisions, he assured his colleagues that reports are required, and Congress will thereby be "involved in decisions which place our forces in circumstances where armed conflict may later develop." 119 Cong. Rec. 21218 (col. 3). He then explained the importance of an early congressional role in the process and pointed to a number of instances in our history where reports would have been required. In his view, a report is mandated whenever there is "armed conflict or the definite risk thereof." 119 Cong. Rec. 21219 (col. 1). Finally, he explained the purpose of the requirement and observed that it "would place congressional influence far closer to the points and moments of great decision" than it has been in the past. Id. (col. 3).

Similar views were expressed by House Foreign Affairs Committee Chairman Zablocki when, in discussing the Conference Report, he pointed out that the President is required to report "after having introduced U.S. forces to combat or to danger of combat." 119 Cong. Rec. 33859 (col. 1). On the Senate floor similar expressions of the broad reach and purpose of the reporting requirement were made by Senators Javits (id. at 24541 and 25101-2) and Eagleton (id. at 25080). But perhaps the observation that best captures the mood of Congress was that of Representative du Pont during the debate on the veto override, in which he was responding to the charge that the bill would tie the President's hands in an emergency:

> What it does do is two things. One, it requires the President to keep us informed, and how can we be against that? Second, it requires that the Congress be a participant in a decision to send America to war.

119 Cong. Rec. 36206 (col. 1). Indeed. Yet that is precisely what this lawsuit is all about.

Third, as noted by the House Report, a subcommittee of the Committee on Foreign Affairs changed the language in section 2 of the House bill, dealing with consultation, by substituting the word "hostilities" for the phrase "armed conflict," because it was "considered to be somewhat broader in scope." House Report at 7. The Report further observed that

> in addition to a situation in which fighting has actually begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. Imminent hostilities denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict. *Id*. (emphasis in original).

While that language is in the part of the section by section analysis dealing with the requirements of consultation, it obviously has substantial impact on the reporting provisions which, as finally passed, have the identical triggering phrases to those used in the consultation provision in the House-passed bill. Moreover, in several other places in the debate where the reporting requirements were mentioned, no one indicated that any thing less than full reports would be provided at the earliest stage of U.S. involvement in potentially escalating circumstances. While none of the participants dealt directly with the facts of this case, all of those statements are entirely consistent with plaintiffs' reading that the reporting requirement of section 4(a)(1) applies to the present situation in the Persian Gulf.[7]

Fourth, it is absolutely essential to recall the purposes of the entire legislation of which the reporting provision is one element. Congress was very concerned about the continued presidential practice of moving United States Armed Forces into wartime circumstances without congressional involvement in the process. Congress also recognized that this involvement often occurred in small steps. See, e.g., 119 Cong. Rec. 21228 (col. 2, remarks of Rep. Fascell) ("We must never again let our country go to war, piece by piece, as we have done in Southeast Asia.") As a result, the United States was placed in a situation where retreat was difficult, if not impossible, perhaps not militarily, but in terms of the commitment of our country. See 119 Cong. Rec. 33550 (col. 3, remarks of Sen. Javits regarding difficulty of using funding cutoff); id. at 33567 (col. 1, remarks of Sen. Mathias); id. at 36208 (col. 3, remarks of Rep. Bingham). The clear overriding purpose of the legislation was to prevent the President alone from involving our nation in a war or hostilities short of war and to assure that Congress has the information needed to be able to carry out its role at the beginning of our involvement, not when it is too late to alter the course except by extraordinary efforts of the kind that it took to end our involvement in Southeast Asia.

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[7] Section 8(c) further supports a broad reading of section 4(a)(1) by defining "introduction of United States Armed Forces" to include the assignment of them to the regular or irregular forces of any other government where there exists an imminent threat that such forces will become engaged in hostilities. 50 U.S.C. § 1547(c).

Indeed, had S. 440 become law, there can be little doubt that the President's decision to volunteer our Navy to escort Kuwaiti ships would not have been authorized (See p. 13, supra). Nonetheless, the President claims that under the War Powers Resolution as enacted, he does not even have to inform Congress of his activities. It is hard to imagine that all that effort and a veto override would produce so little, yet that is the thrust of the President's position.

It is for all these reasons that the reporting requirements of the Act impose upon the President the duty to inform the Congress of "the circumstances necessitating the introduction of United States Armed Forces in hostile circumstances." While, in this case, Congress is aware generally of the facts regarding the reflagging and the escort activities, the reporting requirement of section 4(a)(1) serves the added function of having an official statement of the reasons for the use of U.S. Armed Forces so that Congress may make its own assessment of the wisdom of the President's decision. Moreover, under subparagraph (B) of section 4(a) the President is required to set forth the "constitutional and legislative authority under which such involvement took place" so that Congress can determine whether or not the President acted lawfully.

But most important of all is the requirement of subparagraph (C), under which the President must include "the estimated scope and duration of the hostilities or involvement." This analysis and "judgment" from the President "about the direction in which the situation is likely to develop," Senate Report at 27, is essential for Congress to fulfill its responsibility, to respond to the President's decision to involve United States Armed Forces, and to make a timely decision as to whether to approve or disapprove of the involvement and how to proceed in the 60 days before the automatic termination of involvement is required. As Judge Joyce Green observed in *Crockett v. Reagan*, 558 F. Supp.

893, 899 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), the purpose of the War Powers Resolution "was to give Congress both the knowledge and the mechanism needed to reclaim its constitutional power to declare war." Thus, Congress intended that it "would be informed at the outset of any involvement that could potentially lead to war" and that the "President is not to wait until our forces are actually engaged in combat before informing Congress." Id. Therefore, the information in the required report is essential if Congress is to do its job (Conference Report at 8), and it is counter-productive to the entire thrust of the statute to interpret the reporting requirement of section 4(a)(1), as the President has done here, in a narrow, begrudging fashion and to deny Congress the information needed to become a co-participant in the process, as the War Powers Resolution and the Constitution plainly contemplate.

B. No later than July 22, 1987, United States Armed Forces in the Persian Gulf were introduced into hostilities or into a situation where their involvement in hostilities was clearly indicated by the circumstances.

The President has made it clear, most recently in his September 23rd letter to Congress, that he does not consider that the reporting requirements of section 4(a)(1) were triggered by the use of U.S. Navy ships to escort the reflagged Kuwaiti tankers beginning on July 22, 1987, or even by the September 21st attack by U.S. helicopters on the Iranian ship laying mines. In this case, unlike others such as Crockett v. Reagan, supra, where extensive discovery from the defendants was essential to enable the plaintiffs to prove their case, the material facts cannot be disputed because they are established by the official statements of high officials in the Administration, or from official government publications. These facts, along with the references to the Exhibit numbers and pages where they appear, are contained in the statement of material facts not in dispute filed pursuant to Rule 108(h) which accompanies this memorandum. The question becomes, therefore, based on these established facts, is the President required as a matter of law under section 4(a)(1) to file a report with the information set forth in subparagraphs (A) to (C). As the review of these facts below makes clear, when considered in light of the purposes of the War Powers Resolution, and in particular the goals of the reporting requirements described above, it is clear that the President was obligated to file a report no later than 48 hours after the escort activities of the reflagged Kuwaiti tankers in the Persian Gulf began on July 22, 1987.

Since 1980, Iran and Iraq have been engaged in a state of war, and the United States is a neutral party which has not declared war on either side. In recent years, the war has directly affected neutrals and allies of one or the other belligerents through attacks on shipping in the Persian Gulf and the Strait of Hormuz. Thus, by mid July 1987, more than 300 commercial vessels had been actually hit by hostile fire in this area.

One of the nations menaced by this war is Kuwait which has sided with Iraq and which has been the subject of escalating attacks by Iran. The Kuwaiti government became increasingly concerned about the matter in late 1986 and sought protection from the United States and the Soviet Union for its commercial vessels. In particular, it made a formal request of the United States to allow Kuwaiti tankers to transfer to United States registration and carry the United States flag, after which, under United States policy, the United States Navy would afford protection to such reflagged vessels in international waters such as the Persian Gulf. In early March 1987, President Reagan approved the reflagging policy, and on July 22 the first U.S. Navy escort operations began for three reflagged Kuwaiti ships.

In the interim, several other events had occurred in the area that provide additional support for the conclusion that the commencement of escorting activities would involve actual hostilities or the clear likelihood that hostilities were imminent. First, Iran took the public position that the escort operations of the United States were protecting the ships of Kuwait, which Iran views as allied with its enemy Iraq. Second, Iran acquired surface to surface SILKWORM missiles and moved them to the Strait of Hormuz where they are capable of hitting any ship that traverses the Strait and of doing serious damage if not actually sinking such vessels. Third, an Iraqi airplane attacked the USS STARK on May 17, 1987, killing 37 seamen, thereby underscoring the state of heightened tensions in the Gulf area.

Finally, any doubt as to the likelihood of hostilities in the Persian Gulf was eliminated on July 24, 1987, when a mine, believed by the Administration to have been laid by Iran, exploded and did serious damage to the S.S. Bridgeton, one of the reflagged vessels being escorted by the U.S. Navy. As the Captain of the destroyer USS KIDD, accompanying the Bridgeton, said, "[i]f we had hit that, it would have done enormous damage to the Kidd." That sentiment was echoed by the commander of that convoy, Captain David Yonkers, who stated on July 25, 1987, "I'm very thankful now that we managed to get out safely . . .. Right now, certainly, I wouldn't want to go back through the area."

Subsequent actions of the Administration further reinforce the conclusion that the reporting requirements of section 4(a)(1) were triggered no later than July 22nd. Thus, the United States has undertaken urgent efforts to locate and destroy mines, including ordering U.S. minesweepers and helicopters into the Gulf and seeking the assistance of mine sweepers from other nations. It has also increased the size of the naval operation in the area so that as of early September, at least twenty U.S. warships and more than 10,000 Armed Forces personnel had been ordered to the Persian Gulf region to conduct and support the escort operations. As Defense Secretary Weinberger said on August 4, 1987, in amplification of his response that he did not know how long the military build-up in the Persian Gulf will continue: "We try to put in the resources that deal with the requirements. That changes. That varies. I don't know when it will be enough." Washington Post, August 5, 1987, p. A1. Furthermore, all U.S. warships in the Gulf are constantly at a high state of readiness, and when passing through the Strait of Hormuz are at General Quarters state of readiness, which is the highest condition of battle readiness in the Navy.

Most significant of all is the decision of the Defense Department to award "hostile fire or imminent danger" pay to 10,000 Armed Forces personnel in and around the Gulf area and the Strait of Hormuz pursuant to 37 U.S.C. § 310, effective August 25, 1987, for an indefinite period of time.[8] The decision on whether to award "imminent danger" pay was a difficult one for the Administration for several reasons. First, Congress was putting pressure on the Administration to provide such pay, and given the circumstances in the Persian Gulf, especially the existence of mines, it was plainly a situation in which there were substantial dangers from reflagging and the escort operations. The portion of section 310 that is most clearly applicable, section 310(a)(2), allows extra pay where the individual "was on duty in an area in which he was in imminent danger of being exposed to hostile fire or explosion of hostile mines and in which, during the period he was on duty in that area, other members of the uniformed forces were subject to hostile fire or explosion of hostile mines." But a finding under that provision would plainly have been too close to the language of the reporting requirements of section 4(a)(1), and the President could hardly have avoided filing a report if that provision had been invoked.

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[8] By making the effective date August 25th, Armed Forces personnel who served at any time during that month are entitled to full imminent danger pay for the month of August. _See_ section 310(a).

Therefore, the Defense Department invoked section 310(a)(4), which authorizes imminent danger pay for an individual who was "on duty in a foreign area in which he was subject to the threat of physical harm or danger on the basis of civil insurrection, civil war, terrorism, or wartime conditions." It is highly doubtful that that section, which was added in 1983 to enable individuals on duty in high risk embassies to receive imminent danger pay without requiring the President to invoke the War Powers Act, 129 Cong. Rec. (H 5678, daily ed., July 26, 1983), applies at all since virtually all of the Armed Forces personnel are on duty in international waters, not "in a foreign area." Moreover, they are clearly not subject to threat of harm or imminent danger "on the basis of civil insurrection, civil war [or] terrorism . . .." Thus, unless the Administration suggests that the extra pay is based on being subject to "wartime conditions," the only other option under subparagraph (4), it is difficult to justify the specific invocation of this part of section 310. It is therefore apparent that the specific paragraph relied on is simply a device to avoid the War Powers Resolution's reporting requirements. Thus, what is most important about the decision to award imminent danger pay, beyond its estimated cost of $1 million a month, is that it constitutes a clear recognition on the part of Defense Department officials that our Armed Forces are in imminent danger and should be given additional compensation for that risk. This, as much as anything else, confirms the applicability of the War Powers reporting requirements to this case. And in combination with the remainder of the undisputed facts, it is clear that the President was required to report to Congress under section 4(a)(1) within 48 hours after he began the $15-20 million per month escort operations on July 22, 1987.

C. At least by September 23, 1987, the President Was Required to file a Report pursuant to Section 4(a)(1).

If there were any doubt about the applicability of section 4(a)(1), it was eliminated on September 21, 1987. On that date, two U.S. helicopters attacked and disabled an Iranian Navy ship that was laying mines in international waters in the Persian Gulf. The next day, as part of a follow-up to the attack in which three Iranian sailors were killed, the U.S. Navy seized the Iranian ship, which had been set afire by the attack, and captured twenty-six Iranian sailors.

Despite these combat activities, and the continuation of the escort operations for the reflagged Kuwaiti ships which precipitated the laying of mines by Iran, the President continues to refuse to file a report under section 4(a)(1) of the War Powers Resolution. We simply do not understand what he believes *would* require a report if this latest incident did not.

CONCLUSION

For the foregoing reasons, the Court should conclude that the President was required to file a report pursuant to section 4(a)(1) of the War Powers Resolution no later than 48 hours after the escort activities by the United States Armed Forces for reflagged Kuwaiti vessels began on July 22, 1987. Accordingly, plaintiffs request that the Court enter a declaration to that effect and an order directing the President to comply with section 4(a)(1) within 48 hours of the Court's order. A form of order to that effect is submitted herewith. At the very least, the President was required to submit a report under section 4(a)(1) within 48 hours of the September 21, 1987, attack by U.S. Armed Forces on an Iranian Navy ship, and plaintiffs are also submitting an alternative order providing for declaratory and injunctive relief based on that date.

Respectfully submitted,

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APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL E. LOWRY, *et al.*, Plaintiffs, v. RONALD W. REAGAN, President of the United States, Defendant.	Civil Action No. 87-2196 (GHR) (Revercomb, J.)

BRIEF AMICUS CURIAE OF REPRESENTATIVE HOWARD BERMAN

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Crockett v. Reagan, 558 F. Supp.
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Dellums v. Smith, 573 F. Supp. 1489
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Legislative Materials:

Comm. on Foreign Affairs, The War
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97th Cong., 2d Sess. 123 (Comm.
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119 Cong. Rec. 33551 (1973)....................... 8, 13

129 Cong. Rec. H8933 (daily ed.
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Letters of the President to Honorable Jim Wright, Speaker of the House of Representatives, and Honorable John C. Stennis, President Pro Tempore of the Senate, dated Sept. 23, 1987	1
Letters of the President to Honorable Jim Wright, Speaker of the House of Representatives, and Honorable John C. Stennis, President Pro Tempore of the Senate, dated Oct. 10, 1987	2
Letters of the President to Honorable Jim Wright, Speaker of the House of Representatives, and Honorable John C. Stennis, President Pro Tempore of the Senate, dated Oct. 20, 1987	3
"Reagan Won't Invoke War Powers Law", *Wash. Post*, October 11, 1987, at A4, col. 3	4
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Letter of the President to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, dated April 16, 1986	7

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL E. LOWRY, *et al.*, Plaintiffs, v. RONALD W. REAGAN, President of the United States, Defendant.	Civil Action No. 87-2196 (GHR) (Revercomb, J.)

BRIEF AMICUS CURIAE OF REPRESENTATIVE HOWARD BERMAN

INTRODUCTORY STATEMENT

Representative Howard Berman's sympathies in this case lie with plaintiffs. Both Representative Berman and plaintiffs agree that events in the Persian Gulf require the President to submit a report to the Congress pursuant to Section 4(a)(1) of the War Powers Resolution, 50 U.S.C. § 1543(a)(1) (1983). They differ only in that plaintiffs' motion for summary judgment seeks to compel the President to make such a submission, whereas Representative Berman seeks a determination by this Court (as the basis for granting defendant's motion to dismiss) that each of the reports submitted by the President to the Congress on September 23, October 10 and October 20, 1987, legally constitutes a report made pursuant to Section 4(a)(1) of the War Powers Resolution (a "War Powers Report").

The real issue in this case, as Representative Berman views it, is whether the President has submitted to the Congress War Powers Reports in connection with events in the Persian Gulf and, if so, whether the President can defeat the purpose of the War Powers Resolution by refusing to acknowledge that he has submitted such reports pursuant to the law.

Plaintiffs are not satisfied that any War Powers Reports have been submitted, and for good reason. The Executive Branch refuses to confirm that what the President has submitted to date legally constitute War Powers Reports. In fact, when plaintiffs' complaint was first filed in August 1987, the President had not submitted any report to the Congress under his own name with respect to events in the Persian Gulf. The President apparently did not interpret events in the Persian Gulf up to that date in the same way that plaintiffs did.

That situation changed beginning with a report submitted by the President to the Congress on September 23, 1987, regarding a military incident in the Persian Gulf in which U.S. Armed Forces were involved (attached as Exh. 1). Although it will be argued in this *amicus* brief that the September 23 report, along with two reports submitted in October 1987 (attached as Exhs. 2 & 3), constitute reports submitted pursuant to Section 4(a)(1) of the War Powers Resolution, plaintiffs understandably continue to object to the President's performance (or, in their opinion, failure to perform). The President and Executive Branch officials refuse to admit that the President has done anything pursuant to Section 4(a)(1) of the War Powers Resolution. See, e.g., Reagan Won't Invoke War Powers Law, Wash. Post, October 11, 1987, at A4, col. 3 (attached as Exh. 4). If plaintiffs accept the President at his word, which is the normal presumption of a Member of Congress, then they feel compelled to seek a court order to force the President to represent affirmatively that he is submitting the kind of report plaintiffs believe is legally required by the circumstances. If the President refuses to make such a representation, then no Act of Congress, even one which has been passed over a Presidential veto, can make that representation on behalf of the President.

Believing that the President, whether he wishes to admit it or not, in fact has complied with Section 4(a)(1) of the War Powers Resolution, Representative Berman finds himself in the perplexing position of asking this Court to grant defendant's motion to dismiss, but on grounds entirely different from those argued by defendant. Representative Berman believes that plaintiffs do have standing to bring this action and that plaintiffs' complaint is not a non-justiciable political question.

Plaintiffs' complaint, however, has been mooted as a consequence of the President's submission of three War Powers Reports to the Congress since September 23, 1987. The President's reports satisfy the statutory requirements of the War Powers Resolution. Although he refuses to use certain terminology in those reports, and although he refuses to admit that he is submitting anything to the Congress which may "trigger" other provisions of the law, the President cannot circumvent the clear import of the reports and of the law.

It is critical that this Court declare, in granting defendant's motion to dismiss, that the President has complied with Section 4(a)(1) of the War Powers Resolution and that the provisions of that law, notably Section 5 of the statute, 50 U.S.C. § 1544, are operative as a consequence of the President's compliance with the law. Without such a declaration by this Court, the President will continue to comply with the law in form only, and continue to deny the substantive operation of the law.

The Court is competent to review the evidence of Presidential reporting in connection with the Persian

Gulf situation and determine whether such reporting satisfies the statutory requirements of the War Powers Resolution. The Court need not reach any determination regarding the alleged facts about the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities was clearly indicated by the circumstances, evidence which is in dispute between the parties.

ARGUMENT

The issue in this case is two-fold: (1) what is the proper form, substance and timing of a report by the President under Section 4(a)(1) of the War Powers Resolution, and (2) has the President complied with those requirements in the instant case?

I. THE WRITTEN FORM OF A SECTION 4(A) REPORT IS NOT MANDATED BY STATUTE BUT HAS EVOLVED THROUGH PRACTICE

A report filed by the President under Section 4(a) of the War Powers Resolution, 50 U.S.C. § 1543(a), must be in writing. Aside from this statutory requirement, the War Powers Resolution does not further delineate the form (as opposed to the substance) which the President's report must take. There is no requirement that the President explicitly state in writing that he is submitting the report "pursuant to the War Power Resolution" or "in compliance with the War Powers Resolution" or "under the War Powers Resolution." No particular terminology must be employed by the President in his report in order to satisfy the statutory requirements of Section 4(a) of the War Powers Resolution. There is no explicit requirement that the President even refer to the War Powers Resolution in his report.[1]

The legislative history of the War Powers Resolution shows that the primary concern expressed by legislators with respect to the form of a Section 4(a) report was that it be in writing. During its exhaustive mark-up of the War Powers Resolution in 1973, the Subcommittee on International Security and Scientific Affairs of the House Committee on Foreign Affairs only briefly considered the consultation and reporting requirements of the resolution and engaged in no particular discussion on the form of the report. Comm. on Foreign Affairs, The War Powers Resolution: A Special Study of the Committee on Foreign Affairs 123, 97th Cong., 2nd Sess. (Comm. Print 1982) (prepared by John H. Sullivan). In its report on House Joint Resolution 542, the War Powers Resolution, the Committee on Foreign Affairs stated in 1973:

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[1] Cf. International Emergency Economic Powers Act, 50 U.S.C. § 1703 and National Emergencies Act, 15 U.S.C. § 1622 (both containing detailed requirements for reports made thereunder).

> (2) Form.-- The report by the President is stipulated to be in writing. Moreover, to the maximum extent possible, it is to be unclassified. If the President desires to make classified information available to the Congress as additional justification for his actions, he is free to do so. The procedure of submitting the report to the Speaker of the House and the President pro tempore of the Senate is a normal one for receiving such reports on behalf of Congress.

Staff of House Subcomm. on International Security and Scientific Affairs of the Comm. on Foreign Affairs, Relevant Documents, Correspondence, Reports on the War Powers Resolution, 98th Cong., 2d Sess., at 24 (Comm. Print 1983) (attached as Exh. 5).

The conference report of October 4, 1973, makes no mention of the form of the Section 4 report. Relevant Documents at 14. During the Senate and House floor debates on the conference report, only Senator Javits spoke briefly on the form of the President's report. He was of the view that the Congress could determine whether the form of the report satisfied the requirements of Section 4(a)(1), even if the report did not refer explicitly to Section 4(a)(1):

> At that stage where the President does report, Congress may well decide that the report is one covered by Section 4(a)(1) of this particular measure, and therefore does trigger the 60-day period, even though he may not think so. That is critical . . . .

119 Cong. Rec. 33551 (1973) (emphasis added). It is doubtful that Senator Javits was directing his comments toward a situation where the President submits a report in compliance with the requirements of the War Powers Resolution but then denies that he has submitted any report under Section 4(a) of the War Powers Resolution (the dilemma in the instant case). Rather, Senator Javits was clarifying that the failure of the President to designate the particular subsection of Section 4(a) pursuant to which he was submitting a report does not defeat the legal effect, or the Congress' power to decide the character of, such report.

In practice, the form of written reports provided by the President in connection with the introduction of United States Armed Forces abroad has varied with respect to identifying the section and subsection of the War Powers Resolution under which the report is being submitted. Ideally, the Congress would be best served if the President explicitly confirmed in his report that it is being provided "pursuant" to one of the following provisions of the War Powers Resolution:

-- Section 4(a)(1), 50 U.S.C. § 1543(a)(1): reporting that U.S. Armed Forces have been introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances";

-- Section 4(a)(2), 50 U.S.C. § 1543(a)(2): reporting that U.S. Armed Forces have been introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces";

-- Section 4(a)(3), 50 U.S.C. § 1543(a)(3): reporting that U.S. Armed Forces have been introduced "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation";

-- Section 4(b), 50 U.S.C. § 1543(b): providing "such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad"; or

-- Section 4(c), 50 U.S.C. § 1543(c): reporting "periodically" (but in no event less often than once every six months) on the status of the hostilities or of any situation described in Section 4(a) in which U.S. Armed Forces "continue to be engaged," "as well as on the scope and duration of such hostilities or situation."

Such specificity, however, rarely has been the case in the 12-year history of Presidential reporting following enactment of the War Powers Resolution. The following chart shows the varied terminology used to describe the different reports provided by the President to the Congress:

Date	President	Incident	Terminology
Apr. 4, 1975	Ford	Danang	"taking note of the provision of section 4(a)(2) of the War Powers Resolution" see Exh. 5 at 40.
Apr. 12, 1975	Ford	Cambodia	"taking note of Section 4 of the War Powers Resolution" see Exh. 5 at 42.
Apr. 30, 1975	Ford	South Vietnam	"taking note of the provision of Section 4 of the War Powers Resolution" see Exh. 5 at 43.
May 15, 1975	Ford	Mayaguez	"taking note of Section 4(a)(1) of War Powers Resolution" see Exh. 5 at 45.
Apr. 26, 1980	Carter	Iran	"consistent with the reporting requirements of the War Powers Resolution of 1973" see Exh. 5 at 47.

Mar. 19, 1982	Reagan	Sinai	"consistent with Section 4(a)(2) of the War Powers Resolution" see Exh. 5 at 57.
Aug. 24, 1982	Reagan	Lebanon	"consistent with the War Powers Resolution" see Exh. 5 at 60.
Sept. 29, 1982	Reagan	Lebanon	"consistent with the War Powers Resolution" see Exh. 5 at 62.
Aug. 8, 1983	Reagan	Chad	"consistent with Section 4 of the War Powers Resolution" see Exh. 5 at 64.
Aug. 30, 1983	Reagan	Lebanon	"consistent with Section 4 of the War Powers Resolution" see Exh. 5 at 65.
Oct. 25, 1983	Reagan	Grenada	"consistent with the War Powers Resolution" see Exh. 5 at 84.
Mar. 26, 1986	Reagan	Gulf of Sidra	(no mention of War Powers Resolution) see Exh. 6.
Apr. 16, 1986	Reagan	Libya	"consistent with the War Powers Resolution" see Exh. 7.

Sept. 23, 1987	Reagan	Persian Gulf	"While being mindful of the historical differences between the Legislative and Executive Branches of government, and the positions taken by all of my predecessors in office, with respect to the interpretation of certain of the provisions of the War Powers Resolution, I nonetheless am providing this report in a spirit of mutual cooperation toward a common goal." see Exh. 1.
Oct. 10, 1987	Reagan	Persian Gulf	"consistent with the War Powers Resolution" see Exh. 2.
Oct. 20, 1987	Reagan	Persian Gulf	"consistent with the War Powers Resolution" see Exh. 3.

The established practice since enactment of the War Powers Resolution has been for every report by the President with the exception of one (March 26, 1986), to make affirmative reference to the War Powers Resolution. Whether that reference is in the form of the President "taking note of" or reporting "consistent with" the War

Powers Resolution, or "being mindful of . . . [disputes over] the interpretation and constitutionality of certain of the provisions of the War Powers Resolution," the fact remains that the intent of Section 4(a) of the War Powers Resolution has been met, "even though," in Senator Javits' words, "[the President] may not think so." 119 Cong. Rec. 33551 (1973). That intent is clear: that the Congress receive a report from the President in a timely manner providing three categories of information.

Absent explicit statutory guidance as to the form of a War Powers Report, there is no need in such circumstances to elevate "form over substance" in determining whether the President has submitted a report in compliance with the requirements of Section 4(a) of the War Powers Resolution. See e.g., Beacon Products v. Reagan, 814 F.2d 1, 3-4 (1st Cir. 1987) (refusing to elevate "form over substance" in determining the legal sufficiency of the President's notice of a national emergency with respect to Nicaragua pursuant to the procedures set forth in the National Emergencies Act).

Through the years, members of the Congress have questioned the ambiguity in some of the reports relating to the subsection, or even section, of the War Powers Resolution under which the President is reporting under. See, e.g., War Powers: A Test of Compliance: Hearings

Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 9-10 (colloquy between Rep. Clement J. Zablocki and Monroe Leigh, Legal Advisor, Department of State), 37-39 (Monroe Leigh's response to Question No. 2 in letter from Rep. Zablocki), 69 (statement by Senator Jacob K. Javits) (excerpted pages attached as Exh. 8). It is an important point. Only a report which is provided in connection with the action described by Section 4(a)(1) (*i*.*e*., the introduction of U.S. Armed Forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances") activates the provisions of Section 5 of the War Powers Resolution, which explicitly empower the Congress to determine the future use of U.S. Armed Forces in the situation reported on by the President. The War Powers Resolution does not so empower the Congress when the President reports about actions described by Section 4(a)(2), 50 U.S.C. § 1543(a)(2), or Section 4(a)(3), 50 U.S.C. § 1543(a)(3).

If a report were to clearly state that it is being provided pursuant to Section 4(a)(1) of the War Powers Resolution, then the provisions of Section 5 of the War Powers Resolution, 50 U.S.C. § 1544, unquestionably would apply to the report. Without such specificity in the President's report, the Congress must interpret the report in light of statutory requirements and the circumstances of the incident and make the "critical" decision Senator Javits argued might have to be made. Any imprecision in a report may make the legislative process more difficult, but would not defeat it.

In nine of the above-listed incidents (excluding those pertaining to the Persian Gulf), the circumstances giving rise to a report by the President were resolved prior to the end of the 60-day period following the date of submission of the report. See Reports dated April 4, 12 and 30, 1975, May 15, 1975, April 26, 1980, August 24, 1982, August 8, 1983, March 26, 1986 and April 16, 1986. Exh. 5 at 40, 42, 43, 45, 47, 60, 64 and Exhs. 6&7. Therefore, no legislative action (or inaction) was necessary to render a definitive interpretation of the President's report. In two of the above-listed incidents (excluding those pertaining to the Persian Gulf), the circumstances giving rise to a report by the President did not unambiguously fall under the category of Section 4(a)(1). See Reports dated March 19, 1982 and Sept. 29, 1982. Exh. 5 at 57, 62. In fact, they more clearly fell under the category of Section 4(a)(2), which does not cause the provisions of Section 5 to apply. Therefore, the Congress did not need to address the issue of taking action under the War Powers Resolution subsequent to receipt of the President's report.

Only in the case of Lebanon, following receipt of the President's August 30, 1983 report, did the Congress determine that the requirements of Section 4(a)(1) became operative in connection with the incident described in that report. Exh. 5 at 78. The Congress exercised its authority under Section 5 of the War Powers Resolution to authorize continued participation of U.S. Armed Forces in the Multinational Force in Lebanon. Exh. 5 at 79. In the case of Grenada, the House passed H.J. Res. 402 in 1983 by a margin of 403 to 23 (Exh. 5 at 86, 129 Cong. Rec. H8933 (daily ed. November 1, 1983)), and the Senate passed a similar measure by a margin of 64 to 20 (129 Cong. Rec. S14876 (daily ed. October 28, 1983)), each declaring that the requirements of Section 4(a)(1) became operative on October 25, 1983 (the date of the U.S. action). But the Congress did not have to confront the choice offered by Section 5 of the War Powers Resolution because by December 15, 1983, all U.S. combat troops had been withdrawn from Grenada. Exh. 5 at 86.

Neither the legislative history of the War Powers Resolution nor the statute itself requires that the President's report must set forth the information required by Section 4(a)(A), (B) & (C) in any particular format. For example, there is no requirement that the President precede his discussion of the circumstances necessitating the introduction of United States Armed Forces with the words, "The circumstances necessitating the introduction of United States Armed Forces are . . . ." He simply can state the circumstances and describe the necessary introduction of U.S. Armed Forces. Nor is there any requirement that the President employ the words "scope" or "duration" in his description of the scope and duration of the hostilities or involvement.

The important issue is whether the President in fact provides the information required by Section 4(a). The written form of a Section 4(a)(1) report, then, is not statutorily mandated, but has varied and evolved through practice in such a manner as to encourage Congressional criticism of its typical brevity and ambiguity. Nonetheless, there never has been any Congressional determination that any of the above-listed reports were not provided pursuant to, or did not satisfy the requirements of, Section 4(a) of the War Powers Resolution.

II. THE TIMING, RECIPIENT AND CONTENT REQUIREMENTS OF A SECTION 4(A) REPORT ARE MANDATED BY STATUTE

The War Powers Resolution is very specific about the timing, recipient and content requirements of a report submitted by the President in connection with Section 4(a). The written report must be submitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate within 48 hours of the introduction of U.S. Armed Forces into any of the situations described in subsections (1), (2) or (3), and the report must set forth:

> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

50 U.S.C. § 1543(a)(A), (B) & (C).

The bare words of the statute are clear and need no further elaboration. Either the President meets the 48-hour deadline with a report to the designated Congressional leaders, and sets forth the type of information described in subsections (A), (B) and (C) of Section 4(a), or he has failed to comply with the law. It is instructive that the conference report in 1973 did not even discuss subsections (A), (B) and (C). Exh. 5 at 14. The report by the House Committee on Foreign Affairs in 1973 stated: "A central purpose of the reporting requirement is to cause the President, in the process of decision-making, to take into account the legal and constitutional role of the Congress in warmaking." Exh. 5 at 23.

An interesting development occurred, however, on the way to final passage of the War Powers Resolution. The original House-passed requirements for information to be provided in a War Powers Report were more expansive than what finally appeared in the statute. The President was to include in his initial report not only information concerning the three criteria set forth in Section 4(a) of the statute, but also "the estimated financial cost of such commitment or such enlargement of forces" and "such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad." The House report concluded, "It is the belief of the [Committee on Foreign Affairs] that a report which fulfills the [five] criteria set forth above will provide the Congress with adequate information on which to base its deliberations and possible action concerning the commitment of U.S. Armed Forces by the President." Exh. 5 at 25.

Section 4(a) of the statute does not require that any Presidential report set forth "the estimated financial cost of such commitment or such enlargement of forces". Nor does it require the President's initial report to set forth "such other information as the President may deem useful to the Congress . . . ." Section 4(b) of the statute, however, stipulates:

> (b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

50 U.S.C. § 1543(b). The timing and content of "such other information" depend upon the making of a request by the Congress, which normally would follow receipt of the President's initial report.

Therefore, lacking two of the five criteria which the Committee on Foreign Affairs believed were essential to obtain "adequate information" on which the Congress could "base its deliberations and possible action," the President's initial report under Section 4(a) of the statute may not necessarily include the "adequate information" necessary for the Congress to reach judgment. Those who justifiably want more information from the President may not obtain, and have never been provided with, a tome on such matters within the statutory 48-hour period. Obtaining more information from the President subsequent to the submission of an initial report is the purpose of Section 4(b). The fact that more information may be required for the Congress to fulfill its "constitutional responsibilities" does not mean, however, that the President's initial report necessarily fails to comply with the requirements of Section 4(a). It simply means that the Congress may have to act under Section 4(b) to fill any informational gaps which may exist after the submission of the initial report.

In short, there is enough precedent associated with the War Powers Resolution such that it does not require much insight to recognize a War Powers Report when you see it. Where the President has submitted a report to the statutorily designated Congressional leaders within 48 hours of the introduction of United States Armed Forces abroad, has acknowledged that his report is being provided in connection with the War Powers Resolution, and has provided the information (however minimal) required by subparagraphs (A), (B) and (C) of Section 4(a), he has provided a War Powers Report. Even though the President may not necessarily deem it a report submitted under the War Powers Resolution, his actions traditionally have spoken louder than his words. That is certainly true in the instant case.

III. THE COURT IS COMPETENT TO DETERMINE, AND SHOULD DETERMINE, WHETHER THE REPORTS SUBMITTED BY DEFENDANT COMPLY WITH THE REQUIREMENTS OF THE WAR POWERS RESOLUTION

The situation in the Persian Gulf since May 1987 has attracted a great deal of media attention. One would be hard pressed to argue that hostilities and situations of imminent hostilities have not existed in the Persian Gulf during this period, or deny that United States Armed Forces have been introduced in large numbers into the Persian Gulf since May 1987. The parties in this case, however, do not agree on how to describe what has occurred in the Persian Gulf. Nor do they agree on whether certain facts confirm the existence of a situation of hostilities or a situation in which imminent hostilities was clearly indicated existed or that United States Armed Forces have been introduced into those situations. Compare Plaintiffs' Statement of Natural Facts to Which There is No Genuine Dispute with Defendant's Opposition to Plaintiffs' Statement of Material Facts as to Which There is No Genuine Dispute.

Representative Berman does not believe that it is necessary for the Court to undertake this difficult review of the facts as they have been presented by the parties in this case. It is not necessary for the Court to determine whether these facts require a submission of a report pursuant to Section 4(a)(1) of the War Powers Resolution. Rather, the more proper question before this Court is whether the three reports already submitted by the President on the activities of U.S. Armed Forces in the Persian Gulf constitute valid War Powers Reports in compliance with the requirements of Section 4(a)(1).

Such an examination would be entirely appropriate for judicial consideration. Indeed, the question before the Court is similar to that presented in the case of Dellums v. Smith, in which a U.S. district court was asked to determine if the Attorney General had received information that federal officials violated the Neutrality Act by supporting paramilitary operations against Nicaragua which was sufficient to constitute grounds to conduct an investigation pursuant to the Ethics in Government Act. The court determined that the case did not present a non-justiciable political question:

> Unlike the complaints in Crockett [Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982)] and Sanchez-Espinoza [Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983)], the complaint in the case at bar does not directly challenge the legality of any

> action taken by the President. Plaintiffs seek only to compel good faith performance of a statutory duty. Such relief is unquestionably within judicial competence. The case before this Court does not require any assessment by the Court as to the accuracy of the data reported by plaintiffs to the Attorney General. The sole issue is whether the report is sufficient to trigger the preliminary investigation plaintiffs contend is required by the Ethics in Government Act. The limited task requested of the Court is thus judicially manageable, unlike those requested in Crockett and Sanchez-Espinoza.

Dellums v. Smith, 573 F. Supp. 1489, 1502 (N.D. Cal. 1983), rev'd on other grounds, 797 F.2d 817 (9th Cir. 1986).

Courts traditionally have undertaken tasks of reviewing the legal sufficiency of Executive Branch reporting to the Congress. See, e.g., Beacon Products v. Reagan, 814 F.2d at 3-4 (review of legal sufficiency of Presidential notice to Congress under the National Emergencies Act). In the instant case, the Court is unquestionably competent to review three documents: the President's reports to the Congress, one each dated September 23, October 10 and October 20, 1987, which were submitted following military incidents in the Persian Gulf (Exhs. 1, 2, 3). The Court's review of these reports does not require any review of the underlying facts upon which the reports are based. The Court only needs to examine the form, timing and content of each report to determine whether the report complies with the requirements of Section 4(a)(1) of the War Powers Resolution.[2]

IV. DEFENDANT'S REPORTS TO THE CONGRESS COMPLY WITH THE REQUIREMENTS OF SECTION 4(A)(1) OF THE WAR POWERS RESOLUTION

On three occasions in the last two months, the President has submitted to the Congress a report concerning a military incident in the Persian Gulf. The following summary of the three reports categorizes the information contained in the reports in terms of the requirements of the War Powers Resolution.

A. Report dated September 23, 1987 (Exh. 1)

Starting time and date of incident -- 4:00 p.m. (EDT), September 21, 1987.

Circumstances necessitating the introduction of U.S. Armed Forces -- U.S. Armed Forces engaged and disabled an Iranian landing craft, the "IRAN AJR," which had been observed laying mines near U.S. forces in international waters of the Persian Gulf. The disabled craft was boarded by U.S. forces. It was found to be manned by regular elements of the Iranian navy. Three crewmen were found dead. Twenty-six surviving crewmen were recovered from the water and from lifeboats. Operations were launched to find and clear a number of mines allegedly laid from the IRAN AJR prior to the U.S. action.

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[2] This Court is not required to interfere with the conduct of foreign relations or to declare any Presidential action illegal. See Dellums v. Smith, 573 F.2d at 1502 ("But not every case involving foreign affairs lies beyond judicial cognizance.") (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

Constitutional and legislative authority -- "These limited defensive actions have been taken by our Armed Forces in accordance with international law, and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief."

Estimated scope and duration of the hostilities or involvement -- "U.S. forces in the area have returned to their prior state of alert readiness. They will remain prepared to take any further defensive action necessary to protect U.S. vessels and U.S. lives from unlawful attack."

Reference to the War Powers Resolution -- "While being mindful of the historical differences between the Legislative and Executive Branches of government, and the positions taken by all of my predecessors in office, with respect to the interpretation and constitutionality of certain of the provisions of the War Powers Resolution, I nonetheless am providing this report in a spirit of mutual cooperation toward a common goal."

B. Report Dated October 10, 1987 (Exh. 2)

Starting time and date of incident -- 2:50 p.m. (EDT), October 8, 1987.

Circumstances necessitating the introduction of United States Armed Forces -- Three U.S. military helicopters, while on routine nighttime patrol over international waters in the Persian Gulf, were fired upon without warning by three (possibly four) small Iranian naval vessels. The helicopters returned fire with rockets and machine guns. Three Iranian vessels were hit; one subsequently sank. Two of six recovered Iranian crewmen subsequently died.

Constitutional and legislative authority -- "The limited defensive action described above was taken in accordance with our right of self-defense under Article 51 of the United Nations Charter, and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief."

Estimated scope and duration of the hostilities or involvement -- "U.S. forces . . . have returned to their prior state of alert readiness in carrying out the standing Peacetime Rules of Engagement for the Persian Gulf region. Although they will remain prepared to take any additional defensive action necessary to protect U.S. forces and U.S. lives, there has been no further hostile action by Iranian forces and we regard this incident as closed." Further, "I look forward to cooperating with Congress in pursuit of our mutual, overriding aim of peace and stability in the Persian Gulf region. In this connection, I regard the continued presence of U.S. Armed Forces to be essential to achievement of that aim."

Reference to the War Powers Resolution -- "In accordance with my desire that Congress continue to be fully informed in this matter, I am providing this report consistent with the War Powers Resolution."

C. Report Dated October 20, 1987 (Exh. 3)

Starting time and date of incident -- 7:00 a.m. (EDT), October 19, 1987.

Circumstances necessitating the introduction of United States Armed Forces -- U.S. Armed Forces attacked, and U.S. Navy ships fired upon and destroyed, Rashadat Platform, an Iranian armed platform located in international waters equipped with radar and communications devices which is used for surveillance and command and control. It was used to stage helicopter and small boat attacks and to support mine-laying operations targeted against non-belligerent shipping in the Persian Gulf. It is believed that this platform also was the source of fire directed at a U.S. helicopter on October 8, 1987. The report also describes the October 15, 1987, incident in which a

Silkworm missile fired by Iranian forces from Iranian-occupied Iraqi territory struck a U.S.-flag tanker in Kuwaiti territorial waters, and notes the "series of acts by Iranian forces against the United States, as described in my letters of September 23 and October 10, 1987."

Constitutional and legislative authority -- The actions were taken "at my specific direction in accordance with our inherent right of self-defense, as recognized in Article 51 of the United Nations Charter, and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief."

Estimated scope and duration of the hostilities or involvement -- "United States forces have returned to their prior state of alert readiness in the Persian Gulf region. They will remain prepared to take any additional action necessary to protect U.S. forces, U.S.-flag vessels, and U.S. lives."

Reference to the War Powers Resolution -- "I am providing this report consistent with the War Powers Resolution."

It is clear from the information provided in these three reports that the only category of action under Section 4(a) of the War Powers Resolution which would pertain to the reports is that described in

Section 4(a)(1). The reports describe actual hostilities and the introduction of United States Armed Forces into those hostilities. They do not describe the introduction of United States Armed Forces either into the territory, airspace or waters of a foreign nation, while equipped for combat (Section 4(a)(2)), or in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation (Section 4(a)(3)). All of the activities described in the reports and which involved United States Armed Forces occurred in international waters.

It is also clear from the face of each of these reports that they were submitted by the President within 48 hours of the incident described therein, and that they were submitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate. Each report provides information addressing the three criteria set forth in Section 4(a): they describe the circumstances necessitating the introduction of United States Armed Forces, the constitutional and legislative authority under which such introduction took place, and the estimated scope and duration of the hostilities or involvement.

Although some of the information provided by the President may indeed be ambiguous, as shown above, the War Powers Resolution does not require the President's initial report to satisfy any statutory standard of detailed information. The initial report's practical purpose is to lay the issue before the Congress and, if the Congress believes further information is required, it can request such information pursuant to Section 4(b) of the War Powers Resolution.[3]

This de facto compliance with the requirements of Section 4(a)(1) is confirmed by statements of high-level State Department officials intimately involved in, and responsible for, the making and implementation of U.S. policy in the Persian Gulf. In his declaration in support of defendant, Michael H. Armacost, Under Secretary of State for Political Affairs in the United States Department of State, freely admits that the reports of September 23 and October 10, 1987, "provided the very information that is required by Section 4(a)(1) of the War Powers Resolution." Armacost Declaration, ¶¶ 20, 21.

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[3] Although all of the criteria are addressed by the President, concern could be raised about the President's silence regarding any explicit "legislative authority" under which the introduction of United States Armed Forces took place (Section 4(a)(B)). That silence can be readily interpreted to mean that he may believe there was no specific legislative authority, as opposed to constitutional authority, required for him initially to introduce United States Armed Forces into hostilities or a situation where imminent involvement in hostilities is clearly indicated by the circumstances, especially where such introduction was an act of self defense under international law. However, if the Congress requires further clarification on that point, it could lodge a request under Section 4(b).

Richard L. Armitage, Assistant Secretary of Defense, International Security Affairs, states in his declaration in support of defendant that, "The Executive Branch has carefully reviewed each incident involving U.S. Armed Forces in the context of the War Powers Resolution, including classified intelligence information, and each time has provided Congress in a timely manner with information fully consistent with 4(a)(1) of the War Powers Resolution. Indeed, the totality of the information provided to Congress would seem to exceed that information required by Section 4(a)(1) of the War Powers Resolution." Armitage Declaration, ¶ 37. See also Defendant's Memorandum of Points and Authorities at 8-9.

Indeed, Under Secretary Armacost describes the President's compliance with the three criteria of information set forth in Section 4(a). Armacost Declaration, ¶¶ 20, 21. Also, defendant admits that the September 23, 1987, report contains "all of the information required by paragraphs (A), (B), and (C) of Section 4(a) of the War Powers Resolution." Defendant's Opposition to Plaintiffs' Statement of Undisputed Facts, ¶ 16.

The October 19, 1987, incident which prompted the submission of the President's report of October 20, 1987 (Exh. 3), occurred at the approximate time of the filing of defendant's pleadings. Presumably defendant would take a similar view of the October 20 report.

With such clear evidence before the Court, the real issue in this case is unavoidable. The President has submitted to the Congress three reports since September 23, 1987, which comply with the requirements of Section 4(a)(1) of the War Powers Resolution. The President effectively admits to this, but protests that such reports cannot be construed to "trigger" the consequences of compliance with the law (i.e., operation of Section 5 of the War Powers Resolution). Such protests are inconsistent with the evidence and are unsupportable as a matter of law. The President cannot, by refusing to use certain terminology in his reports and by protesting the legal consequences of such reports, circumvent the clear intent of the law, which is that the submission of a Section 4(a)(1) report by the President invokes the procedures set forth in Section 5 of the War Powers Resolution. The President's novel strategy is to do factually what he has to do in deference to the law, but to deny that his actions have any consequences under the law.

Representative Berman is not asking this Court to "trigger" the provisions of Section 5 of the War Powers Resolution, or to coerce the President to do so. Representative Berman is simply asking this Court to determine, as a matter of both fact and law, whether the President's reports are legally sufficient to constitute reports under Section 4(a)(1) of the War Powers Resolution. If they do constitute War Powers Reports, then defendant's motion to dismiss should be granted on the grounds that this case is moot because such War Powers Reports evidence the President's compliance with Section 4(a)(1) of the War Powers Resolution.

CONCLUSION

The amicus curiae respectfully requests, for the reasons given above, that defendant's motion to dismiss be granted.

Respectfully submitted,

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Dated: November 9, 1987
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PREPARED STATEMENT OF REPRESENTATIVE WILLIAM S. BROOMFIELD

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I AM VERY PLEASED TO APPEAR BEFORE YOUR COMMITTEE THIS MORNING TO TESTIFY ON THE ISSUE OF THE WAR POWERS RESOLUTION OF 1973 -- THE NEED FOR IMPROVEMENTS AND POSSIBLE SOLUTIONS TO THE AMBIGUITIES OF EXISTING LAW.

ALONG WITH MY GOOD FRIEND, CHAIRMAN FASCELL OF THE FOREIGN AFFAIRS COMMITTEE, I WAS ONE OF THE ORIGINAL COSPONSORS OF THE WAR POWERS RESOLUTION IN THE HOUSE OF REPRESENTATIVES. HOWEVER, OVER THE YEARS, I HAVE FOUND THAT THE WAR POWERS RESOLUTION HAS NOT WORKED AS ORIGINALLY ENVISIONED.

THE WAR POWERS RESOLUTION

AS YOU KNOW, THE WAR POWERS RESOLUTION WAS DRAFTED TO CONFRONT THE ISSUES OF THE ENTANGLEMENT OF U.S. ARMED FORCES IN THE INDOCHINESE CONFLICT. CONGRESS NEVER DECLARED WAR ON VIETNAM OR TOOK ANY DEFINITIVE ACTION CONCERNING THE DEPLOYMENT OF U.S. COMBAT FORCES TO INDOCHINA.

THE WAR POWERS RESOLUTION WAS INTENDED TO PREVENT A RECURRENCE OF THIS PROBLEM. AS A RESULT, THE RESOLUTION CONTAINS THE REQUIREMENT THAT U.S. FORCES BE WITHDRAWN WITHIN 60 DAYS IF CONGRESSIONAL APPROVAL HAS NOT BEEN OBTAINED FOR THEIR DEPLOYMENT. THIS WOULD APPLY TO ALL CASES IN WHICH U.S. FORCES ARE ENGAGED IN HOSTILITIES OR INVOLVED IN ANY OTHER SITUATION IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES.

IN ADDITION, THE PRESIDENT IS REQUIRED UNDER THE WAR POWERS RESOLUTION TO CONSULT WITH CONGRESS IN EVERY POSSIBLE INSTANCE BEFORE INTRODUCING U.S. FORCES INTO HOSTILE SITUATIONS. WHEN THE PRESIDENT ACTUALLY INTRODUCES FORCES INTO SUCH A SITUATION HE IS REQUIRED TO REPORT TO CONGRESS WITHIN 48 HOURS.

THE WAR POWERS RESOLUTION WAS PASSED OVER PRESIDENTIAL VETO. AND -- WHILE PRESIDENTS HAVE BY AND LARGE FULFILLED ITS REPORTING REQUIREMENTS -- NO PRESIDENT HAS CONCEDED THE CONSTITUTIONALITY OF THE REQUIREMENT TO WITHDRAW FORCES IN THE ABSENCE OF CONGRESSIONAL AUTHORIZATION.

PERSIAN GULF SITUATION

CURRENT CONSIDERATION OF AMENDMENTS TO THE WAR POWERS RESOLUTION RESULT FROM THE ONGOING U.S. NAVAL OPERATIONS IN THE PERSIAN GULF. SOME IN CONGRESS FEEL THAT THERE HAS BEEN INADEQUATE CONSULTATION BY THE ADMINISTRATION NOT ONLY ON THE COMMENCEMENT OF THESE OPERATIONS BUT ON CHANGES IN POLICY OVER TIME.

I MYSELF EXPRESSED RESERVATIONS REGARDING THE ADMINISTRATION'S DECISION LAST YEAR TO PERMIT THE REFLAGGING OF KUWAITI TANKERS SO THAT THEY WOULD QUALIFY FOR U.S. NAVAL PROTECTION. SINCE THAT TIME, HOWEVER, I HAVE COME TO BELIEVE THAT THE U.S. MILITARY OPERATIONS IN THE PERSIAN GULF HAVE BEEN SURPRISINGLY SUCCESSFUL IN MEETING THEIR LIMITED OBJECTIVES.

THE ADMINISTRATION'S DECISION TO PROVIDE PROTECTION TO THE KUWAITI TANKERS OVERSHADOWED SIMILAR OFFERS BY THE SOVIETS, THEREBY LESSENING THE POTENTIAL FOR GREATER SOVIET INFLUENCE. THE PROTECTION OF THE TANKER CONVOYS, AND SUBSEQUENT NAVAL OPERATIONS, HAS ALSO STRENGTHENED THE SOLIDARITY OF THE WESTERN ALLIANCE IN THE FACE OF THE THREAT TO FREEDOM OF NAVIGATION IN THE GULF. FINALLY, UNITED STATES ACTIONS HAVE SENT AN IMPORTANT SIGNAL OF U.S. DETERMINATION TO OUR FRIENDS AND ADVERSARIES ALIKE.

DESPITE THEIR OVERALL SUCCESS, ADMINISTRATION ACTIONS IN THE PERSIAN GULF HAVE CAUSED CONSIDERABLE CONCERN IN CONGRESS. WHILE THE PRESIDENT HAS CAREFULLY REPORTED ON ALL MAJOR ENGAGEMENTS INVOLVING U.S. FORCES, MANY MEMBERS OF CONGRESS HAVE FELT THE NEED FOR GREATER CONSULTATION ON POLICY.

AMENDMENTS TO WAR POWERS RESOLUTION

THE MILITARY OPERATIONS IN THE GULF HAVE POINTED OUT THE DIFFICULTIES THAT FACE CONGRESS IN CLAIMING A ROLE IN THE DECISION PROCESS OF DEPLOYING U.S. MILITARY FORCES OVERSEAS. THESE OPERATIONS HAVE LED TO SEVERAL PROPOSALS TO AMEND THE WAR POWERS RESOLUTION.

THE CHIEF PROPOSAL CURRENTLY UNDER CONSIDERATION IS S.J. RES. 323, BEING CONSIDERED BY THIS COMMITTEE, AND ITS COMPANION BILL, H.J. RES. 601, BEFORE THE FOREIGN AFFAIRS COMMITTEE IN THE HOUSE.

THIS MEASURE, INTRODUCED BY A DISTINGUISHED BIPARTISAN GROUP OF SENATORS, WOULD ELIMINATE THE 60-DAY TROOP WITHDRAWAL REQUIREMENT OF THE WAR POWERS RESOLUTION. IN ITS PLACE, IT WOULD ESTABLISH A PROCEDURE FOR THE EXPEDITED CONSIDERATION OF RESOLUTIONS TO APPROVE OR LIMIT THE DEPLOYMENT OF U.S. FORCES.

MECHANISM FOR CONSULTATION WITH CONGRESS

THE MOST NOVEL ASPECT OF S.J. RES. 323, HOWEVER, IS THAT IT WOULD CREATE A PERMANENT CONSULTATIVE GROUP OF THE LEADING MEMBERS OF CONGRESS TO SERVE AS THE FOCUS OF CONSULTATIONS REQUIRED UNDER THE WAR POWERS RESOLUTION. THIS GROUP OF EIGHTEEN MEMBERS WOULD INCLUDE THE BIPARTISAN LEADERSHIP AND THE CHAIRMEN AND RANKING MINORITY MEMBERS OF THE RELEVANT AUTHORIZING COMMITTEES.

I AGREE WITH THE THRUST OF THIS APPROACH, WHICH IS DESIGNED TO ENCOURAGE FULLER CONSULTATION BETWEEN THE PRESIDENT AND CONGRESS ON POTENTIAL DEPLOYMENT OF U.S. FORCES OVERSEAS. HOWEVER, I DO NOT ENDORSE THE CONCEPT. I FEEL THAT IT COULD BE COUNTERPRODUCTIVE TO FORMALLY ESTABLISH THE "CONSULTATIVE GROUP" CONTAINED IN THE BILL.

THE LEADERSHIP AND SENIOR MEMBERS OF THE RELEVANT COMMITTEES SHOULD BE CONSULTED WHENEVER POSSIBLE. THE LEADERS, CHAIRMEN AND RANKING MEMBERS OF BOTH HOUSES SHOULD BE CONSULTED BECAUSE OF THEIR ELECTED LEADERSHIP RESPONSIBILITIES. BUT CREATION OF A REGULAR GROUP FOR THIS PURPOSE WOULD ESTABLISH POTENTIALLY CUMBERSOME MACHINERY THAT COULD ACTUALLY IMPEDE TRUE CONSULTATION.

UNDER THE BILL, THE PRESIDENT COULD LIMIT CONSULTATION TO A GROUP OF SIX LEADERS -- THE SPEAKER OF THE HOUSE AND THE PRESIDENT PRO TEM OF THE SENATE, AND THE MAJORITY AND MINORITY LEADERS OF BOTH HOUSES. BUT UNDER THE SPECIFIED PROCEDURES, THESE MEMBERS COULD REQUEST AT ANY TIME THAT THE FULL GROUP BE BROUGHT IN. THIS COULD BECOME A SOURCE OF TENSION AND AN IRRITANT TO PRESIDENTIAL CONSULTATION IN EXTREMELY SENSITIVE SITUATIONS.

ALSO -- LIKE MOST CONGRESSIONAL ORGANIZATIONS -- THE CONSULTATIVE GROUP COULD BEGIN TO ACQUIRE ADDITIONAL FUNCTIONS AND PREROGATIVES, INCLUDING STAFF. THIS COULD FURTHER IMPEDE MEANINGFUL CONSULTATION AND DIMINISH THE ORIGINAL PURPOSE OF THE GROUP TO PROVIDE A BRIDGE FOR CONSENSUS AND ADVICE.

EXPEDITED PROCEDURES FOR CONGRESSIONAL CONSIDERATION

ONE OF THE FUNCTIONS SPECIFIED FOR THE CONSULTATIVE GROUP IN THE BILL WOULD BE TO INTRODUCE A JOINT RESOLUTION FOR EXPEDITED PROCEDURE. SUCH A RESOLUTION WOULD APPROVE OR DISAPPROVE A PARTICULAR MILITARY DEPLOYMENT.

WITH ALL DUE RESPECT, MR. CHAIRMAN, I WONDER WHETHER IT IS APPROPRIATE TO RESERVE THIS FUNCTION FOR ANY PARTICULAR GROUP OF CONGRESSMEN. IN MY OWN VIEW, IT WOULD BE PREFERABLE TO REQUIRE THAT A PARTICULAR NUMBER OF THE MEMBERS OF THE HOUSE IN WHICH THE RESOLUTION WERE INTRODUCED COSPONSOR IT.

IN VIEW OF THE FACT THAT IT WOULD TAKE TWO-THIRDS OF THE MEMBERS OF BOTH HOUSES TO OVERRIDE A PRESIDENTIAL VETO, PERHAPS IT WOULD BE APPROPRIATE TO REQUIRE THAT ONE-THIRD OF THE MEMBERS OF EITHER BODY COSPONSOR A RESOLUTION BEFORE IT WOULD BE GIVEN EXPEDITED CONSIDERATION. THE QUESTION WHETHER THE RESOLUTION IN QUESTION MET THIS TEST COULD BE EASILY DETERMINED BY THE PRESIDING OFFICER, AND SHOULD NOT BE A SUBJECT FOR DEBATE.

LET ME MAKE IT CLEAR THAT I UNEQUIVOCALLY FAVOR THE REMOVAL OF THE TROOP WITHDRAWAL REQUIREMENT FROM THE EXISTING WAR POWERS RESOLUTION. THIS PROVISION CASTS A SHADOW OVER ANY DEPLOYMENT OF U.S. FORCES INTO A HOSTILE SITUATION OVERSEAS. IT INEVITABLY UNDERCUTS THE APPEARANCE OF DETERMINATION BY THE UNITED STATES AND THEREFORE COMMUNICATES AN UNCERTAIN SIGNAL.

IN ADDITION, I BELIEVE THAT EXPEDITED CONSIDERATION OF A JOINT RESOLUTION REGARDING THE DEPLOYMENT OF FORCES COULD BE AN ACCEPTABLE ALTERNATIVE TO THE AUTOMATIC WITHDRAWAL REQUIREMENT. I BELIEVE, HOWEVER, THAT THE PROCEDURES CONTAINED IN THE BILL UNDER CONSIDERATION MAY BE INADEQUATE IN THIS REGARD AND SHOULD BE CLARIFIED.

NEED TO RESTRICT DEBATE UNDER SPECIAL PROCEDURES

S.J. RES. 323 WOULD PERMIT CONSIDERATION OF A RESOLUTION OF APPROVAL OR DISAPPROVAL AT ANY TIME -- PROVIDED THE RESOLUTION WERE INTRODUCED BY THE CHAIRMAN OR VICE CHAIRMAN OF THE CONSULTATIVE GROUP OF CONGRESSMEN. IN THIS RESPECT, S.J. RES. 323 SHARES SOME OF THE DEFECTS OF THE ORIGINAL WAR POWERS RESOLUTION.

ONE OF THE KEY PROBLEMS WITH THE ORIGINAL RESOLUTION WAS THAT IT TENDS TO LEAD TO ENDLESS DEBATE IN CONGRESS CONCERNING PRESIDENTIAL AUTHORITY TO COMMIT U.S. FORCES OVERSEAS. NOT ONLY DOES SUCH DEBATE TEND TO DIVIDE THE COUNTRY. IT ALSO TENDS TO LOWER THE MORALE OF U.S. FORCES AND MAY COMMUNICATE A MESSAGE OF UNCERTAINTY TO OUR FRIENDS AND ALLIES, AS WELL AS OUR ADVERSARIES, OVERSEAS.

I TRUST THAT THE DISTINGUISHED GROUP OF CONGRESSMEN WHO MAY BE MEMBERS OF THE PERMANENT CONSULTATIVE GROUP WOULD REFRAIN FROM ACTIONS THAT WOULD CAUSE ENDLESS DEBATE CONCERNING THE DEPLOYMENT OF U.S. FORCES. BUT NEVERTHELESS THE POSSIBILITY IS THERE THAT THE GROUP COULD RECOMMEND DEBATE ON A RESOLUTION AT ANY TIME IN RESPONSE TO CHANGING CIRCUMSTANCES.

IN VIEW OF THIS PROBLEM, MR. CHAIRMAN, I BELIEVE THAT A LIMITATION SHOULD BE PUT ON RECOURSE TO THE EXPEDITED PROCEDURES PROVIDED FOR IN THE BILL. DEBATE UNDER THESE PROCEDURES SHOULD NOT BE AVAILABLE AGAIN AND AGAIN.

FOR THIS REASON, I BELIEVE THAT THE BILL SHOULD BE AMENDED TO SPECIFY THAT ONCE A QUALIFIED RESOLUTION HAS BEEN GRANTED EXPEDITED CONSIDERATION NO OTHER RESOLUTION CAN BE ACCORDED SIMILAR TREATMENT FOR A SPECIFIED PERIOD OF TIME -- PERHAPS FOUR MONTHS. DURING THE INTERIM, THERE COULD OF COURSE ALWAYS BE A DEBATE UNDER THE USUAL RULES.

DEFINITION OF JOINT RESOLUTION

FINALLY, MR. CHAIRMAN, I WOULD COMMENT THAT THE CONTENTS OF THE RESOLUTION SPECIFIED IN THE BILL APPEAR TO BE INCOMPLETE. THE BILL SAYS THAT SUCH A RESOLUTION WOULD EITHER REQUIRE THE PRESIDENT TO DISENGAGE U.S. FORCES, OR PROVIDE SPECIFIC AUTHORIZATION FOR CONTINUED ENGAGEMENT.

ACTUALLY I BELIEVE THE RANGE OF CHOICES AVAILABLE TO CONGRESS IS GREATER. THEY SHOULD INCLUDE AT LEAST THE FOLLOWING:

-- UNQUALIFIED AUTHORIZATION FOR CONTINUED DEPLOYMENT;

-- PROHIBITION ON CONTINUED DEPLOYMENT OR A SPECIFIC TIME LIMIT ON DEPLOYMENT; AND

-- AUTHORIZATION FOR DEPLOYMENT UNTIL A PARTICULAR TIME OR UNTIL A PARTICULAR CIRCUMSTANCE OCCURS.

CONCLUSIONS

IN SUMMARY, LET ME SAY THAT I BELIEVE THE AUTOMATIC TROOP WITHDRAWAL REQUIREMENT OF THE WAR POWERS RESOLUTION SHOULD BE ELIMINATED. I AGREE THAT THE CONGRESSIONAL ROLE IN THIS AREA IS PROPERLY EXERCISED THROUGH JOINT RESOLUTION. I ALSO AGREE THAT CONSIDERATION SHOULD BE GIVEN TO ESTABLISHING EXPEDITED PROCEDURES FOR THIS PURPOSE.

ON THE OTHER HAND, I HAVE DOUBTS ABOUT THE WORKABILITY OF THE CONSULTATION MECHANISM -- THE PERMANENT CONSULTATIVE GROUP -- THAT WOULD BE ESTABLISHED BY THIS BILL. CONSULTATION CAN BE MEANINGFUL ONLY TO THE EXTENT THAT IT IS FLEXIBLE, AND THIS COULD BE LOST THROUGH ESTABLISHMENT OF SUCH MACHINERY.

FINALLY, MR. CHAIRMAN, I COMMEND TO YOU THE SPECIFIC IDEAS REGARDING CONGRESSIONAL PROCEDURES THAT I MENTIONED EARLIER. I WOULD GREATLY ENJOY WORKING WITH YOU TO DEVISE PROCEDURES THAT WOULD BEST CARRY OUT THE INTENT OF THIS LEGISLATION.

I CONGRATULATE THE COMMITTEE FOR ITS EFFORTS ON THE WAR POWERS QUESTION. I GREATLY DOUBT WHETHER THERE WILL BE ANY RESOLUTION OF THIS ISSUE DURING THE CURRENT CONGRESS. BUT CLEARLY THE WAR POWERS RESOLUTION DESERVES ANOTHER LOOK.

A MIRROR FOR PRESIDENTS

Often as Jimmy Carter quoted Harry Truman in the recent campaign, he never mentioned Truman's favorite maxim: "There is nothing new except the history you don't know." As a Born-Again Baptist, the President-elect may believe that the Bible contains all the history he needs to know, and perhaps he is right. With all due respect, however, I suggest that he and we might both benefit if he took a little time to bone up on American history, and especially the history of the Presidency. For openers, I offer the following observations, derived from study of our first and third Presidents.

The Presidencies of George Washington and Thomas Jefferson, to be sure, were as different as those of John F. Kennedy and Richard Nixon. The two men represented fiercely hostile parties, their ideologies were polar opposites, their administrative methods were studies in contrast, their styles were strikingly antithetical. Apart from being Virginians, they seemingly had nothing in common but their red hair, and even on that score they differed, for Washington never appeared in public without a powdered wig and Jefferson scrupulously disdained that affectation.

If, however, their periods of incumbency are viewed in institutional perspective—if one considers their Presidencies not as administrations but as experiences in the office—one is struck by similarities rather than differences. Moreover, certain inherent and enduringly relevant characteristics of the Presidency itself become manifest.

One such characteristic is that the Presidency is dual in nature, entailing two functions so different from one another that the ability to perform them both is rarely to be found in a single person. One function is administrative and executive, and is involved in the formulation and implementation of policy. The other is ritualistic and ceremonial, and though we think of that part of the Presidency as being of secondary importance when we bother to think about it at all, it is at least as important as the governing function—and possibly a good deal more so. Indeed, scholars have often misunderstood the Presidency because they ignored or underestimated the purely ceremonial aspect of the office; and no small number of gifted men have failed as President because they did likewise, or were adept at one of the functions but not the other.

To justify and explain that observation, it is necessary to begin with colonial and even pre-colonial times. We derived our perception of the executive branch of government from the English, who unfortunately were not at all gifted in dealing with executive authority. For some centuries before the accession of the Tudors in 1485, the English tried to get along with home-grown kings, and they underwent a continuing succession of rebellions, civil wars, regicides, and usurpations. The Tudors, who were Welsh, not English, provided stability in the Crown until 1603, though with a great deal of attendant social, religious, and economic upheaval. Then came the Stuarts and along with them another century of rebellion, regicide, civil war, and revolution. At last, in 1714, the English found a king they could live with—George I of the small German principality of Hanover, who understood neither the English government nor the English language, and spent his entire reign unhappily wishing he could return to his beloved fatherland. The Hanoverians have occupied the British throne ever since, down to and including Elizabeth II.

It was under the first two Hanoverians (George I and George II, 1714-60) that the English worked out a permanently viable monarchy—and, significantly, it was then that Anglo-Americans came to political maturity. The English solution to their problem was at once ingenious and ingenuous: they simply divided the two sets of royal functions and entrusted them to two separate sets of persons. Those functions that had to do with the exercise of power—defending the nation against alien enemies, enforcing domestic order and justice, and formulating and implementing governmental policy—became the province of the ministry, which was composed of

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members of Parliament and headed by the Chancellor of the Exchequer. The ritualistic and ceremonial functions remained the province of the Crown. Removed from the actual work of government, the English Crown became the symbol of the nation—its mystical embodiment—and as such the object of reverence, awe, veneration, even love. In English America, things were somewhat different: whereas the ministry in the mother country was recognized and obeyed as the government, tension continued to exist in the colonies between executive authority, as embodied in the royal governors and their councils, and the colonial assemblies, representing the colonial subjects. But the Americans professed as much reverence for the Crown in the person of the King as did their brethren in the home country, and except in parts of New England those professions reflected deeply felt sentiments. On both sides of the water, a people formerly given to killing their kings had now become willing to fight and die for them.

Then came an aberration, the third George, who attempted to reunite the two royal functions —with, for a time, a considerable measure of success. The Anglo-Americans reacted strongly against that effort, and the story of the American Presidency, as well as the independence of the United States, begins with their reaction. The Americans' sense of betrayal is reflected in the Declaration of Independence: apart from a bit of stirring propaganda at the beginning and end, that document is little more than a recitation in dreary detail of George III's alleged abuses of executive authority. The same sentiment was expressed more tangibly in the revolutionary constitutions: the governors of the several states were mere figureheads, and the Confederation Congress had no executive arm at all.

Yet the Americans did not abandon their habit of ceremonial reverence toward the Crown, despite the Founding Fathers' fervent protestations in favor of republicanism. To have done so would have been to cast off generations of social conditioning overnight, if indeed not to deny a basic human need. Instead, the Americans kept the monarchical habit alive through various surrogates. Thus, for instance, they vested the state governors with responsibility for performing many of the traditional royal rituals; in lieu of celebrating George's birthday they celebrated that of their "deliverer," Louis XVI of France; and when the French dauphin was born in the 1780's they celebrated the event with public balls, firing of cannon, displays of fireworks, and dancing in the streets.

Meanwhile, the political experience of the immediate postwar years convinced most thinking Americans that they had overreacted against executive power in 1776—and, indeed, that government without an executive branch is no government at all. The subject was still so touchy, however, that the delegates to the Constitutional Convention of 1787 spent more time debating the proper construction of the executive branch than they did on the legislative and judicial branches combined. In the end, they merely sketched the duties and description of the office in broad outlines, and left it for the first incumbent to fill in the details.

THEY were willing to do so—and, in fact, were willing to create the Presidency at all—only because George Washington was available to serve as the first President. The virtual deification of Washington in his own time, not merely by the multitudes but by sophisticated and hard-nosed politicians and businessmen as well, is something of a wonder. Part of the explanation is that he was the nation's military hero, though some other American commanders were abler and had better records. He also looked like a leader: he was cool and aloof, and tall, broad-shouldered, and narrow-hipped; and in a country populated mainly by people who were hot-tempered and overly confidential, and short and fat, such attributes were not to be taken lightly. Moreover, he quite self-consciously played the part of the impeccably upright Father of his Country. And, finally, there was the unspoken (and unspeakable) but nevertheless very real popular craving for a king.

Therein lay Washington's greatest contribution to the Presidency and to the perdurance of republican institutions in America. He provided a halfway house between monarchy and republicanism; he made it possible (and safe) for Americans to indulge their traditional reverence for the Crown without reneging on their commitment to a republican form of government. The way he played his role was a product of studied design, and he devoted far more time and thought to matters of ceremony than to matters of state. From all advisers that he trusted he solicited suggestions for rules of conduct that would strike a balance between "too free an intercourse and too much familiarity" (which would reduce the dignity of the office) and "an ostentatious show" of monarchical aloofness (which would be improper in a republic). Rules were worked out, and so effectively did Washington follow them that no less skeptical a person than Abigail Adams, wife of the Vice President and a veteran of receptions at Versailles and the Court of St. James, was almost moonstruck upon meeting the President. Washington, she gushed, moved and handled himself "with a grace, dignity, and ease that leaves Royal George far behind him."

As to carrying out the executive functions of government, Washington looked to the Constitution as a guide and took the document quite literally, almost as if it were a manual of instructions.

For several years, for instance, he did not meet with his department heads in cabinet sessions; rather, as the Constitution directed, he "required their opinions in writing," even on the most trivial of matters, which added greatly to their work loads. As to the formulation of legislative policy, Washington scrupulously avoided having any part of it, for that, he believed, would have involved an improper violation of the doctrine of the separation of powers: he would no more have proposed a law, for example, than he would have vetoed a bill on grounds of policy. Even in regard to foreign affairs he tried for a time to follow the Constitution literally: once, he sauntered into a session of the Senate to seek its "advice and consent" regarding some Indian treaties, and occasioned a great deal of confused embarrassment in the doing.

Such methods of procedure left a considerable void in the actual wielding of executive power, and under those circumstances the United States moved rapidly, albeit temporarily, toward a version of the ministerial system then used in England. Secretary of the Treasury Alexander Hamilton—acting, it will be recalled, neither on his own initiative nor on orders from the President, but upon instructions from Congress—submitted his two great reports on the public debt, then his report on the Bank, and then his report on manufactures, and accompanied them all with lengthy drafts of proposed legislation. Moreover, he worked intimately with congressmen in steering his proposals into law; and, with congressional cooperation, he continued to formulate and see to the enactment of legislation throughout his tenure as Secretary. Clearly he conceived of his "ministry" as the "government," and thought of himself as the prime minister. Even after he retired, Hamilton continued for some time more or less to direct the government, more or less through a ministry.

THE Jeffersonian Republicans objected to the Federalists' approach to government on quite a number of grounds, central among them being the Federalists' conception of the executive. Jefferson and his followers not only believed Hamilton to be a monarchist but even regarded him as the agent of an international monocratic conspiracy. They castigated Washington for indulging in royal pageantry and for wallowing, kinglike, in popular adulation; they denounced Hamilton for introducing, extra-constitutionally, the corrupt British ministerial system. And yet the Republicans' own conception of a proper executive branch was curiously mixed. On the one hand, they insisted that executive power was and should be strictly limited by the written Constitution, and that it should be absolutely separate from the legislative branch. On the other hand, in their hearts they did not trust paper Constitutions, and they looked to Jefferson to be an elected version of what the English Tory, Viscount Bolingbroke, had called a patriot king: one who would rally the entire nation to his banner, and then, in an act of supreme wisdom and virtue, voluntarily restrain himself and thus restore the ancient system of the separation of powers.

When the Jeffersonians came to power in 1801, they promptly refashioned the executive in accordance with their ideological precepts. As to the ceremonial—or what we might properly call the monarchical—functions of the office, Jefferson seemingly rejected them entirely. What he actually did, however, was to republicanize them. He ostentatiously forswore ostentation and display, pomp and protocol. He gave no public balls and held no levees, and no one celebrated his birthday. He abandoned the monarchical ritual (which had been followed by Washington and Adams and all state governors) of appearing in person before the legislative branches, and afterward exchanging formal messages about the executive message; instead, when Jefferson had anything to say to Congress he sent a written note, and kept it as brief as possible. He staged no entertainments for the public; instead, his doors were open to every citizen at all times. Finally, he never held "court" for government officials or foreign ministers. Instead, he held a continuous succession of small, informal dinner parties, at which the wines were superb and the cuisine was prepared by a French chef, but the atmosphere was one of studied casualness. Unwigged, dressed in frayed homespun and rundown slippers, Jefferson captivated his guests with the folksy, open hospitality of a country squire and with dazzling conversation that ranged from art, architecture, and archeology through mathematics and music to philosophy and zoology.

This was not merely a republican affectation adopted as a counterfoil to monarchical affectation, nor was it a form of reverse snobbery. Rather, it reflected a calculated design on Jefferson's part, and accomplished just what he expected it to accomplish. By stripping everyone of the possibility of pretense and the trappings of status, and by dealing with people only in intimate gatherings where he was host and master of the house, he established a setting in which he was utterly without peers. In those circumstances he stood towering as the first among equals.

By that means—and through the instrumentality of a well-organized Republican press, which had only to describe him as he truly was—Jefferson became immensely popular. He became, in fact, quite as popular as Washington had been at the time of his inauguration, before partisan attacks began to tarnish his previously spotless reputation. There was, however, a crucial difference between Jefferson's popularity and that of Washington. Whereas Washington had been revered as a demigod and the symbol of the nation, Jefferson made the transition from monarchy to republicanism complete by humanizing the Presidency and serving as a symbol not of the nation but of the people. That was an achievement of profound significance, for as the American people became democratized and spread their society over a vast continent, they sorely needed a symbolic monarch if they were to remain a single nation, and yet they could tolerate one only if he bore the peculiarly democratic stamp that Jefferson had coined.

As to the executive function, the "Revolution of 1800," as Jefferson called it, took place on several levels and in several stages. Administratively, the government was purged of "irreconcilable monarchists" (that is, staunch Hamiltonians) and in choosing their replacements Jefferson employed an artful blend of patronage and meritocracy. The actual conduct of administration was put mainly in the charge of Secretary of the Treasury Albert Gallatin, who had the twin tasks of dismantling Hamilton's elaborate fiscal machinery and of instituting methodical procedures and strict accounting in place of the slipshod and cavalier ways that had been followed by the Federalists. Gallatin also served as the middleman between the President and Congress. That made it possible for Jefferson to influence legislation without interfering directly in the legislative process, and thus to preserve the form of strict separation of powers; and it gave Jefferson all the flexibility of Hamilton's independent ministerial system while leaving the President in command.

Jefferson presided over the administration with the easy, relaxed, informal manner that he employed at his congressional dinner parties, and with equal success. He conducted cabinet meetings as a democracy of equals, and allowed Congress to operate with no overt presidential direction and only the gentlest of presidential guidance; and yet, until almost the very end, he ran Congress more successfully and more completely than Hamilton had ever done and few succeeding Presidents ever would do, and the cabinet always reflected his will except when he had no firm opinions on a matter. Moreover, he did so without using any of the techniques that are usually associated with "strong" Presidents—popular pressure, naked power, bribery, flattery, cajolery, blackmail, or shrewd trading. Rather, his achievements all flowed from the force of his intellect, his character, and his personality.

But that, perversely, was a grave weakness in the Republican scheme of things: administratively, the system could be made to work only with a Thomas Jefferson at the helm, and so far we have never had another. When Jefferson himself faltered, as he did on several occasions during his Presidency, government almost stopped functioning except in the routine operations of Gallatin's Treasury machinery. When Jefferson left office, the shortcomings of his method of administration rapidly became manifest. The cabinet became the center of petty bickering and continuous cabalizing, and Congress split into irreconcilable factions and repeatedly asserted its will against that of the President.

In other words, the Jeffersonians destroyed the English-*cum*-Washingtonian/Hamiltonian split system of the Presidency, and erected no viable alternative in its place. The resulting problem has plagued us throughout the nation's history. The most popular Presidents in their own time—those who most successfully fulfilled the monarchical function of the office—were men like Theodore Roosevelt and John F. Kennedy, who obviously put on a swell show but never accomplished much of anything, or like Andrew Jackson, who won popular adulation while wreaking irreparable destruction. Others were extremely able at getting things done—I make no comment here about the merits of what they were doing, and have in mind such Presidents as Taft, Hoover, Johnson, and Nixon—but were so totally incompetent in fulfilling the monarchical function of the Presidency that they were virtually ridden out of the office on a rail. The big winners in the history books are those who—like Lincoln, Wilson, and Harry Truman—were shrewd, devious, unscrupulous, and successful operators, unloved and unlovable in their own times, but whom the historians can enshrine as retroactively lovable after all memory of their personalities has disappeared.

So much for the first characteristic of the Presidency. A second characteristic has to do with the exercise, structure, and psychic cost of presidential power, and is a bit more involved. Although in this case too I shall confine my discussion primarily to the Presidencies of Washington and Jefferson, I mean my observations to pertain in general to administrations that extend for two terms. As it happens, both Washington and Jefferson could have been reelected for a third term had they so chosen, but it took a great deal of persuasion to get Washington to serve even a second term, and Jefferson announced shortly after his reelection that he would follow Washington's precedent and retire at the end of his second. By Madison's time the two-term limit had already hardened into a hoary tradition.

Given that tradition, the relations between a President and his party and Congress change profoundly between his first and second terms. Politically they are interdependent during the first term, for each can help the other to reelection. After the President is reelected, they no longer have such a relationship: the President, not coming up for a third election, has no further political need for the congressmen of his party, and he is of no future political use to them. The resulting mutual estrangement is exacerbated by a peculiarity of American political history. That is, though the President is cut off from his power base in government by reason of his lame-duck status, he almost invariably has the illusion of increased power because he almost invariably wins bigger when running for reelection than he did when being elected the first time.

This shifting of political relationships has major implications, one of which is that the President's followers, no matter how loyal and honorable they may have been during the first term, tend to start jockeying for positions in the race to become his successor four years hence—even though such activity may be clearly inimical to the national interest. Throughout Washington's first term, for instance, Jefferson and Hamilton behaved with some civility toward one another in their roles as Secretaries of State and the Treasury; but during the second term they were the leading rivals to succeed him, and all restraint was abandoned. Hamilton spent more time attacking (or, actually, counter-attacking) Jefferson than he did attending to his duties, and eventually he more or less forced Jefferson to resign. Meanwhile, Jefferson entirely neglected his duties in the State Department, attempted to sabotage the administration's foreign policy, vilified his rival incessantly, and finally destroyed Hamilton as a presidential prospect with a lurid exposé of his extramarital indiscretions.

A decade later, after Jefferson himself had been elected for a second term, he was a hapless witness to an even more destructive version of the game. His Secretary of the Navy, supported by factions in the House and the Senate, sought to undermine the administration's foreign policy so as to discredit Secretary of State James Madison as a prospective successor to the Presidency. They backed James Monroe, who was then minister to England; and Madison, for his part, deliberately hewed to a policy that created a serious danger of war with Britain rather than allow Monroe to negotiate a treaty that would insure peace but also greatly increase Monroe's pretensions to the Presidency. Toward the end of Jefferson's second term, the maneuvering for future advantage took on extreme proportions: for instance, William Branch Giles of Virginia, who for fifteen years had been an unwaveringly loyal Republican, began to sabotage Gallatin's Treasury administration when he learned that Gallatin (instead of himself) might be Madison's own choice for Secretary of State.

OTHER implications of the shifting of relationships in the second term more directly affect the President and the Presidency. One is that the President, no matter how humble his behavior before, tends to emerge from his triumphant reelection with a sense of power that borders on arrogance, if indeed he does not suffer delusions that he is God or superman. To a generation that has witnessed the Presidencies of Lyndon Johnson and Richard Nixon, such an observation will hardly elicit a raised eyebrow; but it may come as a surprise to learn that Washington and Jefferson, in their second terms, also tended to set themselves above the law and to regard opposition and even criticism as being tantamount to treason. The phenomenon is indigenous to the presidential office.

Washington, shortly after his reelection, was faced with mounting criticism from informal oppositionist political clubs called Democratic-Republican societies. He regarded the societies much as the late Senator Joseph McCarthy regarded "cells" of the American Communist party—namely, as agents of a foreign power and of an international revolutionary conspiracy—but was at first unable to do much to suppress them. Then a group of moonshiners in the mountains of Pennsylvania tarred and feathered a "revenooer," so to speak—actually they besieged and burned the house of a collector of the federal excise tax on whiskey—and Washington proclaimed the action to be the handiwork of Jacobin subversives, the Democratic-Republican societies. He assembled a force of 15,000 militiamen and personally marched at their head to crush the so-called insurrection. That episode was typical of his toleration for political opposition during his second administration.

But if Washington's second administration was intolerant, that of the Father of American Liberty, Thomas Jefferson, was a nightmare of repression. Among other things, Jefferson attempted to have the Supreme Court purged of Federalists through impeachment on purely political grounds; he sanctioned the suspension of *habeas corpus*, the wholesale arrest of citizens without charges, and the forcible removal of accused persons from the district in which they had a constitutional right to trial; he declared large regions in insurrection and under martial law for the legal violations of a handful of persons; he became the only President prior to modern times who bypassed the courts and used the army in the routine enforcement of the laws; he sought, received, and personally enforced legislation depriving whole classes of people of their property, not only without due process of law but without even the possibility of a trial; he denounced a critical press with an almost paranoid sense of persecution, and attempted by legal and extra-legal means to suppress newspapers which opposed him. Finally, he attempted during his last year in office to supervise, with minute and personal attention, not only what his fellow citizens should eat—this is quite literally true—but how much they should eat as well.

In the face of all this his party became split into two ideological wings. One, concentrated in the House and led by John Randolph of Roanoke, veered to the extreme position of the doctrinaire libertarian who would abide the subversion of government and of society itself before willfully jeopardizing the rights and liberties of a single citizen. The other, concentrated in the Senate and led by William Branch Giles, adhered to a form of Republicanism that might be styled totalitarian libertarianism: believing that government in their hands was dedicated to preserving human liberty, they saw legal protection of the civil rights of accused persons only as subterfuges behind which traitors and other enemies of liberty could hide. Jefferson almost uniformly sided with this latter group. Among the fruits of their labors was a bill, passed in the Senate but rejected in the House, which would have prescribed the death penalty for any person who "resisted the general execution of any public law."

YET another implication to the Presidency of the reelection-and-lame-duck syndrome is related to the previous one. It is in the nature of the Presidency that matters of domestic reform, however engrossing they may be for the President initially, lose their appeal after a time. The chore of manipulating or currying favor with congressmen, necessary though it is, grows tedious and even demeaning, and the attraction of dealing with foreign affairs, wherein one has a much freer hand, becomes well-nigh irresistible. So it was with Washington by the winter of 1792-93, and so it was with Jefferson by the winter of 1804-05. Each man found the prospect of close future dealings with Congress entirely distasteful, to say the least; and neither would have been human if, in the afterglow of a triumphant reelection, a voice deep inside had not whispered that he had now earned the right to stand above that sort of thing.

In any event, though neither of them plunged totally into overseas adventuring upon being reinaugurated—as many of their successors were wont to do—both entirely neglected domestic reform for the sake of foreign affairs in their second terms. Since I am not concerned here with the history of their administrations, but with generalizations about the Presidency that can be drawn from them, I shall not dwell on this subject. It is germane, however, to point out that Washington was much more successful in handling foreign relations than Jefferson was, and to suggest a reason.

Washington was governed exclusively by his conception of the national interest, while Jefferson's policy was tempered (if not dictated) by considerations of ideology. Historians have generally held that Jefferson's approach was the more progressive, enlightened, and humane, and that it was merely bad fortune that his policy brought failure, economic ruin, and ultimately war, whereas Washington's had brought peace and prosperity. I devoutly disagree with that judgment. To the extent that ideology and not interest governs a nation's policy, the nation sacrifices its ability to compromise, to admit it was wrong, and to change—for when the true believer, in politics or in religion, compromises or recants, he has committed the mortal sin of making accommodations with the infidel or the devil. The Jeffersonians, proving to be unable to make accommodations with those they regarded as wicked, locked themselves into a foreign-policy strait jacket, and the inexorable result was Jefferson's calamitous last year in office in which, to avoid war in Europe, the United States government virtually waged war against its own citizens.

STILL another aspect of the problem is that in his second term the President becomes fair prey for every manner of vilification: once the reality of his lame-duck status begins to penetrate the popular consciousness, press and politicians move in like so many hyenas gathering around a wounded lion. It has been so since the beginning. Washington, who had been utterly sacrosanct before, had scarcely been reelected when the personal attacks began. Early in 1793 Philip Freneau's *National Gazette* (an opposition newspaper secretly financed by Jefferson out of State Department funds) opened the barrage by describing the celebration of Washington's birthday as a "monarchical farce," and by sneering that his sycophants fawned upon him as if he were "Virtue's self." The attacks mounted in shrillness and intensity in the ensuing months, and by year's end a New York Republican journal was emboldened to charge that Washington's education had consisted mainly of "gambling, reveling, horse racing, and horse whipping"; that he was "infamously niggardly" in private dealings; and that, despite his pretended religious piety, he was a "most horrid swearer and blasphemer." Before long, if John Adams's recollections are to be believed, "ten thousand people in the streets of Philadelphia, day after day, threatened to drag Washington out of his house, and effect a revolution in the government." For the next two years, as the attacks continued and increased (he was accused of stealing from the Treasury and even of having secretly been a traitor during the Revolution), Washington repeatedly interrupted cabinet meetings to indulge himself in tirades against the press or in fits of self-pity. When he finally left office, Benjamin Bache—grandson of Franklin and editor of the Philadelphia *Aurora*—penned this stirring eulogy: "If ever there was a period for rejoicing, this is the moment. Every heart [that is] in unison with the freedom and happiness of the people ought to beat high with exultation that the name of Washington from this day ceases to give a currency to political iniquity and to legalized corruption."

Jefferson's story was somewhat different, for he had been exposed to some pretty juicy scurrility through much of his public career. Already before he became President he had been widely castigated as an atheist, a coward, a bloodthirsty revolutionary, a hypocrite, a liar, a demagogue, and a fop; and during his first term his improper advances toward the wife of a close friend were revealed in the newspapers, and it was charged (or exposed, depending upon which historians you believe) that he had long had a slave as a concubine and had sired several children by her. Throughout all this, however, he maintained his aplomb, and at least publicly maintained his posture as the unqualified champion of freedom of the press.

It was in the second term that newspaper attacks finally and deeply began to wound him—or, to put it another way, that his critics became so vicious that they were at last able to find his vulnerable spots. Curiously, he proved to be relatively insensitive to attacks on his personal behavior or morality but hypersensitive to charges regarding his public conduct. Charges that he was an agent or lackey of Napoleon, or was excessively secretive, or dictated to Congress sent him into fits of rage or fits of depression. And his enemies, once they got the knife in, twisted it unmercifully. Jefferson's response was much as Washington's had been, except perhaps that it was more so. He had once written that a free press was more vital to public happiness than good government, and that faced with a mutually exclusive choice he would readily opt for the press; now he resurrected the oppressive ancient doctrine of common-law indictment for seditious libel, and attempted to whip the press into line by instituting what he called "a few wholesome prosecutions." When that failed to stop the onslaught, he could only fulminate and whimper and rage. "Nothing can now be believed which is seen in a newspaper," he wrote again and again. He remarked repeatedly that it was a "melancholy truth" that suppression of the press would be no worse than the press's own "abandoned prostitution to falsehood." He wailed that "our printers raven on the agonies of their victims, as wolves do on the blood of the lamb."

Along with attacks by the press, there is usually, toward the end, some sort of open rebellion by Congress. This does not always apply, but it is almost invariable with what political scientists used to call "strong" Presidents. Thus, during Andrew Jackson's last year in office and in Theodore Roosevelt's as well, Congress formally resolved that it would not even receive any further messages from the President. Normally the congressional rebellion emanates from the Senate, which is attempting to regain some of the influence in the conduct of foreign relations which it believes the President has usurped. The phenomenon can work with either or both houses, however, and the Presidencies of Washington and Jefferson offer illustrations of each of the possible combinations.

With Washington, the rebellion came in 1796, and arose in the House of Representatives. The keystone in Washington's foreign policy was Jay's treaty with Great Britain, signed in the winter of 1794-95 and approved by the Senate, after an intensive campaign and by the narrowest of constitutional margins, in a special session in the summer of 1795. When the full Congress reconvened in December, House Republicans (who vehemently opposed the treaty) sought to chastise the administration and cut the House in on foreign-policy decisions in future. Taking the position that the House's exclusive power to initiate appropriations (without which no treaty could be implemented) gave it a voice in foreign policy co-equal to the Senate's power to approve or reject treaties, the House demanded that the President turn over all papers relating to Jay's mission. Those papers contained some politically damaging documents, and (quite in addition to his objection to the constitutional challenge) Washington was loath to surrender them. He brooded over the demand; and then, summoning what was left of his great personal dignity, he sent his answer. The papers, he said, were not "relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution had not expressed," and on that ground he refused. Despite everything, no congressman was willing to go that far, and the matter died.

Jefferson, for his part, did not fare as well. During the last congressional session of his Presidency, the Senate rose to reassert its claim to a role in foreign affairs, particularly in ways designed to prevent Jefferson's successor from having a free hand in continuing Jefferson's policies. Then both houses decided to scuttle the embargo, on which Jefferson had staked his all as an instrument of foreign policy, and they did so in a way that was at least partly a deliberate insult: they voted that the embargo should expire on March 4, so that Jefferson's Presidency and his favorite policy should die together. Finally, the Senate took a cheap shot that was a matter of calculated cruelty aimed at the fallen President. Some months earlier Jefferson had appointed an old friend, William Short, to a legally nonexistent post as minister to Russia, expecting that the Senate would routinely confirm the appointment and thus support a pet project that he had worked long and diligently for, the opening of diplomatic relations with Czar Alexander I. For political reasons, he held back an announcement of the appointment until the last minute; and when the Senators received it, they summarily and unanimously rejected it.

My final point should by now be obvious. It is simply that the burden of presidential power over a period of two terms

—the psychic cost of the office—is greater than any reasonable man can be expected to bear.

The Presidency left Washington a broken and beaten man—embittered, given to almost insane rages, possessed of little memory or judgment, and convinced that a conspiracy had undermined his Presidency and was hounding him to his grave. Perhaps the most telling testimony as to what the office had cost him is the angry, defensive, and self-pitying draft of a final message that he composed early in 1796—that is, before Hamilton wrote for him the immortal document which was actually released as his Farewell Address. This is how Washington's own version read:

> As this address, fellow citizens, will be the last I shall ever make to you, and as some of the gazettes of the United States have teemed with all the invective that disappointment, ignorance of facts, and malicious falsehoods could invent, to misrepresent my politics and affections—to wound my reputation and feelings—and to weaken, if not entirely destroy, the confidence you have been pleased to repose in me; it might be expected at the parting scene of my public life that I should take some notice of such virulent abuse. But, as heretofore, I shall pass them over in utter silence.

The rest of the draft was an itemized denial of the charges.

And if Washington's Presidency ended in anguish, Jefferson's ended in agony. Jefferson had remarked that Washington suffered during his second term "more than any person I ever yet met with," but Jefferson's own suffering in the same circumstances was even greater. He came to regard each session of Congress as an unbearable ordeal; he repeatedly referred to the Presidency as his prison; during his last two years in office he was periodically afflicted with migraine headaches that kept him shut alone in a darkened room for weeks on end; in his final year he collapsed under what used to be called a nervous breakdown—a total paralysis of will. At last the ordeal was done, and on March 4, 1809, he was at Madison's side as Chief Justice John Marshall administered the oath of office to the President-elect. He remained in Washington a week, packing his belongings, before quitting the place forever. Then the sixty-five-year-old Father of American Liberty mounted a horse, to ride through snow and storm for three days and nights until he regained the sanctuary of his home at Monticello. In the seventeen years that remained of his life, he never again left the foothills of the Blue Ridge Mountains.

PREPARED STATEMENT OF ABRAHAM D. SOFAER

I am honored to have the opportunity to present this distinguished Committee with views of the Executive branch concerning the War Powers Resolution. I am also prepared to offer some general comments on current proposals to amend the Resolution.

This Committee is intimately familiar with the provisions and the history of the Resolution. I see no need to offer an extended description of either. Some general observations do seem in order, however, to place into proper context the Resolution's key provisions.

The War Powers Resolution has been controversial from the day it was adopted over President Nixon's veto. Since 1973, Executive officials and many Members of Congress have criticized various aspects of the Resolution repeatedly. Furthermore, it is widely regarded - by its critics and its supporters alike - as ineffective. Presidents dispute its constitutionality in certain fundamental respects; and Congress has failed to enforce its most questionable provisions.

The intense debate generated by the War Powers Resolution is part of our beloved system of government. No sooner had George Washington become President when debates commenced about the relative powers of the three branches under the Constitution. President Washington's declaration of U.S. neutrality in the war between England and France, for example, spawned a debate on the relative powers of the political branches over foreign policy and war. Legal argument has been a national pastime, particularly over the crucial powers of war and foreign affairs. We must expect it to continue.

Debate about the War Powers Resolution has focused on particular requirements of the Resolution rather than on the principles that govern Executive/Congressional relations, which has tended to divert the attention of Congress from the wisdom and effectiveness of policies to the legal niceties of this subject. It has led, and will continue to lead, to unnecessary and undesirable legal faceoffs between Congress and the President, at times when the nation most needs to formulate and implement policy effectively and wisely. The issues this Committee is addressing are therefore of the greatest importance. The crucial question in any war powers situation should be how the political branches can best cooperate in the nation's interests, not which branch is right or wrong on particular legal issues.

This Administration recognizes that Congress has a critical role to play in the determination of the circumstances under which the United States should commit its forces to actual or potential hostilities. No Executive policy or activity in this area can have any hope of success in the long term unless Congress and the American people concur in it and are willing to support its execution. We also believe, however, that the War Powers Resolution has not made a positive contribution to Executive-Congressional cooperation in this area that would justify the controversy and uncertainty it has caused and seems certain to cause in the future. It incorporates a view of the relative powers of the political branches of our government, and of their proper roles, that is at odds with the Constitution's scheme and with over two hundred years of relatively consistent experience. It is, moreover, based on erroneous assumptions about the power of both Congress and the President. It underestimates the power of Congress in the sense that it is not needed to make clear that Congress has substantial power under the Constitution in matters concerning war. And the Resolution is also unnecessary in that it can grant Congress no more power in such matters than the Constitution allows.

The notion that this Resolution is necessary to curb Presidents who claim unlimited "inherent" or unilateral power to use force is incorrect. No President has been able for long to exercise exaggerated claims of power to act in the face of legislative constraints. As Madison stated in arguing for a balance among the branches: "In republican government the legislative authority necessarily predominates." Congress has powers that enable it to curb any Executive pretension, including the power to declare war; to raise and support armies; to tax and spend; to regulate foreign commerce; and to adopt measures necessary and proper to implement its powers.

President Johnson did not make war in Vietnam; the United States made war there, until Congress decided to end its support. Indeed, it is ironic that the Vietnam War was the purported basis for the War Powers Resolution when Congress was in fact a full player in that war. President Nixon regarded repeal of the Gulf of Tonkin Resolution as insufficient to prevent him from continuing the war. But this was in the context of Congress continuing to pay for - and thereby to authorize - his actions. Once Congress denied funds for certain military activities, President Nixon ultimately complied. President Ford properly regarded as a strategic catastrophe Congress' insistence that we completely abandon Indochina, and later take no action in Angola to offset Soviet and Cuban intervention. He complied, however, as did Presidents Carter and Reagan in Angola, until the Clark Amendment was repealed.

The Resolution is intended to prevent the President from acting unilaterally, beyond a limited time period, even when Congress has not ordered him to stop, and even though the President is acting for purposes traditionally regarded as appropriate. This constitutes, as former Legal Adviser Monroe Leigh put it, a procedure by which Congress attempts "to restrain the Executive without taking responsibility for the exercise of that restraint in time of crisis."

In a great many instances over the past two hundred years, Presidents have used military force without first obtaining specific and explicit legislative authorization. In our system of government, explicit legislative approval for particular uses of force has never been necessary, and the War Powers Resolution cannot and should not be permitted to make it necessary.

Congress and the American people in fact expect that the President will use the military forces placed by Congress at his disposal for long-recognized purposes, including the defense of the United States, its bases, its forces, its citizens, its property, its fundamental interests, and its allies. This is true even with respect to the most serious forms of military power - the use of nuclear weapons. In placing such weapons at the President's disposal, Congress has recognized that the President must have the authority to use them without prior approval, in order to deter effectively an enemy attack.

Conversely, however, Congress must recognize and respect the role which the President plays under the U.S. constitutional scheme. As repository of the Executive Power of the United States, Commander-in-Chief of the armed forces, and the officer in charge of the diplomatic and intelligence resources of the United States, the President is responsible for acting promptly to deal with threats to U.S. interests, including the deployment and use of U.S. forces where necessary in defense of the national security of the United States. Congress should not, as a matter of sound policy, and cannot, as a matter of constitutional law, impose statutory restrictions that impede the President's ability to carry out these responsibilities.

It is against these basic concepts that the adequacy of the key provisions of the War Powers Resolution should be judged. If the Resolution is repealed, this Administration would certainly continue to consult and involve Congress in decisions involving the introduction of U.S. forces in hostilities. And if some future Administration attempted to behave otherwise, Congress could compel it to mend its ways.

* * *

My remaining remarks will focus on those features of the Resolution that have led Presidents to criticize it. I will also comment on proposals to amend the Resolution.

Section 2

Section 2(c) of the Resolution states the view of Congress as to circumstances under which the President may introduce U.S. Armed Forces into actual or imminent involvement in hostilities. The list of circumstances in Section 2(c) is clearly incomplete, however. As my predecessors as Legal Adviser have advised this Committee, the list fails to include several types of situations in which the United States would clearly have the right under international law to use force, and in which Presidents have used the armed forces without specific statutory authorization on many occasions.

Specifically, Section 2(c) omits, for example, the protection or rescue from attack, including terrorist attacks, of U.S. nationals in difficulty abroad; the protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

It is not clear whether Congress really intended Section 2(c) as an exclusive enumeration of the President's authority, but in any event such an enumeration is neither possible not desirable. Any attempt by Congress to define the constitutional rights of the President by statute is bound to be incomplete and to engender controversy between the branches. The solution to this problem is to delete Section 2(c) altogether, as proposed by Senators Byrd, Nunn and Warner. The only way that the character and limits of such fundamental constitutional powers can be defined and understood is through the actions of the two branches in coping with real world events over the years. No convenient shortcut exists.

Section 3

Section 3 of the Resolution requires the President to consult with Congress "in every possible instance" before introducing U.S. Armed Forces into actual or imminent hostilities. Over the years, both before and after the Resolution was adopted, the Executive branch has engaged in consultations with the Congress in a variety of circumstances involving the possible deployment of U.S. forces abroad. Consultations have taken place whether or not called for by the Resolution. Consultations are intended to keep Congress informed, to determine whether Congress approves of a particular action or policy, and in the period immediately before an action to give Congressional leaders an opportunity to provide the President with their views. Consultations are not intended to enable Congress to review or approve the detailed plans of a military operation.

The Resolution requires consultation "in every possible instance" and thus recognizes that consultation may be impossible in particular cases. No President has challenged the merits of the statutory obligation to consult; the statute leaves to the President the discretion to decide whether consultation is possible, and if so, to determine the form and substance of the consultation according to the circumstances of each case. In some instances, such as the introduction of U.S. forces into Egypt to participate in peacekeeping operations, detailed consultations were held with many interested members of Congress well in advance of the action contemplated. In other instances, consultation was limited to a smaller number of members, and was less extensive. In the case of the Tehran rescue mission, President Carter concluded that prior consultation was not possible because of extraordinary operational security needs.

The President's flexibility respecting the number of persons consulted and the manner and timing of consultation must be preserved. Any requirement for a schedule of regular meetings (as in the Byrd-Nunn-Warner bill) that does not preserve this element of flexibility would impermissibly interfere with the exercise of the President's Article III powers. Further, the Byrd-Nunn-Warner bill could result in the President being required to engage in prior consultation with 18 members, except in "extraordinary circumstances affecting the most vital security interests of the United States." The Administration regards this as excessively burdensome and undesirable in many cases even if "vital security interests" might not be affected.

An additional constitutional problem arises from the provisions of Section 3(2) of the Byrd-Nunn-Warner bill regarding the proposed permanent consultative group. Under that proposal, the requirement that the President consult with the group is triggered by a majority vote of that group. This is inconsistent with the Supreme Court's decision in INS v. Chadha, which precludes the Congress from taking actions having legal effect on the Executive branch except by approval of both Houses and presentment to the President for signature or veto.

On the other hand, Secretary Shultz has long indicated his support for ways of encouraging ongoing consultations between the leaders of the Executive branch and Congress on national security issues generally. The procedure proposed in the Byrd-Nunn-Warner bill, however, creates an unwieldy cabinet-like institution, thereby eliminating necessary flexibility on the most sensitive and vital issues before the two branches.

Section 4

Section 4 requires that the President submit, within 48 hours after the introduction of U.S. forces, a written report to the Congress in three circumstances: where U.S. forces are introduced into actual or imminent hostilities; where U.S. forces are introduced into foreign territory, waters or airspace "while equipped for combat", with certain exceptions; and where such forces are introduced in numbers which "substantially enlarge" the combat-equipped U.S. forces already located in a foreign country.

Presidents have uniformly provided written reports to the Congress with respect to U.S. deployments abroad, as a means of keeping the Congress informed, while reserving the Executive branch's position on the applicability and constitutionality of the Resolution. Indeed, the Executive branch has provided information to the Congress in many cases where no relevant statute applies.

The Executive branch's administration of this Section has satisfied any special need for information that Congress may have in this area. Section 4 does not require the President to state the particular subsection under which reports are made, and no President has felt compelled to do so. A definitive judgment at the outset of a deployment as to whether hostilities will result is often difficult to make. Furthermore, this practice is a useful way for the Executive to avoid unnecessary constitutional confrontations over whether Section 4(a)(1) is applicable, or whether -- even if its conditions are met -- it can properly be deemed to trigger an automatic termination under Section 5.

Section 5

Section 5 of the Resolution purports to require the President to withdraw U.S. forces from a situation of actual or imminent hostilities in two circumstances: where 60 days have elapsed without specific Congressional authorization for the continuation of their use, with some specific exceptions; and where the Congress at any time enacts a concurrent resolution requiring such withdrawal.

The 60-day provision presents serious problems under our constitutional scheme, in which the President has the constitutional authority and responsibility as Commander-in-Chief and Chief Executive Officer to deploy and use U.S. forces in a variety of circumstances, such as in the exercise of our inherent right of self-defense, including the protection of American citizens, forces and vessels from attack. The provision is particularly troublesome because it would require the withdrawal of U.S. forces by reason of the mere inaction of Congress within an arbitrary 60-day period. The Resolution itself appears to recognize that the President has independent authority to use the armed forces for certain purposes; on what basis can Congress seek to terminate such independent authority by the mere passage of time?

In addition to this general, constitutional objection, this provision has several harmful effects:

o The imposition of arbitrary and inflexible deadlines interferes with the effective and successful completion of the initiative undertaken by the President.

- Such limits may signal a divided nation, giving our adversaries a basis for hoping that the President may be forced to desist, or at least feel pressured to do so. As Senator Tower recently testified: "The important thing is that we be perceived as being able to act with dispatch, and that the policy that we employ will not be picked to pieces through Congressional debates or nitpicking Congressional action."
- Such limits could increase the risk to U.S. forces in the field, who could be forced to withdraw under fire.
- Debates over the time deadline provide an undesirable occasion for interbranch or partisan rivalry, potentially misleading our adversaries into assuming an absence of national resolve, thus escalating the military and political risks.
- The automatic nature of the deadline, if obeyed, would result in the termination of Executive protection of the national interest without any Congressional action taking full responsibility for that termination.
- The deadline also reduces the effectiveness of potential role of Congress by placing unnecessary pressure on Congress to act where the President has not sought specific legislative approval to continue an action beyond the designated time limits.

- The nation has successfully defended its interests by following a pattern of government in which Congress withholds final judgment on Executive actions until their outcome becomes more clear. Once again, as Senator Tower said: "Congress is not structured to maintain the day-to-day business of the conduct of diplomacy. Congress is not structured to devise and maintain a long-term, comprehensive, reliable foreign policy."

The concurrent-resolution aspect of Section 5 is clearly unconstitutional under Chadha v. INS. In that case, the Supreme Court held that Congress may not regulate matters beyond its own internal affairs other than through legislation, subject to the veto. To the extent Congress can impose restrictions relating to military action, it can only do so by legislation subject to a Presidential veto. Because the War Powers Resolution's concurrent resolution procedure violates this principle, it is unconstitutional and should be repealed. Moreover, Section 5(c) contemplates Congressional action that may intrude on the President's authority as Commander-in-Chief and Chief Executive Officer.

Sections 5(b) and (c) should be stricken, as proposed by the Byrd-Nunn-Warner bill. This course would be consistent with the Constitution and with U.S. national interests.

Section 6

Section 6 of the Resolution contains procedures for the expedited consideration of joint resolutions introduced pursuant to Section 5(b). Since we favor repeal of Section 5(b), we likewise favor repeal of this provision.

The Byrd-Nunn-Warner bill contains a somewhat different set of expedited procedures from those set forth in the War Powers Resolution and are designed to serve somewhat different purposes. Under that bill, expedited procedures would apply in either of two situations to any joint resolution approved by a majority of the permanent consultative group authorizing the President to continue a particular deployment of U.S. forces or prohibits him from doing so. The two situations are where the President has reported to Congress under Section 4(a)(1), or where a majority of the 18-member permanent consultative group finds that he should have done so.

The Byrd-Nunn-Warner bill would add two other provisions that would create undesirable consequences as a result of the adoption of a joint resolution opposing or disapproving Executive action. One provision would automatically prohibit the use of funds for any activity which would have the purpose or effect of violating any provision of such a joint resolution; the other would give standing in U.S. District Court to any Member of Congress to seek declaratory and injunctive relief on the ground that any provision of such a joint resolution had been violated. We oppose both of these proposals for both constitutional and policy reasons.

Congress has broad power to control the expenditure of funds. Congress, however, may not use its funding power to restrict or usurp the independent constitutional authority of another branch. For example, Congress could not require the Supreme Court to decide a case in a particular way as a condition on the use of funds by the judiciary. By the same token, Congress could not lawfully deny funds for the armed forces to compel the President to cease exercising functions that are lawfully his as Commander-in-Chief, such as the defense of U.S. vessels from attack on the high seas in a particular region. Congress would also exceed its authority by ordering the President to conduct a particular type of military operation in a specific manner; the power to control spending cannot properly be used to interfere with the President's discretion over the conduct of military operations.

We believe the proposal to permit suit by any Member of Congress would be inconsistent with current case law, and a grave setback for the system of separation of powers established by the Framers. The federal courts have prudently decided that they will not exercise jurisdiction over suits based on the War Powers Resolution. The courts have held that such suits raise non-justiciable political questions which should be resolved by the political branches. Congress has no institutional interest in having the courts pass on such questions. As the courts have concluded, judicial supervision is inherently unsuited to monitoring military actions outside the United States, or resolving political controversy over the propriety of such actions. Congress, as we have seen, has ample power concerning the President's use of military forces. It should not resort to the courts to perform its proper function.

Particularly troublesome is the concept that any single Member of Congress would have the right to sue. This provision is objectionable both from a legal and a policy perspective. As a legal matter, we believe the Congressional standing provision purports unconstitutionally to expand the jurisdiction of the federal courts to litigation not presenting an Article III case or controversy. We believe that membership in Congress, without more, is insufficient to confer standing under Article III. The amendment purports to grant standing to members of Congress merely for the purpose of enforcing a generalized grievance about governmental conduct; but this is insufficient to confer standing on a member of Congress, just as it is for a member of the general public.

This provision fares no better when viewed from a policy perspective. For example, under the Byrd-Nunn-Warner proposal, Congress might enact a joint resolution authorizing continuation of the President's use of the Armed Forces, subject to certain conditions, and the Congress as a whole might be perfectly satisfied with the President's compliance with the resolution; and yet, one or more dissatisfied Members of Congress would be authorized to bring the matter into the courts with the objective of obstructing or disrupting the President in his direction of U.S. Armed Forces in a situation of actual or potential hostilities.

The Constitution intended that such situations be resolved by the Congress and the Executive branch in the exercise of their respective constitutional powers, ideally in a spirit of cooperation and concern for the national interest. Whether or not Congress as a whole would act in a partisan manner in such situations, the risks of partisan motivation are great indeed when a single Member is authorized to sue.

Section 8(a)

Section 8(a) of the Resolution purports to instruct future Congresses on the manner in which they may choose to authorize the introduction of U.S. Armed Forces into actual or imminent hostilities. Specifically, it states that no law passed - or treaty ratified - can ever authorize such action unless it contains an explicit statutory statement that it is intended to constitute specific authorization within the meaning of the Resolution.

This provision appears to be a response to the fact that the Tonkin Gulf Resolution, contemporaneous appropriation legislation, and the SEATO Treaty were construed by courts in the 1970's to authorize conduct of the Vietnam war. In our view, Section 8(a) ineffectively attempts to restrict the rights of future Congresses to authorize deployments in any way they choose.

If a Congress chooses to adopt a statutory provision which authorizes the President to act, but fails to mention the Resolution, that authorization is nonetheless valid and effective, whatever the Congress may have said to the contrary in 1973. Indeed, the passage of such a law would properly be regarded as the equivalent of an amendment of the War Powers Resolution, since subsequent statutes are controlling over earlier ones that contain inconsistent provisions. In short, if Congress supports an Executive initiative to the extent Congress supported the President in Vietnam, the initiative would, we believe, be upheld in court as lawful. We therefore favor repeal of Section 8(a), to remove any misunderstanding as to its constitutional effect.

Conclusion. This review of the key provisions of the War Powers Resolution makes clear that the Administration has constitutional and policy objections to various provisions of the Resolution in its current form. We believe it should be repealed altogether. We particularly urge repeal of Sections 2(b), 5(b), 5(c) and 8(a). The Byrd-Nunn-Warner bill would properly delete three of these sections, but contains other provisions which the Administration could not accept.

In the last analysis, we cannot solve the problems which the Resolution seeks to remedy merely by adopting new, more detailed statutes or restating general principles. The only effective solution for these problems is for the two political branches to work together in pursuit of common national interests, to communicate more effectively with one another on their particular concerns and ideas, and to utilize their proper powers to influence events rather than attempting to modify a constitutional framework that has served us too well to jeopardize.

SENATE RECORD VOTE ANALYSIS

100th Congress
1st Session

Vote No. 340

October 20, 1987, 3:14 p.m.
Page S-14578 (Temp. Record)

WAR POWERS RESOLUTION/U.S. Response to Iran

SUBJECT: **War Powers Act Compliance . . . S.J. Res. 194. Helms perfecting amendment No. 1022 to Helms amendment No. 1014.**

ACTION: AMENDMENT AGREED TO, 93-2

SYNOPSIS: Pertinent votes on this legislation include Nos. 316-317 and 338-347.

The Helms amendment No. 1022, a perfecting amendment to the Helms amendment No. 1014, would authorize the U.S. Navy to sink any Iranian vessel, destroy any Iranian missile battery or neutralize any Iranian installation which threatens the safe passage of American warships or other vessels known to have U.S. citizens on board.

NOTE: Senator Helms offered this almost identical second-degree amendment to his underlying amendment No. 1014, presumably to prevent further amendments from being added. For debate on these amendments, see vote No. 341.

YEAS (93)				NAYS (2)		NOT VOTING (5)	
Republicans (44 or 98%)		**Democrats** (49 or 98%)		**Republicans** (1 or 2%)	**Democrats** (1 or 2%)	**Republicans** (1)	**Democrats** (4)
Armstrong	Lugar	Adams	Hollings	Hatfield	Matsunaga	Evans—3	Gore—2
Bond	McCain	Baucus	Inouye				Sanford—2
Boschwitz	McClure	Bentsen	Johnston				Simon—2
Chafee	McConnell	Biden	Kennedy				Stennis—2
Cochran	Murkowski	Bingaman	Kerry				
Cohen	Nickles	Boren	Lautenberg				
D'Amato	Packwood	Bradley	Leahy				
Danforth	Pressler	Breaux	Levin				
Dole	Quayle	Bumpers	Melcher				
Domenici	Roth	Burdick	Metzenbaum				
Durenberger	Rudman	Byrd	Mikulski				
Garn	Simpson	Chiles	Mitchell				
Gramm	Specter	Conrad	Moynihan				
Grassley	Stafford	Cranston	Nunn				
Hatch	Stevens	Daschle	Pell				
Hecht	Symms	DeConcini	Proxmire				
Heinz	Thurmond	Dixon	Pryor				
Helms	Trible	Dodd	Reid				
Humphrey	Wallop	Exon	Riegle				
Karnes	Warner	Ford	Rockefeller				
Kassebaum	Weicker	Fowler	Sarbanes				
Kasten	Wilson	Glenn	Sasser				
		Graham	Shelby				
		Harkin	Wirth				
		Heflin					

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Senate Republican Policy Committee
William L. Armstrong, *Chairman*

SENATE RECORD VOTE ANALYSIS

100th Congress
1st Session

Vote No. 342

October 20, 1987, 6:02 p.m.
Page S–14587 (Temp. Record)

WAR POWERS RESOLUTION/Support of Presidential Actions

SUBJECT: **War Powers Act Compliance . . . S.J. Res. 194. Boren amendment No. 1070 to Byrd-Warner amendment No. 951.**

ACTION: AMENDMENT AGREED TO, 92-1

SYNOPSIS: Pertinent votes on this legislation include Nos. 316-317 and 338-347.

In response to an Iranian attack on a U.S.-flagged ship in Kuwaiti waters, the President authorized retaliatory actions against Iran on October 19. The Boren et al. amendment would express the sense of the Senate endorsing the President's actions in this incident and conveying our resolve that the Iranian government cannot take military action against the United States with impunity.

Those favoring the amendment contended:

The Senate must send a clear signal to the Iranian government that this country stands united behind the President's actions. Such an expression would indicate that the United States will not hesitate to use similar actions in the future if the situation warrants it. This amendment should help to discourage further Iranian hostilities against the United States.

No arguments were expressed in opposition to the amendment.

YEAS (92)

Republicans
(43 or 98%)

Armstrong
Bond
Boschwitz
Chafee
Cochran
Cohen
D'Amato
Dole
Domenici
Durenberger
Garn
Gramm
Grassley
Hatch
Hecht
Heinz
Helms
Humphrey
Karnes
Kassebaum
Kasten
Lugar
McCain
McClure
McConnell
Murkowski
Nickles
Packwood
Pressler
Quayle
Roth
Rudman
Simpson
Specter
Stafford
Stevens
Symms
Thurmond
Trible
Wallop
Warner
Weicker
Wilson

Democrats
(49 or 100%)

Adams
Baucus
Bentsen
Biden
Bingaman
Boren
Bradley
Breaux
Bumpers
Burdick
Byrd
Chiles
Conrad
Cranston
Daschle
DeConcini
Dodd
Exon
Ford
Fowler
Glenn
Graham
Harkin
Heflin
Hollings
Inouye
Johnston
Kennedy
Kerry
Lautenberg
Leahy
Levin
Matsunaga
Melcher
Metzenbaum
Mikulski
Mitchell
Moynihan
Nunn
Pell
Proxmire
Pryor
Reid
Riegle
Rockefeller
Sarbanes
Sasser
Shelby
Wirth

NAYS (1)

Republicans
(1 or 2%)

Hatfield

Democrats
(0 or 0%)

NOT VOTING (7)

Republicans (2)

Danforth—[2]
Evans—[2]

Democrats (5)

Dixon—[2AY]
Gore—[2]
Sanford—[2]
Simon—[2]
Stennis—[2]

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Senate Republican Policy Committee
William L. Armstrong, *Chairman*

SENATE RECORD VOTE ANALYSIS

100th Congress
1st Session

Vote No. 343

October 21, 1987, 9:34 a.m.
Page S–14632 (Temp. Record)

WAR POWERS RESOLUTION/President's Constitutional Powers

SUBJECT: **War Powers Act Compliance . . . S.J. Res. 194. Dole et al. amendment No. 1017 to the Byrd-Warner amendment No. 952.**

ACTION: AMENDMENT AGREED TO, 94-0

SYNOPSIS: Pertinent votes on this legislation include Nos. 316-317 and 338-347.

The Dole et al. amendment would state that nothing in S.J. Res. 194 should be construed as limiting the President's constitutional powers as Commander-in-Chief to use American military forces in self-defense operations. Also, nothing in the resolution should be interpreted as urging the withdrawal of American military forces from the Persian Gulf.

Those favoring the amendment contended:

This amendment is intended to limit the amount of damage that will be done by invoking the War Powers Resolution or passing similar legislation. Whether or not we admit it, the resolution will at least inadvertently hurt American credibility and American interests in the Persian Gulf region. We are treading on very delicate and dangerous ground, and some Members have offered potentially very detrimental legislation. This amendment would have a positive influence by reaffirming that we do not wish to limit the President's constitutional powers or urge him to withdraw U.S. forces from the Gulf.

No arguments were expressed in opposition to the amendment.

YEAS (94)

Republicans
(45 or 100%)

Armstrong
Bond
Boschwitz
Chafee
Cochran
Cohen
D'Amato
Dole
Domenici
Durenberger
Evans
Garn
Gramm
Grassley
Hatch
Hatfield
Hecht
Heinz
Helms
Humphrey
Karnes
Kassebaum
Kasten
Lugar
McCain
McClure
McConnell
Murkowski
Nickles
Packwood
Pressler
Quayle
Roth
Rudman
Simpson
Specter
Stafford
Stevens
Symms
Thurmond
Trible
Wallop
Warner
Weicker
Wilson

Democrats
(49 or 100%)

Adams
Baucus
Bentsen
Bingaman
Boren
Bradley
Breaux
Bumpers
Burdick
Byrd
Chiles
Conrad
Cranston
Daschle
DeConcini
Dodd
Exon
Ford
Fowler
Glenn
Graham
Harkin
Heflin
Hollings
Inouye
Johnston
Kennedy
Kerry
Lautenberg
Leahy
Levin
Matsunaga
Melcher
Metzenbaum
Mikulski
Mitchell
Moynihan
Nunn
Pell
Proxmire
Pryor
Reid
Riegle
Rockefeller
Sanford
Sarbanes
Sasser
Shelby
Wirth

NAYS (0)

Republicans
(0 or 0%)

Democrats
(0 or 0%)

NOT VOTING (6)

Republicans (1)

Danforth—^{2}

Democrats (5)

Biden—^{2}
Dixon—^{2AY}
Gore—^{2}
Simon—^{2}
Stennis—^{2}

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

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AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Senate Republican Policy Committee
William L. Armstrong, *Chairman*

INTERNATIONAL LAW AND THE USE OF FORCE

Abraham D. Sofaer*

Few legal issues are of greater significance to the interests of the United States, and of people everywhere, than the rules and the practices of nations concerning the use of force. The United States is committed to the principle that our conduct in international affairs -- including the use of force -- must be subject to law. The rule of law requires individual nations to subordinate their perceived needs to accepted standards of conduct based on the practice of nations.

Lawyers play many important roles in connection with determining when and under what conditions nations may lawfully resort to the use of force. Among the most important of these roles is the function of advising government leaders -- often themselves lawyers -- on the legal principles applicable to proposed uses of force. To be effective in performing this role, lawyers must provide credible and practical guidance, based on the actual practice of nations, and consistent with legitimate political interests. Legal advisers in the United States have, since the adoption of the U.N. Charter, in general provided such advice, taking a "common-law" lawyer's approach that rests on a case-by-case application of widely accepted principles of international law to the particular facts of each situation. This approach has worked well to the extent lawyers have in fact been consulted for their advice.

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*Legal Adviser, U.S. Department of State. This article is based on an address to the American Society of International Law on April 22, 1988. The author is grateful for the able assistance of Steven Ratner and Peter Spiro.

The decision of the International Court of Justice in Nicaragua v. United States casts considerable doubt on this approach to the law relating to the use of force, particularly with regard to the right of collective self-defense. The ICJ has formulated and applied impractical and counterproductive rules, having little or no basis in accepted international practices. These rules may be intended to reduce the worldwide use of force, but in fact they reduce only the right to defend -- collectively and effectively -- against uses of force short of conventional warfare, which are in fact the most pernicious and widespread forms of aggression in the world today. Furthermore, the rules created by the ICJ for this purpose are so artificial, impractical, and counterintuitive, that they threaten accepted principles of international law, as well as the stature of the ICJ itself.

I. The Lawyer's Role in Use of Force Decisions

Lawyers play important roles in the development and application of the law relating to the use of force. In addition to the judges and advocates that handle specific cases, scholars and the bar take a deep interest in this subject. We write, lecture, and lobby to advance our points of view. Legislators, many of whom are also attorneys, express their views through laws, resolutions, in hearings, or as influential individuals. Government lawyers have special responsibilities. We are sworn to uphold the law, and that includes international law, which is the law of the land. We have the duty to alert our leaders to applicable international rules of conduct, and to argue that the proper rules be respected. In doing so, however, we must rely on our ability to convince our clients to consult us, and to accept our advice. We can issue no writs; we can only seek to persuade.

Political leaders are not always eager to talk to lawyers -- even their own lawyers -- about planned uses of force, and Legal Advisers through the years have occasionally been bypassed, or consulted inadequately, in such situations. Even when we are fully involved in the decision-making process, our advice is sometimes rejected in whole or in part.

To have any hope of influencing the political and military leadership, the lawyers in a government -- any government -- must have both a coherent and a convincing message. We must be able to explain why nations are bound by certain rules, and to demonstrate that the rules we propose as authoritative are reasonable, commonly accepted, consistent with prior practice, and fair in terms of the strategic challenges our leaders face. As Larry Hargrove recently put it: The "primary rules [governing the use of force], in order to work, must therefore be readily perceivable, by people bearing the actual responsibilities of government, to reflect the practical requirements of the world in which states must survive and conduct their affairs." The rules we advance as authoritative will fail to convince if they offend "the rough intuitions of responsible politicians" concerned with the safety of their citizens.1/

II. The United States Position

The principles which the United States believes govern the use of force are in fact straightforward, sensible, and enlightened. The U.N. Charter contemplates an end to the threat or use of force by states against the territorial integrity or political independence of other states, unless the Security Council has authorized such action.2/ This represents a bold step toward peaceful relations among states by bringing, as Lou Henkin put it, "within the realm of law those ultimate political tensions and interests that had long been deemed beyond the control of law."3/

The Charter expressly reserves in Article 51, however, the "inherent right of individual or collective self defense."4/ While that provision is written in terms of defense against "armed attack," the "inherent" right of self-defense necessarily includes the right to defend those fundamental interests customarily protected. The United States has tried repeatedly to gain approval for collective U.N. action in using force, but that option became unavailable as a practical matter after Korea. Nevertheless, the United States has always assumed that Charter principles provide a workable set of rules to deal with the array of needs that potentially require the use of force, including such threats as state-supported terrorism and insurgencies, even if they are deemed not to amount to an "armed attack." General Assembly interpretive declarations make clear that "force" means physical violence, not other forms of coercion. But they also indicate that aggression includes both direct and indirect complicity in all forms of violence, not just conventional hostilities.5/ Our position has been that the inherent right of self-defense potentially applies against any illegal use of force, and to the extent the term "armed attack" is relevant in use-of-force issues that it should be defined to include forms of aggression historically regarded as justifying resort to defensive measures. Furthermore, the U.S. has assumed that it may lawfully engage in collective self-defense in any situation in which the nation assisted is entitled to act, and to the same extent. On the other hand, we recognize that force may be used only to deter or prevent aggression, and only to the extent it is necessary and proportionate.

The actions of Presidents of the United States, and the positions taken by their lawyers, have consistently demonstrated this principled but practical approach to use-of-force rules. In requesting aid for Greece, President Truman announced the Truman Doctrine, which recognized the importance of the peaceful development of nations under the UN system, but called for the protection of free nations from "aggressive movements" seeking to impose totalitarian regimes. "This is no more than a frank recognition," he said, "that totalitarian regimes imposed upon free peoples, by direct or indirect aggression, undermines the foundations of international peace and hence the security of the United States."6/ When President Eisenhower sent U.S. forces into Lebanon in 1958 at President Chamoun's request, both the United States and Lebanon asserted a realistic definition of "armed attack." Secretary of State Dulles said: "[W]e do not think that the words 'armed attack' preclude treating as such an armed revolution which is fomented from abroad, aided and assisted from abroad."7/

In the wake of the Bay of Pigs debacle, which apparently went forward without legal screening of any kind, President Kennedy was careful to consult government lawyers during the Cuban Missile crisis. Then Legal Adviser Abe Chayes argued successfully for an approach that treated the matter as a threat warranting a quarantine, but not amounting to an armed attack.8/ Professors Wright and Henkin criticized Chayes for his reliance on the Rio Treaty, but Chayes' response reflected an approach to use-of-force decisions that aptly describes what U.S. practice has been, when the lawyers have been consulted.9/ Chayes rejected the notion that law relating to the use of force was "a set of fixed, self-defining categories of permissible and prohibited conduct."10/ He proposed instead what he called a "common-lawyer" approach in which international law is left open to a broad range of interpretation and emphasis, with terms that do not dictate conduct so much as orient deliberation, order priorities, and guide within broad limits. Using this practical and flexible common-law approach, Chayes argued the quarantine was a justified response.

This flexible but principled approach to the use of force had strong support among leading scholars of the day. Professor Stone had criticized efforts to determine a "mechanical test of aggression, insulated from the merits of the situation in which States act . . ., [a] juristic push-button device."11/ McDougal and Feliciano in fact explained the issue in terms strikingly similar to those used by Chayes:

> It is no more desirable to attempt to define aggression "once and for all" than it is so to define any other legal term or concept of international or municipal law. For observers with full awareness of the factors realistically affecting decision, the task of "defining aggression" is not appropriately conceived of one as searching for a precise, certain, and final verbal formula that would abolish the discretion of decision-makers and dictate specific decisions. It is rather, in broad outline, that of presenting to the focus of attention of the various officials who must reach a decision about the lawfulness or unlawfulness of coercion, the different variable factors and policies that, in differing contexts and under community perspectives, rationally bear upon their decisions; of indicating the interrelations of these factors and policies in context; and, perhaps, of making some lower-order generalizations about the relative weighting of pertinent factors and policies in different contexts. The task, again, is not so much to abolish, with quasi-magical arrangements of words, conflicts of national interests (more or less myopically perceived) as it is to clarify common, long-term interests in the maintenance of minimum public order.12/

When President Johnson intervened in the Dominican Republic, no attack of any kind had occurred on the U.S. or its citizens. The danger to Americans there was serious, however, and a Communist takeover was seen as a real possibility. Legal

Adviser Leonard Meeker defended the intervention as justified to protect Americans "in imminent danger of life and limb from rioting mobs," and he argued that a continued U.S. presence was necessary to prevent anarchy. He rejected criticisms based on what he called "fundamentalist views about the nature of international law," as such views were "not very useful as a means to achieving practical and just solutions of difficult political, economic, and social problems." He called for "practical idealism," in which international law could be read as consistent with efforts to prevent bloodshed and Communist takeovers. He said an "international law which cannot deal with facts such as these, and in a way that has some hope of setting a troubled nation on the path of peace and reconstruction, is not the kind of law I believe in."13/ President Johnson added explicitly the justification of intervening to prevent revolutions by "evil persons who had been trained in overthrowing governments and establishing Communist control."14/

The Viet-Nam conflict generated a great deal of legal debate about the use of force, and the Legal Adviser's Office found the U.S. intervention to assist South Vietnam legally justified under the doctrine of collective self-defense.15/ Further debate was prompted by the U.S. incursion into Cambodia. By this time, Abe Chayes had changed his point of view. While purporting still to believe that "absolute" judgments about "legality" should be avoided in international law, his analysis became highly technical and much less oriented to the specific facts. He properly criticized the Government for failing to consider the incursion's legality prior to its implementation. But his judgment on legality was controlled by what had become in his "view the essential guiding principle of world law and world order: to confine within the narrowest limits the situations in which we are prepared to condone or legitimate unilateral decisions to resort to force."16/ This guiding principle radically altered the practical approach and deliberative process Chayes considered proper as Legal Adviser, and which served the nation and world order so well at that critical time.

President Ford relied on Article 51 in ordering U.S. forces to attack Cambodian naval assets to secure release of the vessel Mayaguez and its crew. The seizure of a U.S. merchant vessel was deemed "a clear-cut illegal use of force" which UN Ambassador Scali asserted justified appropriate measures in self defense.17/ Similarly, President Carter used force in an attempt to rescue American hostages in Iran, arguing that the United States is entitled to seek to protect its citizens abroad "where the government of the territory in which they are located is unable or unwilling to protect them."18/ Carter received the support of Professor Reisman,19/ and limited uses of force to rescue citizens have strong support in customary practice and scholarship.20/ Nonetheless, the President was condemned by some international law experts, who argued that by no stretch of the imagination was the seizure of Americans as hostages an armed attack, and therefore that the U.S. was precluded from using force to secure their release.21/ President Carter later confirmed his belief in counterintervention, moreover, by warning that the United States would intervene by any means necessary, including military force, in response to "an attempt by any outside force to gain control of the Persian Gulf region."22/

The Reagan Administration has continued to adhere to the practical but principled approach to use-of-force rules which has in general characterized United States policy since the Charter's adoption. The President has repeatedly made clear, moreover, that he will continue the policy of assisting nations in preventing nondemocratic takeovers conducted by outside forces (as in Afghanistan) or fomented and aided by them.23/ The Grenada operation involved no armed attack on the U.S. but was justified as necessary to protect U.S. lives and to respond to invitations of the Governor General and of members of the Organization of the Eastern Caribbean States. Chayes suggested that this action could not be distinguished from the Soviet invasion of Afghanistan,24/ and others criticized it, including the ABA Section on International Law. Legal Adviser Davis Robinson's defense, resting on the combined effect of all the unique circumstances supporting intervention, is an exemplary illustration of the U.S. common-law tradition.25/ As Edwin Yoder commented at the time:

> All the Grenadian operation has in common with recent Soviet enforcements of the Brezhnev doctrine, so-called, is the unpleasant use of military force. If force per se is to be condemned, if the legitimacy of its use under international law has nothing to do with intent or result, then it is anarchy merely disguised as law.26/

We relied on the same approach in exercising our right of self-defense by attacking facilities in Libya used to support terrorists. Before December 1985, we had exhausted virtually every measure short of force to convince Libya to stop supporting terrorists in attacks on Americans. Then came the mindlessly cruel attacks at the Rome and Vienna airports in which seven Americans were killed, including 11-year old Natasha Simpson. Tunisian passports were found on the killers that were traced to Libyan officials, and Qadhafi praised the killers as heroes. Nevertheless, the President decided not to use force at that point, but instead to exhaust all remaining economic sanctions and to warn Libya one more time, explicitly invoking our view of the governing law. He said:

> By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if it had used its own armed forces.27/

Secretary Shultz explained our position in greater detail in January 1986, at the National Defense University:

> A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorists, or to rescue its citizens when no other means is available. The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the rights of states to use force in exercise of their right of individual or collective self-defense. The UN Charter is not a suicide pact.28/

Despite these warnings, Libya organized and supported additional attacks, including the bombing of a Berlin disco in which two Americans were killed and over 100 people injured. We reliably knew that Libya was planning several more attacks. The purpose of the limited air strike was to convince Libya to halt this support for terrorist operations.

Most recently, we have used force in defensive actions in the Persian Gulf. Iran repeatedly engaged in placing mines in sea lanes with the intention of attacking U.S. public and flag vessels. We warned Iran that we regarded such mining as an armed attack that justified the necessary and proportionate use of force in self defense. They persisted, openly asserting that they would make us suffer. For what? For exercising our right to navigate in international waters. We caught Iran laying mines and sank the vessel involved. Again Iran acted, this time firing a missile at a U.S. vessel. We destroyed a platform used for these military operations. Iran persisted in laying new mines, and one seriously damaged a Navy frigate, the U.S.S. Roberts, injuring 10 crewmen. We destroyed two platforms, and then responded to Iranian attacks by sinking vessels of Iran's navy. If we deferred to such threats, we would have no end of Khomeinis and Qadhafis ordering us to give up exercising our rights. President Carter adopted the principle that we would exercise and defend our rights in international waters, including the Persian Gulf. President Reagan is determined to uphold that bipartisan policy. The limited scope of our actions, at each point, was wholly consistent with the legal advice the President received.

III. Nicaragua v. United States

The rules and expectations on which the United States has consistently relied in making use-of-force decisions have been cast into grave doubt by the International Court of Justice in Nicaragua v. United States.29/ The background of this case is well known. El Salvador, unable to defend itself effectively against Nicaraguan-supported guerrillas, asked the U.S. to help in its defense. We assumed that Nicaragua's support of guerrillas for the purpose of destroying the Government of El Salvador was a form of aggression against El Salvador, and that necessary and proportional responses, including force, could be taken collectively against such actions. This was precisely the position taken by Secretary of State Dean Rusk, in defending the legality of our actions against North Vietnam before the American Society of International Law in 1965. He said:

> In resisting the aggression against it, the Republic of Viet-Nam is exercising its right of self-defense. It called upon us and other states for assistance. And in the exercise of the right of collective self-defense under the United Nations Charter, we and other nations are providing such assistance.
>
> The American policy of assisting South Viet-Nam to maintain its freedom was inaugurated under President Eisenhower and continued under Presidents Kennedy and Johnson. Our assistance has been increased because the aggression from the North has been augmented. Our assistance now encompasses the bombing of North Viet-Nam. The bombing is designed to interdict, as far as possible, and to inhibit, as far as may be necessary, continued aggression against the Republic of Viet-Nam.30/

Significantly, Nicaragua did not disagree with us in these legal assumptions. Rather, it claimed it was innocent of having aided the insurgents in El Salvador, and therefore that our actions in aiding the contras had no justification.

The ICJ's opinion articulated a significantly different view of international law. While refusing unequivocally to determine that Nicaragua's conduct amounted to aggression, the Court nonetheless found or assumed that Nicaragua had indeed supplied arms to the rebels in El Salvador at least through early 1981.31/ President Singh was willing to assume that Nicaragua's flow of arms to the rebels in El Salvador had "been both regular and substantial, as well as spread over a number of years and thus amounting to intervention."32/ The Court concluded, however, that a limited intervention cannot justify resort to self-defense. According to the Court, customary law only allows the use of force in self-defense against an "armed attack,"33/ and an armed attack does not include "assistance to rebels in the form of the provision of weapons or logistical or other support."34/ This ruling was without support in customary international law, or the practice of nations, which could not rationally be read to deprive a state of the right to defend itself against so serious a form of aggression. Recognizing this, the ICJ came up with the following solution: A state is not permitted to resort to "self defense" against aggression short of armed attack, but it may be able to take what the Court called "proportionate countermeasures."35/

This ruling arguably should not alone cause great concern. So long as a nation's inherent right to protect itself is recognized, whether one calls the actions "self-defense" or "countermeasures" need make no real difference. But the verbal play in which the Court engaged had a purpose, egregiously transparent. Had the Court called the defensive actions it allowed "self-defense," then Article 51 would explicitly have allowed such actions to be taken collectively as well as individually.36/ But by characterizing permissible defensive actions as "countermeasures," the Court created a tautological rationale that enabled it to deny the right of joint action. "Countermeasures," the Court found, can only be undertaken by the victim state, not by any other state, because such measures do not constitute self-defense.37/

The Court went further in narrowing the right to collective self-defense. To be entitled to exercise collective self defense, the Court suggested, the victim must openly declare that it is under armed attack at the time of the attack, and must formally request assistance from the state seeking to justify its actions.38/ The facts showed that the Government of El Salvador had repeatedly and openly complained of Nicaragua's support for the rebels in that country.39/ Furthermore, the uncontroverted Declaration of Intervention of El Salvador, filed with the Court, confirmed that its President had asked the United States to come to his country's defense.40/ But the Court nonetheless ruled that El Salvador had failed to meet these new procedural requirements, and that this failure deprived U.S. actions of their potential justification as defensive measures.

Whether actions of the United States were necessary and proportional was treated by the Court in a single paragraph.41/ American actions were pronounced unnecessary because they were undertaken "several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence." Thus, the Court said, "it was possible to eliminate the main danger to the Salvadoran Government without the United States embarking on activities in and against Nicaragua."42/

The Court's treatment of proportionality was similarly curt. Interestingly, the Court made no finding that aid to the contras failed this test; in fact, United States aid to the contras was the same sort of aid the evidence demonstrated was extended by Nicaragua to the rebels in El Salvador. Rather, the Court said it could not regard the actions relating to the mining of Nicaraguan ports, and attacks on port and oil installations, as satisfying proportionality, and that United States help to the contras continued long after any aggression by Nicaragua could reasonably have been presumed to have continued. Judge Schwebel detailed in his opinion, however, the similar measures of depredation engaged in by the insurgents in El Salvador,43/ and he explained that an action is proportional when it is needed to halt and repulse an attack, not just when it corresponds exactly to the acts sought to be defended against.44/ The mining of harbors could be expected to restrict the flow of arms from Nicaragua's suppliers, which were being passed on to the rebels in El Salvador, and the attacks on oil installations could similarly be expected to diminish Nicaragua's capacity to continue its aggression.

The decision, in short, ignored actual custom and practice, and relied on rules that were seemingly derived for the purpose of depriving the United States and El Salvador of inherent rights. Aggression, though undeniably present, was deemed irrelevant because it did not amount to an "armed attack." Defensive measures, though undeniably justified, were deemed "countermeasures" so they would not be jointly exercisable. Collective self-defense, though undeniably intended, was found imperfect for lack of unprecedented procedural requirements. Necessity and proportionality, though demonstrated by the desperate situation in which El Salvador found itself, were found lacking for reasons that might have reflected nothing more than the success of El Salvador and the United States at preventing, through the acts condemned, further and more serious aggression.

IV. Effects of the ICJ's Decision

Many international law academics and practitioners strongly believe that lethal support of the contras by the United States was inconsistent with our international obligations. I ask even those who take such a view, however, to consider whether the ICJ's conclusions are properly based, or seem likely to be effective in reducing resort to force in the world. In my view, the ICJ's rulings concerning the use of force create artificial distinctions and mechanical rules that are fundamentally inconsistent with the principled but flexible approach followed by the United States since the Charter's adoption.

The Court's restrictive approach in defining "armed attack" could deprive states of the right of self defense against the most common and dangerous forms of aggression in the world today. Our political leaders and military strategists cannot reasonably be expected to and will not accept the notion that self-defense applies only to armed attacks across borders in the formal sense, when the principal vehicles for competition against the democratic West through violence are state-supported terrorism and insurgencies. That the Court might allow "countermeasures" even where self-defense is inapplicable may well demonstrate that the ICJ has not completely lost its grip on reality. But the distinction is artificial and creates undesirable uncertainty in an area of grave importance. Lawyers are unlikely to impress their political and military clients by assuring them that, although they may not be able to regard essential national security activities as "self-defense," they may nonetheless be allowed to engage in such activities as "necessary countermeasures."

The puzzlement that such an assurance is likely to cause will turn to disbelief as these clients learn the new rules of collective self-defense. While an ally may assist the victim state within the victim's territory, we lawyers must now explain, the ally may not according to the ICJ act against the aggressor state in the latter's territory. Furthermore, before acting to assist an ally in collective self-defense the ICJ would have the lawyer insist that his clients obtain from the victim state a public declaration that it is under attack, and a public invitation for the ally's assistance. At this point the client's eyes would assume that glazed expression associated with polite disregard.

But the lawyer would have even more to say. The Court also expressed artificial and unrealistic standards in applying the accepted principles of necessity and proportionality. Rather than asking what in fact appears militarily necessary to deter the illegal conduct involved, the ally is supposed to do only that which seems sufficient to make it possible that the victim state's independence will be preserved. Furthermore, acts which are not strictly similar to those of the aggressor state will run a high risk of being condemned as disproportionate, even though they might be reasonably related to the threat involved. These are not the sort of standards that are likely to convince, and at this point the lawyer is likely to have lost his case, or even worse to have lost his influence. Government lawyers don't get fired for failing to convince. But they get ignored, thereby losing their capacity to help ensure that traditional and accepted use-of-force standards are maintained.

The Court's proposed rules, therefore, though undoubtedly well motivated, could reduce the effectiveness of traditional and accepted standards of law. This is not because political leaders are slow witted, or averse to technical analysis, but rather because they would see through the Court's rules as efforts to change the law rather than as guidance on the application of accepted rules of conduct.

Once the issue becomes the desirability of one set of rules over another, rather than their legitimacy, political leaders will feel free to challenge the Court's premise that intervention and force would be minimized by its approach. They could reasonably conclude, in fact, that the Court's rules are more likely to encourage conflict, intervention, and the unlawful use of force than are the rules and practices which reflect accepted norms of conduct. To construe restrictively the meaning of "armed attack," for example, would do wonders for the world if as a result unconventional forms of aggression became less frequent or more benign in their consequences. The Court's ruling could have no such effect; rather, it can only limit -- and is designed to limit -- the use of force in *responding* to such forms of aggression. To the extent it succeeds in this objective states which now sponsor terrorism and insurgencies will feel less real pressure to stop.

The Court's limits on collective self-defense are likely to have the same adverse effects. Refusing to allow an ally to join in "countermeasures" in the territory of an aggressor would not reduce the tendency of aggressors to sponsor internal subversion; rather such a rule would only diminish the capacity of relatively weak states to defend against aggression by relatively strong states. Where the victim state is not strong enough to use "proportional countermeasures" against the aggressor on the latter's territory, conflict would be limited to the territory of the victim state. If anything, the interests of peace would seem most clearly served by rules having a measured, deterrent effect on such aggression. Similarly, one is at a loss to understand what interest is served by the formalistic requirements that a state declare it is under attack and openly invite assistance from its ally. Apparently the Court seeks to promote the goal of limiting the number of actors in a conflict. Once a state is forced to declare itself as under armed attack, however, and openly to invite an ally's assistance, the chances for diplomatic resolution may be reduced.

The problem of controlling conflict in this contentious world is not so easily dealt with as the Court, and some international lawyers, assume. Political and military strategists intensely dispute which sets of rules and forms of conduct are most likely to preserve peace. The use of force is a central element in these calculations, and respected thinkers have cautioned against a world in which force can only be used in conventional war. Henry Kissinger has suggested, for example, that "in the missile age, the side which can add another increment of power without resorting to all-out war -- or which can threaten to do so -- will gain a perhaps decisive advantage over an opponent who does not have this ability."45/

Ronald Reagan and George Shultz have made a similar point: "diplomacy not backed by strength is ineffectual."46/ We must adapt power to political circumstances to compete effectively with opponents who treat force as a continuation of politics by other means. Once it is established that state-sponsored terrorism and insurgencies can achieve their political objectives, their practitioners will get bolder, and the threat to our interests greater. The Court's severe and artificial limitations on the right of self-defense would serve to encourage aggression by diminishing the capacity lawfully to deter.

The concepts of "armed attack" and "self-defense" are limitations which world leaders have accepted, and they provide a sufficient basis if reasonably construed to satisfy legitimate national security planning. But the right to self-defense is too fundamental for leaders to allow it to be subordinated to any scheme of world order based on theory and wishful thinking, however enlightened. Self-defense is not a production of lawyers to be modified as we please, but a concept lawyers have used to describe the situations and manner in which civilized nations have traditionally used force. It is a reflection of the fact that, despite the UN Charter, we still live in a world in which states are controlled by leaders who claim to get their marching orders directly from God; whose tolerance for pointless destruction is so monumental it can be explained only in pathological terms; or who are outright criminals -- murderers, drug dealers, thiefs. In dealing with the actions of such states, our leaders will continue to insist upon use-of-force rules that offer them, in clear and comprehensible terms, a sufficient degree of latitude to plan and act effectively to deter aggressors who would physically harm Americans or America's allies.

The most predictable result of the decision in Nicaragua v. United States will be a diminution in respect for the ICJ's pronouncements, and in its future potential as an instrument of reason in the cause of peace. At one point in his opinion, President Singh explained that the Court could not allow itself "to miss a major opportunity to state the law so as to serve the best interests of the community."47/ Yet, the ICJ's place in history will depend, not upon its seizing opportunities to issue rulings attempting to narrow the inherent right of self-defense, but rather upon its development of a jurisprudence that retains the flexibility of the Charter's design, and leaves to statesmen the task of achieving the Charter's goals within the bounds of principles based on the actual practice of nations.

The case against the ICJ's involvement in Nicaragua v. United States was cogently expressed by Abe Chayes in his earlier days. He wrote:

> I suggest that most great disputes between states, even when they involve important legal elements, are not justiciable - and for much the same reason that most disputes between organs of our government not involving invasions of private right are not justiciable. Courts do not exist to answer legal questions just for the sake of having an answer. They are specialized institutions. Acceptance of their judgments depends on a subtle complex of factors. Institutional characteristics limit the range in which they can effectively exercise authority. If judges go beyond those limits, the result is likely to be not vindication of the law, but erosion of judicial authority.48/

Chayes likes to say that he has "already made a meal of those words in the Hague,"49/ where he successfully persuaded the ICJ to risk the erosion of judicial authority he had predicted. Presumably, Chayes at some point also decided to eat his words about the common lawyer approach to use-of-force decisions. But the reasons he gave for the ICJ to decline jurisdiction remain valid. They go beyond separation of powers objections, and in the final analysis relate to the kind of international law the ICJ seems inclined to produce when it becomes involved in such issues, a law that this nation's leaders -- of both parties and in both branches -- will refuse to accept as the final word on protecting essential national security interests.

Perhaps the most dramatic evidence of this point was Congress' action after the Court had issued its judgment on the merits. While some legislators criticized the U.S. on the basis of the ICJ's ruling, Congress provided $75 million in lethal aid for the contras. The reaction of the international bar -- consisting on the whole of lawyers devoted to the rule of law -- is also instructive. It has produced a range of commentary that is as divergent as it is impassioned.50/ The decision has been hailed as "a positive model of judicial style," whose "quality of legal reasoning is admirable";51/ and it has been denounced as "a tragedy for world order."52/ The Judgment has been said both to misunderstand, and to uphold, international law. It has been characterized as both "authoritative",53/ "extremely persuasive,54/ and "a misfortune of some magnitude" in its impact on the vitality of the law of the United Nations Charter governing force and self-defense.55/ Policy makers are particularly unlikely to defer to rules which are not only inconsistent with prior behavior, but also evoke such intense differences among persons expert in the field.

V. Conclusion

The United States properly refused to participate in the merits stage of the Nicaragua case, because the President decided this nation could not allow its right to exercise self-defense to be regulated by the ICJ without its consent. This nation remains committed to the rule of law, however, and to the appropriate use of the ICJ. Our continuing support for the Court is demonstrated by our willingness to take to chambers within it a maritime boundary dispute with Canada. We also continue to have over 60 treaties vesting the Court with jurisdiction over disputes; we are presently before a chamber of the Court in a commercial dispute with Italy arising under one such treaty. We welcome the idea, moreover, of attempting to work out agreed areas of jurisdiction for the Court, to which all permanent members of the Security Council would adhere. We are, in short, despite our rejection of the Court's jurisdiction in the Nicaragua case, determined to work to preserve the Court's role in the areas we believe it functions with authority and effectiveness.

Meanwhile, with respect to the use of force, the United States will continue to follow a principled but flexible approach: one that requires policymakers to grapple with and be guided by the traditional limitations on the use of force, while recognizing the legitimacy of protecting, effectively, not only American territory, but American citizens, interests, and allies. Lawyers must play an active role in the decision-making process, not by attempting to force policy to particular results through the assertion of artificial rules, but by insisting on the thorough evaluation of and respect for limitations, based on accepted community practice.

ENDNOTES

1. John Lawrence Hargrove, "The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defense," The American Journal of International Law, vol. 81 (1987), p 137.

2. Article 2(4) of the Charter obligates all members "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." Articles 39, 41, and 42 provide for collective action under Security Council auspices in response to unlawful uses of force.

3. Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), p. 131.

4. U.N. Charter, Article 51.

5. See, e.g., Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N.G.A. Res. 2625 (1970).

6. "Special Message to the Congress on Greece and Turkey: The Truman Doctrine, March 12, 1947," Public Papers of the Presidents of the United States: Harry S. Truman 1947 (Washington: U.S. Government Printing Office, 1963), p. 178 (emphasis added).

7. Department of State Bulletin, vol. 34, no.. 995 (July 21, 1958), p. 105.

8. See generally Abram Chayes, *The Cuban Missile Crisis: International Crises and the Rule of Law* (New York: Oxford University Press, 1974).

9. Quincy Wright, "The Cuban Quarantine," The American Jounral of International Law, vol. 57 (1963), p. 546; Louis Henkin, Comment, *in* Chayes, *The Cuban Missile Crisis*, pp. 149-54.

10. Chayes, *The Cuban Missile Crisis* 101.

11. Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Los Angeles: University of California Press, 1958), pp. 10-11.

12. Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), pp. 151-53.

13. Leonard Meeker, "The Dominican Situation in the Perspective of International Law," Department of State Bulletin, vol. 53, no. 1359 (July 12, 1965), p. 60.

14. Department of State Bulletin, vol. 52, no. 1352 (May 24, 1965). p. 822.]15. Department of State, Office of the Legal Adviser, "The Legality of United States Participation in the Defense of Viet Nam," Yale Law Journal, vol. 75 (1966), p. 1085.

16. Hammarskjold Forum, "Expansion of the Viet Nam War into Cambodia -- The Legal Issues," New York University Law Review, vol. 45 (1970), p. 664 (comments of A. Chayes).

17. Eleanor C. McDowell, ed., Digest of United States Practice in International Law 1975 (Washington: U.S. Department of State, 1976), p. 780.

18. Jimmy Carter, "Rescue Attempt for American Hostages in Iran," Public Papers of the Presidents of the United States: Jimmy Carter 1980-81, vol. I (Washington: U.S. Government Printing Office, 1981) p. 779 (1980-81) (letter to Congress, April 26, 1980).

19. Michael Reisman, "Humanitarian Intervention," The Nation, May 24, 1980, at 612.

20. The use of force for rescue, and perhaps for other purposes is widely approved. As noted in the official comment to Section 703 of the Restatement of the Foreign Relations Law of the United States, "It is increasingly accepted that a state may take steps to rescue victims or potential victims in an action strictly limited to that purpose and not likely to involve disproportional destruction of life or property in the state where the rescue takes place." American Law Institute, Restatement of the Law: The Foreign Relations Law of the United States, vol. 2, p. 177 (Minneapolis: ALI Publishers, 1987). The U.S. and others strongly defended Israel's use of force in rescuing its citizens at Entebbe in 1976. See, e.g., William Scranton, "U.S. Gives Views in Security Council Debate on Israeli Rescue of Hijacking Victims at Entebbe Airport," Department of State Bulletin, vol. 75, no. 1936 (Aug. 2, 1976) pp. 181-84.

21. See Joseph H. Crown & John H.E. Fried, "A Legal Disaster," The Nation, May 24, 1980, at 613; Benjamin B. Ferencz, "Rescue Mission Violated the U.N. Charter," N.Y. Times, May 5, 1980 (letter to the editor).

22. The State of the Union, Weekly Compilation of Presidential Documents, vol. 16 (Jan. 23, 1980), p. 197.

23. President Reagan said, for example, that the U.S. would prevent another Iran in Saudi Arabia, and he hailed the U.S. action in Grenada as a first step in the repeal of the Brezhnev Doctrine. Professor Reisman has pointed out that:

> Rhetorical idiosyncracies aside, it could have been Kennedy or Johnson: Ronald Reagan could claim no innovation here. U.S. actions in [the Caribbean and Central America] are consistent with the United States' conception of its interests and its behavior for decades. If one sought a specific declaration by a U.S. president that expressed Ronald Reagan's conception of present U.S. regional objectives and rights, it could certainly be Kennedy's manifesto of April 1961.

W. Michael Reisman, "Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice," Yale Journal of International Law, vol. 13 (1988), p. 180.

24. Abram Chayes, "Grenada Was Illegally Invaded," N.Y. Times, Nov. 15, 1983.

25. See Letter from State Department Legal Adviser Davis R. Robinson to Prof. Edward Gordon, reprinted in "Contemporary Practice of the United States," The American Journal of International Law, vol. 78 (1984), p. 661.

26. Edwin M. Yoder, Jr., "The Legality of It All," Washington Post, Oct. 28, 1983.

27. Dep't State Bull., March 1986, at 36 (presidential news conference of Jan. 7, 1986).

28. George Shultz, Address before the National Defense University, Washington, Jan. 15, 1986 (U.S. Dep't of State Current Policy No. 783).

29. Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14 (Judgment on the Merits of June 27) (hereinafter Nicaragua v. U.S.).

30. Dean Rusk, "The Control of Force in International Relations," Department of State Bulletin, vol. 52, no. 1350 (May 10, 1965), p. 698.

31. Nicaragua v. U.S. at 76, 77, 100, 109-10, 118, 122.

32. Id. at 144 (Singh, President, concurring).

33. Id. at 93-94, 100-101. In these few sentences, the Court resolved a forty-year-old debate about the meaning of Article 51 with absolutely no analysis. The majority view, backed by such scholars as Myres McDougal, Philip Jessup, Julius Stone, D.K. Bowett, Sir Humphrey Waldock, and James Brierly, has examined the travaux preparatoires of the United Nations Charter. They concluded that Article 51 was inserted to ensure that regional self-defense organizations, such as the then-recently concluded Inter-American alliance created by the Act of Chapultepec, would not be paralyzed by a requirement that all collective responses to force be taken by the Security Council. The Article was meant to reaffirm, not constrain, the right of individual and collective self-defense under customary international law.

The minority school, led by Professor Ian Brownlie of Cambridge University, insists that Article 51 was inserted in order to create only the smallest exception to the ban on the use of force in Article 2, paragraph 4. That exception was to apply to self-defensive measures taken in response to an armed attack and to such an attack alone. The Court squarely adopts the minority view.

34. Nicaragua v. U.S. at 94.

35. Id. at 106, 110, 127.

36. State practice and publicists support the view that a victim state's allies may assert the right of self-defense in those circumstances in which the victim state asserts it, presuming the consent of the victim state. Mutual defense agreements enshrining this principle include among others the Rio, North Atlantic, and Warsaw treaties.

37. Nicaragua v. U.S. at 127. For a review of the literature and state practice showing that both the victim state and its allies may use force in the territory of the aggressor even in the case of so-called "indirect aggression," see id. at 369-73 (Schwebel, J., dissenting).

38. Nicaragua v. U.S. at 104, 105, 122.

39. See id. at 465-75 (Schwebel, J., dissenting) (chronological compilation of press statements).

40. See Declaration of Intervention of the Republic of El Salvador (Military and Paramilitary Activities in and Against Nicaragua) 2, 6 (Declaration dated Aug. 15, 1984).

41. Nicaragua v. U.S. at 122-23.

42. Id. at 122.

43. Id. at 411-509 (Schwebel, J., dissenting).

44. Id. at 367-369 (Schwebel, J., dissenting).

45. Henry Kissinger, American Foreign Policy ___ (3d ed. 1977).

46. George Shultz, "Power and Diplomacy in the 1980s," in Realism, Strength, Negotiation: Key Foreign Policy Statements of the Reagan Administration (Washington: U.S. Department of State, 1984) p. 8.

47. Nicaragua v. U.S. at 153 (Singh, President, concurring).

48. Abram Chayes, "A Common Lawyer Looks at International Law," Harvard Law Review, vol. 78 (1965), p. 1409.

49. Abram Chayes, "Nicaragua, The United States, and the World Court," Columbia Law Review, vol. 85 (1985), p. 1475.

50. The international legal community is indebted to The American Journal of International Law for soliciting and publishing the views of 16 leading international law scholars on the ICJ's decision. See Harold G. Maier, ed., "Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)," The American Journal of International Law, vol. 81 (1987), p. 77.

51. Richard Falk, "The World Court's Achievement," The American Journal of International Law, vol. 81 (1987), p. 106 (1987).

52. John Norton Moore, "The Nicaragua Case and the Deterioration of World Order," The American Journal of International Law, vol. 81 (1987), p. 152.

53. Herbert W. Briggs, "The International Court of Justice Lives Up to Its Name," The American Journal of International Law, vol. 81 (1987), p. 85.

54. Tom J. Farer, "Drawing the Right Line," The American Journal of International Law, vol. 81 (1987), p. 113.

55. John Lawrence Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-Defense," The American Journal of International Law, vol. 81 (1987), p. 135. At least one commentator has decried the Court for not going far enough in its denunciation of United States activities in Central America. See Francis A. Boyle, "Determining U.S. Responsibility for Contra Operations Under International Law," The American Journal of International Law, vol. 81 (1987), p. 86 (arguing that U.S. should have been held responsible for contra violations of laws of war).

PREPARED STATEMENT OF MORTON H. HALPERIN

Mr. Chairman,

We very much appreciate this opportunity to testify on behalf of the American Civil Liberties Union on the War Powers Resolution. The ACLU is a non-partisan organization of over 250,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Constitution and the Bill of Rights.

Congress passed the existing War Powers Resolution in order to ensure its constitutional role in any decision to use military force. Unfortunately, the Resolution has failed that objective both in its letter and in practice. As written, the War Powers Resolution gives the President virtually unlimited discretion to initiate the use of military force. In practice, neither the President nor Congress has been willing to invoke it in any situation that would trigger the 60/90 day time limit. Thus, the War Powers Resolution has failed to achieve its intended purpose.

To remedy this situation, we propose that the Congress establish a regime of prior notice, consultation, and approval for all uses of military force. Furthermore, we believe that the same procedures required for the use of overt military force should also be applied to covert uses of force, i.e., covert paramilitary action. This regime would require the President to consult with (through a special consultative body of the type proposed by the Byrd, Nunn, Warner, Mitchell bill) and seek the approval of Congress on all decisions to use force now covered by the War Powers Resolution (except for those specific situations involving the President's inherent power to act in emergency situations) and the Intelligence Oversight Act. In addition, it would require the President to consult on any military-type action that does not clearly fall into either the overt (war powers) or covert (intelligence oversight) categories in order to determine exactly which procedures should apply for securing Congressional approval.

Presidents assert that they turn away from Congress in matters of war because of constitutional prerogative or national security imperative. But the underlying reason for this phenomenon has a more telling label: power politics. Simply put, presidents refuse to include Congress in the process because they do not want Congress involved, because Congress will ask too many questions and might actually oppose the operation. Robert McFarlane said it pointedly when he testified at the Iran-Contra hearings: the President and his advisors "turned to covert action [in Nicaragua] because they thought they could not get Congressional support for overt activities." Rarely is it the case that Congressional participation would jeopardize the success of the operation or undermine the effectiveness of our foreign policy.

On the contrary, we assert that Congressional participation enhances, and is essential--constitutionally as well as practically--to a successful American foreign policy. The benefits of public consensus on military activity far outweigh the conceivable loss of some opportunities because of the requirement of public debate and congressional approval. Not only does our democratic system demand, as a matter of constitutional law, that the government make all major policy decisions--especially decisions concerning war--publicly and through the legislative process, but it is also the case that no major military policy will succeed without public and Congressional approval.

Former Secretary of Defense Casper Weinberger accepted this latter tenet when he articulated predicate standards requiring clear Congressional and public support before the engagement of any U.S. troops. His standards should apply equally to covert paramilitary operations as it does to overt war. But these standards should be secured in a legal framework that ensures some form of Congressional participation in every kind of military involvement.

Thus, it is essential that Congress develop a comprehensive system to cover all situations involving the use of force. Any gaps in the system will inevitably be exploited by some future administration looking for a way to engage U.S. forces without the consent of Congress. Not only does the existence of such loopholes lead to violations of the law, it also encourages the administration to employ ever more extreme methods in order to avoid legal compliance. The Iran-Contra affair is but the latest example of this problem, where the administration used the NSC, and then the "Enterprise," as a means of avoiding the proscriptions of the Boland Amendments.

In addressing this issue, it is worth considering briefly the constitutional and historical record of the war power. The Constitution, while often vague and imprecise, unambiguously confronted the question of which branch should have control of the war power: "The Congress shall have power . . . to declare war." Of course, the precise meaning of that power has been under dispute ever since the Constitution was ratified. We think the meaning is clear: the President may not introduce the United States into a military situation without the consent of Congress. This applies whether the war is declared or undeclared,[1] whether it is gradual or immediate, whether the commitment is with money or blood. Just as the conduct of war is too important to be left to the generals, the decision to go to war is too important to be left to the President.

The foreign affairs power struggle has raged for two centuries and come no closer to resolution than when it began. The general structure of the foreign affairs power was laid out in the Constitution; it has subsequently been refined through legislation, executive order, and institutional practice, as well as through the attestations of the founding fathers, the Federalist Papers, and the exchanges of Madison and Hamilton (and their alter egos Pacificus and Helvidius).

The documentary evidence -- the Constitution itself and the records of the constitutional conventioneers -- favors Congress's view that the President is limited to executing the foreign policies made by Congress, except for repelling attacks upon U.S. territory and for negotiating treaties and appointing ambassadors (the latter two of which still require Senate approval). The historical evidence favors the President as the dominant, if not sometimes exclusive, authority over foreign policy, due both to the practical necessity of having a single representative for the country in the world community and, until recent times, to Congress's general deferral to the President, save when he commits a blatant blunder. But even 200 years of historical precedent and political convenience cannot override the Constitution.

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[1] Congress's power in the Constitution to "grant letters of marque and reprisal" is the historical and legal equivalent of the present day practice of low-intensity conflict. It is military action short of war, like a paramilitary action. The Framers were not unaware of the phenomenon of undeclared war.

Thus do the words of Justice Jackson in the 1952 Steel Seizure case ring equally true today to this constitutional logjam: "partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question." While no clear resolution will likely ever emerge, just one look at the Constitution is enough to inform us that the foreign affairs power was divided between, and is to be shared by, the executive and legislative branches.

A shared foreign affairs power does not of its own inhibit the conduct of our foreign relations; it merely requires that all such conduct be properly authorized -- i.e., approved by Congress. Many "foreign policy" conflicts between the President and Congress have much less to do with the substance of the policy being pursued than with the procedure through which it was carried out. The War Powers Resolution is the case in point. Congress's attempts to invoke the War Powers Resolution whenever the President engages U.S. troops in hostile situations has caused more divisiveness between the two branches than the actual troop engagement. For example, even after the U.S. ships came under attack in the Persian Gulf, Congress generally agreed that the President should continue to help protect the shipping lanes from attacks by Iraq and Iran. A major conflict arose, however, when the President failed to report the incident in accordance with the War Powers Resolution. Such compliance would have given Congress its due role in formulating our Persian Gulf policy. (See the attached articles by Allan Adler from First Principles. Attachments 1 and 2)

Congress enacted the War Powers Resolution in 1973 over President Nixon's veto in order to reassert its exclusive constitutional responsibility of declaring war. Many castigate the Resolution as a knee jerk reaction to the experience of the Vietnam war, where Congress found itself unable to check the President's incremental escalation of involvement in that conflict. Vietnam certainly sparked the Resolution's genesis. But its substance grew from a much deeper source. Its drafters sought to rearticulate for the 20th century the originally intended relationship between Congress and the President in matters of war. They wanted to bring Congress back into the decision making process, while preserving the President's inherent powers to act in self-defense, in true national emergencies, and in protection of American citizens. As Senator Hathaway, one of the co-sponsors of the original Senate bill, stated:

> [T]he war powers bill is not a tipping of the balance in favor of Congress; it is a reestablishing of the balance outlined in the Constitution, but it is a reestablishing of that balance in keeping with the necessities and requirements of the modern world. It is a bill to make clear to a future Executive that he is authorized by Congress to act in a situation of real emergency, but if he should try to move from that emergency situation into a nightmarish situation of war without the consent of Congress, not only will he have to abuse the Constitution; he will have to violate the mandate of law.[2]

Ironically, as finally put into law, the War Powers Resolution ended up relinquishing as much of Congress's war power as it sought to reclaim. The Resolution is most remarkable for the amount of flexibility it gives the President. In effect, the War Powers Resolution is a permanent, advance 90 day declaration of war. It lets the President unilaterally engage in war, or in any military activity short of war, any where in the world for any reason at any time, for up to 90 days (60 days, plus an additional 30 days to withdraw the troops). It requires only that he consult with Congress prior to making such a move, *whenever possible*, and that he report to Congress the reasons and the legal authority for doing so, and the duration and scope of the involvement. Finally, of course, it requires that the

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[2] *Cong. Rec.* S13875 (July 18, 1973); *see also* attached article by Gary M. Stern, "Who's in Control? The Constitutional Struggle Over War Powers," in *First Principles*, Vol 12, No. 5. Attachment 3.

President withdraw the troops within 90 days if Congress has not passed a bill extending the authorization.

The claim that the 60/90 day withdrawal requirement is an unconstitutional legislative veto is wholly unfounded. The War Powers Resolution does include a legislative veto. Section 5(c) would require the President to remove the U.S. forces at any time "the Congress so directs by concurrent resolution." That is an unconstitutional legislative veto, and there is very little dispute over that.

But the 60/90 day requirement is a completely different matter; it is simply an affirmative, statutory authorization capped with a kind of sunset provision. Congress does it all the time. In the same way that Congress can authorize the President to perform any given action for a specified period of time, subject to Congress's reauthorization when the time runs out, the War Powers Resolution authorizes the President to engage in war for a specified period of time (90 days), likewise subject to Congress's reauthorization.

Ninety days is plenty of time for the President to persuade Congress of the merits of his actions and for Congress to consider his policy and vote for or against it. Critics of the War Powers Resolution claim that it actually foments hostilities because it encourages the adversary not to settle the dispute on the hopes that the troops will have to be withdrawn within 90 days. But the troops will be withdrawn only if a majority of Congress votes against the authorizing bill. (The Resolution itself provides expedited (fast-track) procedures to ensure that Congress will vote on the bill within 60 days after the President files his report.)

If a majority of Congress cannot come to agreement with the President to continue his use of military forces in "hostilities," then perhaps the troops simply should not be there. As the Congressional Report accompanying the Resolution stated: "Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the alleged [sic] attack or imminent threat of attack."

Moreover, the adversary does not need the War Powers Resolution to play a wait-and-see game. Any unilateral action by the President will invite a challenge from Congress as soon as it becomes known. Congress can support or oppose the President's action on its merits in any event. If Congress has serious objections to the operation, it is fully capable of undercutting the President through its normal legislative powers, even without the War Powers Resolution.

But it is inconceivable that the Congress would fail to support any reasonably prudent action taken by the President. Indeed, the whole point of the War Powers Resolution is to incorporate the perspective of Congress into military policy as it is being formulated. Congress, of course, need not accept the President's view at face value, especially since it is Congress's very function to formulate policy for the President to execute. As with the budget or any other policy proposal initiated by the President, Congress will certainly give due deference to the executive's desire, but it will retain the option to make modifications.

In nearly every episode implicating the War Powers Resolution, Congress has been fully prepared to sign on to the President's policy. In Lebanon, Grenada, and the Persian Gulf, Congress challenged the President only with respect to his refusal to recognize Congress's right to have at least some sort of say in the process. Members voiced very little objection to the actual substance of what he was doing in those places. Indeed, invoking the War Powers Resolution would likely have brought more support to the President's actions than he already enjoyed, albeit perhaps with some greater clarity of purpose. And it also would have provided an additional means for disengagement--at the behest of Congress--should that have ever been necessary

When the President introduces military forces into hostilities without a declaration of war or without consulting and reporting under the War Powers Resolution, he is conducting an unauthorized war. It will have been conceived and conducted in the dark recesses of the executive branch, without any Congressional authorization. And there lies the fundamental point. The President has consistently refused to abide by the War Powers Resolution precisely in order to keep Congress out of the decision making process to use military force.

That refusal stems from a penchant within the executive branch to carry out its policies impervious to outside scrutiny. Secrecy is maintained for as long as possible to avoid domestic political scrutiny, criticism, or opposition. The longer the President can keep Congress and the public in the dark, the easier he can proceed with his policy and program. And even after the actual engagement of troops reveals the program, most Presidents would still prefer to proceed unimpeded indefinitely: hence the continued refusal to accept the Resolution, even though the Resolution already gives the President uninhibited discretion for up to 90 days, as well as unlimited authority to act in situations of self-defense.

Not only is Congress constitutionally entitled to an equal role in the decision making process, but sound foreign policy necessitates that the President not take any military action without Congress's participation. Congress can give the President a much needed "second opinion" before he proceeds with a risky operation. The decision to go to war requires the greatest reflection, deliberation, and contemplation from all perspectives. When surrounded only by handpicked advisors, the President is too easily insulated from views not consistent with his own. The potential for making mistakes or abusing power increases when the number of alternative views narrows.

The legislature, and the people of this country, have a right, if not an obligation, to be skeptical when the President takes it upon himself to commit the United States to war or any other military action. While he may ultimately have good cause to do so, recent history--the Vietnam war and the Iran-Contra affair alone--invites us to exercise significant caution before supporting such a commitment. If the President cleared his action with Congress before carrying it out, he could avoid the rancorous and disruptive reaction that could otherwise ensue. By overcoming internal division in advance, the President can more effectively focus attention on the military objective at hand.

Advance Congressional approval also legitimizes the policy to the outside world once an operation has actually begun. Policy makers have always striven for a bipartisan foreign policy. It allows us to present to allies and adversaries alike a unified front fully committed to achieving its goals. And it would further undermine any attempts by the adversary to try to defeat the President through the Congress.

Finally, advance approval will help to prevent the political backlash from Congress that invariably follows upon a foreign policy failure. Indeed Congress's investigation into the Iran-Contra affair focussed extensively on the President's failure to keep Congress informed about the Iran operations, as was required under the intelligence oversight procedures in effect. (The President's violation of the funding restrictions on the Nicaragua operation was a wholly separate problem.) Had the appropriate members of Congress been so informed, they would have had far less to complain about once the ensuing operation was exposed. While Congress may still have voiced strong objection to the intent and effect of the Iran operation, the President would have at least satisfied all of the existing legal requirements. Of course, we believe that the existing legal requirements are deficient because they allow the President to proceed with a military operation even in the face of Congressional opposition.

When the Senate passed its version of the War Powers Resolution in 1973, it intended the law to prevent the President from using force without Congressional approval except in certain, defined emergency situations. The Senate bill at that time articulated the only three exceptions where unilateral Presidential action was to be permissible: to repel attack upon U.S. territory, to repel attacks against U.S. armed forces located outside U.S. territory, and to rescue U.S. citizens.

The Senate saw these three exceptions as the limit of presidential discretion in the unilateral use of armed force. They were seen, in essence, as the broadest interpretation of the Framers' original intent to preserve for the President the inherent power to repel sudden attacks upon United States territory. (As James Madison noted, Congress's power was changed from "make war" to "declare war" simply to leave "to the Executive the power to repel sudden attacks.") In all other situations where there was no declaration of war and no specific statutory approval, the President would be precluded from committing U.S. troops without congressional approval.

We believe that this original Senate language is the best vehicle for instituting a prior approval requirement on all uses of overt military force. It puts the war power back where it belongs, in the Congress, but it leaves the President the necessary leeway to take immediate action in defense of the United States and its citizens. These same requirements should also apply to the use of covert paramilitary action: advance Congressional approval, except to repel attack and rescue hostages. Indeed, all military action--whether overt or covert, direct or indirect--should be treated on the same terms.

And even in those situations where the President does not need advance approval from Congress, the President should consult with a special leadership committee of Congress in advance both to give notice of whatever kind of operation he is contemplating and to get feedback about it. Consult means, in the words of Senator Byrd, "the exploration of a consensus prior to a decision to commit U.S. forces in a situation." The President should also consult this committee about any ambiguous operation that could conceivably fall through the crack between war powers and covert action, in order to determine to which category it belongs. Under no circumstances, except when time is of the essence, should the President carry out an action without at least consulting the leadership committee in advance.3/

3/ We note that this was the standard intended under the Intelligence Oversight Act of 1980, and it is the standard as written in the pending Intelligence Oversight Act of 1988. The new law will require prior notice of all covert operations. The 48 hour exception will apply only when time is of the essence and

The bill introduced in May 1988 by Senators Byrd, Nunn, Warner, and Mitchell contains an effective mechanism in setting up a "permanent consultative body" (a leadership committee) of six persons--the majority and minority leaders of both Houses, the Speaker of the House and the President pro tempore of the Senate--whom the President must always consult prior to using force. (We note however that we oppose the effort of that bill to repeal the automatic termination requirement without Congressional approval.) To this structure, we would add simply that the President must also consult with the consultative body about any contemplated covert paramilitary action or support and any other mission (hostage rescue, ally assistance program, etc.) that does not clearly fall into one category or another. We would then require that the whole Congress approve the measure, unless it is one of the specific exceptions established in the original Senate War Powers Resolution.

The requirement that covert paramilitary operations, as instruments of war, should not be initiated or supported without public debate and Congressional approval on the substantive objectives of the proposed policy would not prevent the President from conducting military operations whose operational details need to be kept secret. But it would ensure a democratic basis for the policy objective of the operation. The quantity and

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for no other reason. It will not apply for even the most super-sensitive-risky-daring operation where there is more than 48 hours to act. For those sensitive operations, the only option available to the President is to report to the "Gang of Eight" rather than the full Intelligence Committees.

quality of the assistance, as well as the names of third countries who do not want their identities revealed can remain secret, or, at least, not be officially confirmed. The same standards that currently apply to all other national security secrets--a balance between the government's legitimate interest in secrecy and the public's right to know, with a presumption in favor of disclosure--should apply here.

The three most recent paramilitary operations, at least in their latter stages, comport with this approach. The United States conducted major paramilitary operations to overthrow or repulse sitting governments in Afghanistan, Angola, and Nicaragua. Although there were initial attempts to keep each operation covert, in whole or in part, they were quickly revealed in the media and by the foreign operatives themselves. All three then continued unhindered from an operational perspective, although they did experience public and Congressional opposition. Those local governments who wished to assist us without officially revealing their involvement were not constrained to do so, even though their involvement was well known. In all, no operational purpose was served in pursuing any of these operations "covertly."

While the operations in Afghanistan, Nicaragua and Angola are useful models for instituting a prohibition on covert paramilitary operations, they are also indicative of the problems endemic to the existing system of conducting covert operations. Both the Contra and Afghan operations were initiated as covert operations, and received public approval only afterwards. Congress gave its assent only with the momentum of the operations already in full swing. The Administration presented Congress with a fait accompli, and left Congress with the ominous burden of bearing the blame for whatever "failure" might ensue should it stop the operation.

As is also the case when U.S. forces are overtly committed abroad, it is very difficult for Congress to pull the plug once U.S. commitments and resources are on the line. The proposed prohibition, like the War Powers Resolution before it, is designed to give Congress its opportunity to act before the operation begins and before the political pressure mounts. Indeed, the present and proposed intelligence oversight statutes require prior notification of all covert operations, except in the most extreme circumstances, for precisely the same reason.

Congress has the constitutional authority and the statutory means to prohibit the use or support of covert paramilitary operations for conducting major foreign policy initiatives. What it lacks is the political will. The present sentiment on Capitol Hill continues to favor retaining the covert option. So concluded the Iran-Contra Report. Even the strongest advocates of tighter Congressional oversight have not been willing to go the next step in support of a procedural ban on paramilitary operations. That reluctance stems in part from the fear of giving up a policy tool that has come to be seen as a middle ground between military intervention and diplomacy. But as David Aaron, former Deputy

Assistant National Security Adviser to President Carter, stated, "one of the tragedies about covert action is that it is often an excuse for doing something without really doing it. It is something that a policy maker does because he does not have anything else [to] do. . . ."

This practice, reinvigorated by the Reagan Administration, violates the Church Committee conclusion that covert operations should only be used in extreme situations. We assert that once covert paramilitary operations are removed from common practice and relegated to last-resort status, requiring that they be publicly approved will not seem so drastic. Moreover, public authorization will not necessarily eliminate the "middle option" from our foreign policy retinue; it will simply place it in the public sphere where all major policy decisions of a democratic society belong.4/

We feel that these hearings are critical in developing a constitutional framework for deciding when our nation goes to war. We appreciate this opportunity to testify and welcome any questions you may have.

4/ For further elaboration on this issue, see the attached article by Gary M. Stern, "Covert Paramilitary Operations: Without Congressional Approval, They Should not be Attempted," in First Principles, Vol. 13, No. 1. Attachment 4.

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War Powers and Lebanon: Doesn't Congress Remember?

by Allan Adler

The present "war powers" debate over U.S. military operations in the Persian Gulf (see "In the Congress") bears a striking resemblance to that which occurred over the deployment of U.S. military forces in Lebanon in 1983. Congress would be wise to review its "resolution" of that interbranch conflict before considering whether it will once again accommodate the White House by compromising its own obligations under the law.

In August 1982, President Reagan dispatched 1,200 U.S. Marines to Lebanon as part of a multinational peacekeeping force to oversee the evacuation of PLO guerrillas from that strife-torn country. Although he formally notified Congress of this action, Reagan stated that he did so only "in accordance with [his] desire that the Congress be fully informed on this matter, and consistent with"—not "pursuant to"—the War Powers Resolution.

Like his predecessors, Reagan wanted Congress to note that his compliance with the War Powers Resolution was strictly voluntary. The implication that Reagan considered submission of the report more of a courtesy than an obligation was clear in his statement that the troops were deployed "pursuant to the President's constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces."

Most disturbing to many Congressional observers, however, was Reagan's failure to signify under Section 4(a)(1) of the War Powers Resolution that the Marines had been introduced into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances."

More than a month earlier, when President Reagan first publicly mentioned that U.S. troops might be sent to Lebanon, the chairman of the House Foreign Affairs Committee had warned that "any common sense assessment of the situation in Lebanon" would conclude there was a serious risk of involvement in hostilities and that any other characterization of the situation "could only be interpreted as an attempt to avoid capriciously" the requirement that Congress authorize the extended presence of U.S. troops in a war zone. A similar message was sent to the President by the chairman and ranking minority member of the Senate Foreign Relations Committee in August. Still, the President demurred, insisting that the U.S. agreement with the Lebanese government "expressly rules out any combat responsibilities for the U.S. forces" and "all armed elements in the area have given assurances that they will take no action to interfere with the implementation of the departure plan or the activities of the multinational force."

This pattern was repeated late in September 1982 when the President reported to Congress on his decision to base the Marines in Beirut in response to the Lebanese Government's request following the assassination of the Lebanese president and the massacre of hundreds of Palestinian civilians. Once again, Reagan skirted the issue of whether the deployment was being made under provisions of the War Powers Resolution which would require him to seek congressional approval to maintain the presence of the troops for more than 60 days. Reagan reiterated his assurance that "there is no intention or expectation that U.S. Armed Forces will become involved in hostilities."

Although the President's report indicated that the troops "will be needed only for a limited period to meet the urgent requirements posed by the current situation," the likelihood of rapid withdrawal disappeared on November 29 when Lebanon officially requested that the United States double the number of troops participating in the Multinational Force that would remain in Lebanon until all foreign forces, including Israeli and Syrian combatants, quit the country. The date was significant because, on the previous day, the Lebanon deployment had become the first case in the nine-year history of the War Powers Resolution in which U.S. forces equipped for combat had been introduced into a potentially hostile environment and maintained there for more than 60 days.

The present "war powers" debate over U.S. military operations in the Persian Gulf bears a striking resemblance to that which occurred over the deployment of U.S. military forces in Lebanon in 1983.

On December 15, two weeks after a senior State Department official had appeared before the Senate Foreign Relations Committee to discuss the deployment, thirteen members of the Committee wrote to President Reagan that "[i]ndividual members of Congress, including members of our Committee, have disagreed with your assessment of the risks inherent in the Beirut operation and, therefore with your interpretation of the War Powers Resolution in this case." Noting that "no member has chosen to contest the issue through Congressional action at this time," the senators went on to state their expectation "that formal Congressional authorization would be sought before undertaking long-term or expanded commitments or extending indefinitely the present level of operations." "In the longer term," they concluded, "it may be appropriate to consider more general legislation to clarify the respective roles of the President and the Congress in undertaking the commitment of U.S. armed forces to such operations."

Ironically, on the day that Lebanon made its provocative request for a larger, extended U.S. military commitment, the *New York Times* had published a letter from former Senator Jacob Javits which took issue with the need for such clarifying legislation. Javits, one of the authors of the War Powers Resolution, argued that it already contained the authority Congress needed to resolve the ambiguity created by the President's

(continued on page 12)

War Powers and Lebanon: Doesn't Congress Remember, *continued from page 11*

failure to report under one of its specific provisions. Referring to a section of the Resolution that required the termination of deployment unless it is authorized by Congress within sixty days "after a report is submitted or is required to be submitted" under section 4(a)(1), Javits construed the phrase "required to be submitted" as authority "enabling the Congress . . . to start the 60-day clock running as effectively as if the President had filed a section 4(a)(1) report."

Senator Charles Percy, then chairman of the Senate Foreign Relations Committee, alluded to Javits' interpretation when he placed the Committee's letter to President Reagan into the *Congressional Record* of December 18. He concluded, however, that Javits' prescription was not yet appropriate because "the President's original hope of avoiding involvement in hostilities has so far been realized."

The situation changed in January and February of 1983 when a series of close encounters between U.S. Marines and Israeli forces generated further disgruntlement in Congress. Members continued to hold back specific legislative proposals to avoid potential disruption of negotiations for an agreement on the withdrawal of Israeli troops. But, when more than 50 people died in a terrorist bombing at the U.S. Embassy in Beirut in April, heightened pressure for legislative action required a more tangible response than mere complaint.

The vehicle for Congressional action was a bill authorizing more than $250 million in military and economic aid to Lebanon for fiscal year 1983. Following similar actions in April by both the House Foreign Affairs Committee and the Senate Foreign Relations Committee, Congress passed the Lebanon Emergency Assistance Act in June with a provision stating that the President "shall obtain statutory authorization from the Congress with respect to any substantial expansion in the number or role in Lebanon of United States Armed Forces, including any introduction of United States Armed Forces into Lebanon in conjunction with agreements providing for the withdrawal of all foreign troops from Lebanon and for the creation of a new multinational peacekeeping force in Lebanon."

> *Congress would be wise to review its "resolution" of [the Lebanon compromise] before considering whether it will once again accommodate the White House by compromising its own obligations under the law.*

Congress thus made clear its determination to have a say in any prospective "substantial expansion" of the number or role of the U.S. forces in Lebanon, but it had failed to confront the President on the applicability of the War Powers Resolution to the existing situation. Instead, it sought only to maintain the ambivalent *status quo* by providing that "[n]othing in this section is intended to modify, limit, or suspend any of the standards and procedures prescribed by the War Powers Resolution of 1973."

It was not until August 29, when two Marines were killed and fourteen others were wounded by artillery fire from Druse Moslem forces, that the year-long "war powers" debate reached its turning point.

In notifying Congress of the casualties, President Reagan conceded only that the Marines were encountering "sporadic fighting." Based on the assertion that the artillery fire was directed at Lebanese Christian forces, rather than the Marines, he steadfastly refused to acknowledge that U.S. personnel risked the "imminent involvement in hostilities" which would have triggered a specific timeframe for their withdrawal under the War Powers Resolution.

The situation did not make congressional leaders any less wary of the political risks involved in calling for withdrawal after their repeated statements of general support for the President's Lebanon policy. However, it did make them more determined to force the president to invoke the War Powers Resolution. Their aim was to do it by agreement, in order both to avoid the procedural risks and mechanical consequences of a direct confrontation and to achieve a consensus between the two branches on the purpose and duration of the Marines' presence in Lebanon.

Negotiations proceeded amidst events that continued to raise the stakes for both branches. In early September, some 2,000 Marines were assigned to a U.S. naval squadron stationed off the Lebanese coast. Although this action was generally perceived as anticipating an increase of U.S. forces based in Lebanon, the President maintained that these troops were not part of the peacekeeping deployment and did not require statutory authorization under the Lebanon Emergency Assistance Act. Then, after two more Marines were killed by rocket fire, U.S. warships began a bombardment of Druse Moslem artillery positions and the President authorized Marine commanders to call in defensive air strikes on their own initiative from the warships offshore.

The inability of Congress and the White House to place this escalation within a mutually acceptable framework for consultation and decision-making was further complicated by disagreements between the House and Senate, which, in turn, were aggravated by disagreements between House and Senate Democrats. Each camp, however, recognized that its own weaknesses would eventually require a compromise.

While the President remained adamant in his refusal to invoke the War Powers Resolution and indicate the anticipated duration of the deployment, Administration officials realized that the White House could not afford to jeopardize the general willingness that Congress had thus far shown to back the President's policy in Lebanon notwithstanding the "war powers" debate. And, despite their determination to make the President accept Congress as a partner in shaping that policy, Congressional leaders found themselves fragmented in proposing the substance and procedure by which the Administration would be forced to do so.

The legislators, who wanted a decision on duration but lacked a consensus on a reasonable timeframe, understood that the prospect of a veto battle made it virtually impossible to invoke the War Powers Resolution through legislation. They also understood, however, that both present and future political considerations made it absolutely impossible for them to concede impotence on the matters which had led Congress to enact the War Powers Resolution in the first place.

In terms of the latter consideration, the eventual compromise in late September between Congress and the President—embodied in the Multinational Force in Lebanon Resolution (Public Law 98-119)—can hardly be considered a display of strength, let alone a victory, for Congress.

The gist of the compromise resolution was relatively straightforward: While stating that continued U.S. participation in the peacekeeping force was necessary to achieve "an essential United States foreign policy objective in the Middle East," Congress retroactively declared the War Powers Resolution to be "operative" as of August 29, 1983, and, pursuant to its requirements, provided specific statutory authorization for U.S. forces to remain in Lebanon for another eighteen months.

But many members of Congress believed that the eighteen-month authorization was a serious mistake, giving the President a "blank check" tantamount to another Tonkin Gulf Resolution. And an even more vexing question for many members of the Constitution as President and as Commander-in-Chief of the Congress was whether the compromise actually vindicated the War Powers Resolution, in light of the negotiators' admission that the President would only agree to sign the Lebanon resolution with the understanding that he would continue to reject any obligation under the War Powers Resolution itself.

House leaders passionately defended the compromise as affirming the viability of the War Powers Resolution and denied that any of its provisions could justify the kind of escalation of U.S. military involvement in Lebanon that occurred in Vietnam following passage of the Tonkin Gulf Resolution. Two days before final passage of the legislation in both the House and Senate, Speaker O'Neill buttressed these arguments with a letter from President Reagan providing specific reassurances of his "intention" to abide by the Lebanon Emergency Assistance Act if substantial expansion of the number or role of U.S. forces is required, and to "work together with the Congress with a view toward taking action on mutually acceptable terms" if deployment beyond the eighteen-month period became necessary.

Upon signing the Lebanon Resolution, President Reagan left no doubt that he viewed this "war powers" compromise as having no ameliorating effect on the basic "differences" between Congress and the Chief Executive over "institutional prerogatives."

The White House text of his remarks is more a diatribe against the War Powers Resolution than an endorsement of the Lebanon compromise. Warning of the "inherent risk and imprudence of setting any precise formula" for making determinations under the reporting requirement of section (4)(a)(1), the President argued once again that "the initiation of isolated or infrequent acts of violence against United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities."

Questioning the "wisdom and constitutionality" of the timetable for withdrawal under section 5(b), the President stated that "the imposition of such arbitrary and inflexible deadlines creates unwise limitations on presidential authority to deploy United States Forces in the interests of United States national security."

Finally, President Reagan made clear that his signing of the resolution did not "cede any of the authority vested in me under United States Armed Forces," nor could it be "viewed as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that . . . the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces."

The Senate's timid action in merely requiring President Reagan to report to Congress on his policy of providing U.S. naval escorts for reflagged Kuwaiti tankers cannot even rise to the pretense of an effort to vindicate the War Powers Resolution.

If the President's statements clouded the issue of what Congress had gained by virtue of its compromise, subsequent events quickly provided evidence that it had gained trouble and little else.

On October 23, 1983, just eleven days after President Reagan had made Congress an official partner in the Lebanon deployment, a terrorist vehicle carrying tons of explosives decimated the Marine barracks at the Beirut airport, killing more than 240 Marines. The fragile consensus on deployment quickly became another casualty of the blast.

Two days later, President Reagan put the "war powers" debate back to square one when he launched a surprise military invasion of the Caribbean island of Grenada. Stunned legislators could only sputter a mixture of support and consternation, wondering whether the Lebanon Resolution had "compromised" their objections to yet another military venture by the Commander-in-Chief.

Today, with U.S. military forces already involved in "hostilities" in the Persian Gulf, one can only marvel at the Senate's irresolution after repeated disavowals by President Reagan and yet another extended "war powers" debate. This time, its timid action in merely requiring President Reagan to report to Congress on his policy of providing U.S. naval escorts for reflagged Kuwaiti tankers cannot even rise to the pretense of an effort to vindicate the War Powers Resolution. And the history of the Lebanon Resolution eliminates all but lack of will and loss of memory as justifications for the Senate's decision to sidestep once again the responsibilities of Congress under the 1973 law. ■

WAR POWERS

2

Senator Adams' Gambit Paves the Way For Vote on Tanker-Escort in the Persian Gulf

by Allan Adler

When S.J.Res. 217 was called up before the Senate on December 4 last year, it seemed that the sponsor of the measure, Senator Brock Adams (D-Wash.), had pulled off an extraordinary feat of parliamentary legerdemain. After months of evasion through procedural wrangling and extended debate, the Senate suddenly appeared to be confronted with an unavoidable "war powers" vote on authorizing the U.S. tanker-escort operation in the Persian Gulf. How had this come to pass?

The answer lies in provisions of the War Powers Resolution, the statute enacted over a presidential veto in 1973 to help Congress exercise its constitutional responsibility for determining whether U.S. Armed Forces will engage in war. Relying on these provisions as they had been interpreted during the 1983 debate over authorizing the continued deployment of U.S. Armed Forces in strife-torn Lebanon, Senator Adams sought to trigger a procedure which would force the Senate to vote on applying the War Powers Resolution to the Persian Gulf escort operation. Though the stratagem did not succeed, it may have laid the groundwork for future success if events warrant another such effort in connection with U.S. forces in the Persian Gulf or elsewhere.

The "Hostilities" Issue

The basic premise of the War Powers Resolution is that the President is required to submit a report to Congress within 48 hours after U.S. Armed Forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." [Section 4(a)(1)] Congress then has sixty days "after a report is submitted or is required to be submitted" to declare war or specifically authorize the continued use of such forces; if Congress does not act, the President must terminate their deployment. [Section 5(b)] See *First Principles*, November/December 1987 for the text of the statute and more detailed analysis.

As a general rule, Congress may have assumed that it could depend upon the President's cooperation and candor in reporting whether U.S. Armed Forces have been deployed in the face of "hostilities." But what if the President refuses or otherwise fails to make such a report, despite facts that would clearly seem to require one?

This contingency is addressed by the requirement that authorization or withdrawal of deployed forces must occur within sixty days "after a report is submitted *or is required to be submitted*" by the President (emphasis added). According to the late Senator Jacob Javits (R-N.Y.), one of the authors of the War Powers Resolution, the phrase "required to be submitted" was intended for those situations where the President has not submitted a report and Congress must resolve an ambiguity or dispute regarding the conditions of deployment. In such cases, Javits explained, section 5(b) "enabl[es] the Congress . . . to start the sixty-day clock running as effectively as if the President had filed a section 4(a)(1) report."

The Lebanon Precedent

In the debate over Lebanon, as in the debate over the Persian Gulf, Congress was confronted with President Reagan's repeated refusal to acknowledge that the U.S. forces at issue were confronting "hostilities" or "imminent involvement in hostilities." Despite bipartisan entreaties from the Senate Foreign Relations Committee in September and December of 1982, the President denied that the U.S. troops were at risk and that the War Powers Resolution had any application to their deployment in the volatile Beirut area.

This impasse continued until August 29, 1983 when U.S. Marine positions came under mortar, rocket and small arms fire, resulting in a toll of 4 Marines killed and 24 more injured. In notifying Congress of the casualties, President Reagan conceded only that the Marines were encountering "sporadic fighting." This proved too much for then-Senator Charles Mathias (R-Md.), a senior member of the Foreign Relations Committee and an original sponsor of the War Powers Resolution.

On September 12, 1983, Senator Mathias introduced a joint resolution for the purpose of triggering the War Powers Resolution and authorizing a continuation of the Lebanon deployment for six months. The resolution provided that the sixty-day period for authorization or withdrawal had begun on August 31—48 hours after the triggering "hostilities" occurred and immediately upon expiration of the time period for submission of the President's report.

The basic thrust of the Mathias measure was supported by then-Senator Charles Percy (R-Ill.), chairman of the Foreign Relations Committee, who had anticipated it in a December 1982 floor speech confirming that "the war powers resolution provides an expedited procedure for the consideration of such a resolution and any Member of Congress can institute this process."

The "priority procedures" set forth in section 6 of the War Powers Resolution were designed to ensure that Congress can take necessary action under section 5(b) within the requisite sixty-day period. It provides that a joint resolution, having been introduced at least thirty days before the expiration of the sixty-day period triggered by the "hostilities" reporting requirement, would be referred to the

Foreign Relations Committee for action no later than twenty-four days before expiration of the sixty-day period. If the committee acts on the bill, or fails to take timely action and is discharged of further obligation, it would become the pending business of the Senate and be voted on within three days. If passed, the resolution would go to the House Foreign Affairs Committee for House action under a similarly expedited time-frame designed to facilitate final action by the Congress prior to the expiration of the sixty-day period.

For the Lebanon debate, which was then bogged down with inter- and intra-branch haggling over policy and tactics, the significance of triggering the sixty-day time-frame of the War Powers Resolution quickly became apparent. Three days after Senator Mathias had introduced his resolution, Senate Democrats introduced their own legislation to trigger the sixty-day period under the War Powers Act without providing any specific authorization for extended deployment. Faced with the prospect that the mechanically-driven statutory procedures could force an imminent vote under the War Powers Resolution, the Reagan Administration began negotiating with legislators in earnest, and devised a compromise resolution which President Reagan signed into law on October 12, 1983. Though the President and Congress continued to publicly disagree about whether the War Powers Resolution imposed any obligations on the President with respect to U.S. forces in Lebanon, the practical effect of the compromise resolution was to achieve the basic objective of the joint resolution introduced by Senator Mathias—congressional invocation of the War Powers Resolution and enactment of specific authorization for the Lebanon deployment within the statutory 60-day period.

Congress was confronted with President Reagan's refusal to acknowledge that U.S. forces were confronting "hostilities" in Beirut.

Senator Adams and the Persian Gulf

The lesson in this bit of recent history must have struck home with Senator Adams after he and Senator Lowell Weicker (R-Conn.) had labored unsuccessfully for nearly two months last fall to invoke the War Powers Resolution in connection with U.S. military operations in the Persian Gulf. On November 10, a little more than two weeks after their efforts resulted in the Senate's anticlimactic adoption of the Byrd-Warner amendment (see *First Principles*, November/December 1987), Senator Adams sought to trigger the priority procedures of the War Powers Resolution by introducing S.J. Res. 217.

Structurally similar to the Mathias proposal of four years ago, S.J. Res. 217 stated that the sixty-day time-frame for authorization or withdrawal of U.S. forces used to escort oil tankers in the Persian Gulf had begun on October 19—the date on which U.S. forces fired upon and destroyed an armed Iranian platform in retaliation for an Iranian missile attack on a U.S.-flagged tanker four days earlier. It specifically authorized the continued use of U.S. forces in escort duties for only another six months after the expiration of the sixty-day period. Since President Reagan has never submitted a Section 4(a)(1) report in connection with the Persian Gulf operation, S.J.Res. 217 was clearly premised on the assertion that such a report was "required to be submitted" after the events of October 19. Upon introduction, it was referred to the Senate Foreign Relations Committee.

On November 30, the committee's failure to act upon S.J.Res. 217 within the requisite priority time limits of the War Powers Resolution resulted in an order which discharged the committee from further action and placed the measure on the Senate calendar for consideration before the end of the sixty-day period. Under the terms of Section 6, S.J.Res. 217 would then become the pending business for "equally-divided" debate and a vote within three days.

By agreement, on December 4, S.J.Res. 217 was called up on the Senate floor subject to an immediate point of order by Senate Majority Leader Robert Byrd (D-W.Va.). The basis for Byrd's procedural challenge was that during earlier attempts to invoke the War Powers Resolution "the Senate declined to decide that hostilities exist." Byrd claimed that "[g]ranting this resolution privileged status under the law would negate those previous actions of the Senate. Accordingly, I raise the point of order that this resolution is not entitled to the expedited procedures created by the law."

The majority leader's motives in seeking to thwart Senator Adams' plan may have been based more in Senate expediency than on any real objection to the procedure involved. Bearing responsibility for planning and moving the Senate's legislative agenda, Senator Byrd had previously acted—in devising his October compromise with Senator John Warner, (R-Va.)—to prevent the controversial Persian Gulf "war powers" debate from blocking other Senate floor business. Now, under pressure to complete work on budgetary legislation in order to adjourn before Christmas, he was not likely to allow the priority requirements of the War Powers Resolution to consume scant time and bipartisan spirit in both houses.

Even so, the point of order was substantively grounded in a procedural paradox which explains why congressional action under the War Powers Resolution is so difficult to initiate in the absence of a presidential "hostilities" report. Like the traveler who is given impossible directions, the legislator seeking to trigger the War Powers Resolution may learn that "You can't get there from here."

This is the "point" to Senator Byrd's objection. Although the "hostilities" determination is clearly a condition precedent and *sine qua non* for activating the War Powers Resolution, it is not at all clear *how* the existence of "hostilities" is determined when the President has not submitted a report as required by the statute. Although Senator Javits explained that Congress can start the sixty-day clock for authorization or withdrawal if it is determined that a "hostilities" report "is required to be submitted," neither he nor anyone else has explained who or what will determine that such a report is required. Evidently, as Senator Byrd objected, it is not satisfactory for that determination to have been made by the sponsor of legislation seeking to authorize the continued deployment of the forces at issue. Moreover, it does not appear that adoption of such a determination by the Foreign Relations Committee would be adequate, since precisely that action in June of last year was not considered conclusive. At a minimum, it would seem that the determination would have to be made by a vote of the house in which the authorizing legislation is to be introduced.

Given the importance of this determination to effectuating the purpose of the War Powers Resolution, it seems strange that Congress would provide a specific, expedited process for legislative action *pursuant to* such a determination but not provide a process to insure that a timely determination is made. Yet, as Senator Adams has discovered, the priority procedures of the War Powers Resolution cannot be used to avoid filibuster and delay in deciding the "hostilities" issue because they only come into play *after* the decision has been made. Thus, the authorization provisions of S.J.Res. 217 could not be accorded "privileged status" in the absence of a previous "hostilities" determination, and the "hostilities" determination, which had been thwarted by endless debate and procedural stalls, could not be advanced through expedited consideration as a part of S.J.Res.217.

By agreement, . . . S.J.Res. 217 was called up on the Senate floor subject to an immediate point of order by Senator Byrd.

In any event, the point of order as stated by Senator Byrd was submitted to the Senate without debate or further elaboration and, by voice vote, was considered "well taken." But this apparent, procedural roadblock had been carefully arranged between the parties beforehand. Senator Adams, though denied his "war powers" vote on this particular day, had secured in exchange the Senate's commitment to a procedure which would allow the "hostilities" issue to be addressed by the Senate at a future time during the 100th Congress, without first having to overcome filibusters and procedural motions for delay. By unanimous consent, it was ordered that, for the remainder of this Congress, "a point of order raised by any Senator against the privileged status of a measure that has been laid before the Senate and initially identified as privileged for consideration upon its introduction under the War Powers Resolution . . . shall be submitted directly to the Senate" and decided by vote after 4 hours of "equally-divided" debate.

The fate of the U.S. forces still engaged in escort duty in the Persian Gulf cannot, of course, be predicted. Yet, it is not unlikely that the Senate procedure adopted on December 4 will be employed to challenge another resolution introduced by Senator Adams sometime before the end of the 100th Congress. At such time, it will be seen whether Congress can find a way to get on with its responsibilities under the War Powers Resolution, beginning, as it must, with a determination that the requisite "hostilities" exist. ■

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Center for National Security Studies

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to

③

First Principles.

THOMAS PAINE
Dissertation on First Principles of Government, July 1795

NATIONAL SECURITY AND CIVIL LIBERTIES

Who's in Control?
The Constitutional Struggle Over War Powers

by Gary M. Stern

The commitment of United States forces in the Persian Gulf to protect the sea lanes once again raises the issue of the division of responsibility between the Congress and the President in decisions to go to war. This issue provides yet another lesson in understanding the Constitution upon its 200th anniversary. But the debate extends beyond merely understanding and incorporating the Framers' intent; it encompasses the procedures and substance for carrying out our nation's foreign policy in the modern world.

The Constitution distributes the war making powers between the legislative and the executive branches. The Congress has the power to declare war and to raise and support the armed forces; the President is the Commander-in-Chief (with the apparent inherent authority to repel sudden attacks against U.S. territory and persons). Yet there is little agreement on how this division of authority should work.

The intent of the Framers on this issue has been debated to no end, without any clear resolution. The historical record presents evidence for arguments equally persuasive on either side. As Justice Jackson commented on this very issue in his concurrence to the Steel Seizure case:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from material almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half [now two centuries] of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[1]

In what little attention they did pay to foreign affairs, the one sentiment the Framers made clear was the deep distrust of exclusive executive control of the war powers; their aversion stemmed from their experience under British colonial rule, and in particular under the British-appointed state governors. The

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Continental Congress, as well as most of the newly drafted state constitutions, provided for extensive legislative control over foreign and military affairs. The drafters of the Constitution, therefore, sought to provide a balance between the management of war once begun (clearly an executive function—legislative control over General Washington in the early parts of the Revolutionary War proved disastrous) and the initial decision to engage in war (a right reserved for the representatives of the people). The result called for shared control.[2]

The Senate Foreign Relations Committee articulated this conclusion in 1973 in its report on the War Powers Resolution:

> [T]he Committee reiterates its view that the Constitution is not at all imprecise in allocating the war powers; on the contrary, the Constitution is quite specific—as the Framers intended it to be—in giving Congress the authority to decide on going to war and in giving the President the authority, as Commander-in-Chief, to respond to an emergency and to command the armed forces once a conflict is underway. In brief, the Constitution gave Congress the authority to take the nation into war, whether by formal declaration of war or by other legislative means, and the President the authority to conduct it.[3]

What has emerged since the ratification of the Constitution is a general concession by Congress of its share of the war powers to the President. Over the next 180 years, Congress has come to yield its power to the President in virtually every military engagement of troops initiated by the President, culminating with the Vietnam War.

This state of affairs developed as much from congressional deferral to the President as from presidential "usurpation" of Congress's role. The point, however, is not who is to blame for the change of status; rather, the point is how Congress can and should reestablish its role in the war making area.

Congress Reasserts Its War Power Responsibilities

In 1969, members of Congress began to develop legislation that would clarify and standardize the war power relationship between the two branches. The result was the War Powers Resolution of 1973. The final bill, as passed into law over President Nixon's veto on November 7, 1973, was the result of a significant compromise between the two houses that conceded as much as it asserted Congress's authority and ability to restrict the President's unilateral war powers.

Congressional opposition to presidential war making heightened as the war in Vietnam continued to escalate through the late 1960s. In 1969, the Senate passed the "National Commitments Resolution," a non-binding "sense of the Senate" resolution asserting the need for *joint* legislative and executive approval (by treaty, statute, or concurrent resolution) before the engagement of any U.S. troops outside of U.S. territory.[4]

In 1970, the House overwhelmingly passed a war powers resolution that recognized the President's authority to use force without prior congressional authorization only in extraordinary and emergency situations (although it did not specify what the situations were); the resolution required that the President consult with Congress whenever feasible before sending troops into armed conflict.[5]

Hearings and debates continued in Congress over the next three years as the war in Vietnam persisted. Each house passed its own version of a war powers act in 1972, but the two houses were unable to reach a compromise during that session.[6] In 1973, with the President having withdrawn U.S. troops from Vietnam, Congress reconvened determined to assert its authority in ending all U.S. involvement in Southeast Asia—U.S. military involvement still continued in Cambodia. July 1, 1973, saw the first legislation ever passed to limit United States military activity in Southeast Asia; a bill was passed requiring the President to cease all bombing of Indochina by August 15. The House and Senate then took up battle over how to control the President during future military engagements.

Senate Bill 440

The Senate version of the War Powers Act—S. 440—was crafted by Senators Javits, Eagleton, and Stennis. Like so many legislative teams, the three brought together a mix of ideology, allegiance, and motive in drafting their bill. But they all agreed on the need for the Congress to reassert its institutional role in the war making process. In the concurring words of Senator Hathaway during the floor debate over the Senate bill:

> Mr. President, the war powers bill is not a tipping of the balance in favor of Congress; it is a reestablishing of the balance outlined in the Constitution, but it is a reestablishing of that balance in keeping with the necessities and requirements of the modern world. It is a bill to make clear to a future Executive that he is authorized by Congress to act in a situation of real emergency, but if he should try to move from that emergency situation into a nightmarish situation of war without the consent of Congress, not only will he have to abuse the Constitution; he will have to violate the mandate of law.[7]

The Senate bill was designed as an articulation of the originally intended relationship between Congress and the President while preserving the President's inherent powers. In function, the bill gave prior congressional approval for the President unilaterally to commit U.S. forces into hostilities in a limited number of emergency situations consistent with the President's inherent powers. In all other situations where there was no declaration of war and no specific statutory approval, the President was precluded from committing U.S. troops without congressional approval.

There were three operational sections to S. 440.

Section 3: Section 3 of the bill articulated three exceptions to unilateral presidential action:

> (1) to repel an attack upon the United States or its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and

> imminent threat of such an attack;
> (2) to repel an attack against the United States Armed Forces located outside of the United States and its territories and possessions, and to forestall the direct and imminent threat of such an attack;
> (3) to protect citizens of the United States while evacuating them as rapidly as possible from any country in which such citizens, there with the express or tacit consent of the government of such country, are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: *Provided*, that the President shall make every effort to terminate such a threat without using the United States Armed Forces: *And provided further*, That the President shall where possible, obtain the consent of the government of such country before using such armed forces.[8]

The Senate saw these three exceptions as the limit of presidential discretion in the unilateral use of armed force; these exceptions were seen, in essence, as the broadest interpretation of the Framers' original intent to preserve for the President the inherent power to repel sudden attacks upon United States territory. (As James Madison noted, Congress's power was changed from "make war" to "declare war" simply to leave "to the Executive the power to repel sudden attacks.")

Objections to these limitations centered on the notion that such specifications might be underinclusive; the President should not be prevented from responding to some unforeseen emergency that does not fall within any of the three exceptions. The effect of this legislation would be to tie the President's hands. Thus there should be no specific delineation of what the President can and cannot do.

In response to the accusation that the Senate bill would "do what the Founding Fathers felt they were not wise enough to do, anticipate the unlimited variations of future events when defensive measures may be needed," Senator Javits stated that:

> The implication of this charge is that total and unfettered advance authority must be given to the President to wage war at his sole and total discretion. One cannot legislate on the basis of hypothetical unknowns. Rather, one must legislate on the basis of known factors and situations and hard experience. [This bill] is based upon actual historical experience in contrast to future, unknown, unidentified hypotheses. The authors of the bill believe that this is the correct legislative approach and entails far fewer dangers to our national security.[9]

Section 5: In those situations where the President exercised his unilateral war power pursuant to the three exceptions under section 3, or where U.S. troops were introduced into hostilities for any other reason, section 5 of the Senate bill stipulated that such forces must be withdrawn, or begin to withdraw, within thirty days, unless the Congress has declared war, given specific statutory approval for their continued presence, or is physically unable to meet as the result of armed attack upon the United States.[10]

The Committee Report accompanying S. 440 termed section 5,

> . . . the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practice in our history and, climatically [sic], in recent decades.[11]

Section 5 required Congress's participation and approval for the continuation of any and every use of military force. The only exceptions to this requirement were to allow for the necessity of gradual withdrawal amidst hot combat beyond thirty days and the inability of Congress to assemble due to an armed attack.

Critics claimed the bill was cowardly because it allowed Congress to force the President to act without taking any action itself—if Congress did nothing, the 30 day period would end and the President would have to withdraw. But the alternative, requiring a majority vote to order a withdrawal, would be subject to the President's veto; that scenario would have left the President in essentially the same position as he would be without the legislation. It would effectively gut Congress's powers.

More accurately, the bill simply represented a cautious, and one could say a skeptic's, view of all uses of force. The bill presumed against such use, and put the burden on the President to demonstrate its necessity. The bill was not meant to encourage congressional inertia and inaction. On the contrary, it was "an important objective of this bill to bring the Congress . . . into any situation involving U.S. forces in hostilities at an early enough moment so that Congress's actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war."[12]

Responding to similar questioning of whether Congress could impose any time limitation on the President's power to repel, or forestall, an attack on the United States, the Committee Report responded:

> The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the allleged [sic] attack or imminent threat of an attack.[13]

The Report referred to a statement by Abraham Lincoln in 1848 as perhaps the clearest admonition of this problem:

> Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don't.[14]

The bill also provided for expedited procedures in both houses in order to make the war powers issue the pending order of business as soon as it is introduced and to prevent it from being

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tied up in committee or by other procedural tactics.[15]

Section 4: The Senate bill assumed that Congress was just as capable as the President of judging the necessity of using military forces in any given situation; it required that Congress have all the "necessary information at hand" in order for it to act intelligently and responsibly.

Thus, section 4 required the President to report to Congress "promptly" with "a full account of the circumstances under which . . . [he has acted,] . . . the estimated scope of such hostilities or situation, and the consistency of the introduction of such forces in such hostilities or situation with the provision of section 3 of this Act."[16] The word "promptly" was inserted instead of "immediately" or "within 24 hours" to allow the President to give the most comprehensive report, *as soon as possible*, but with enough time to assemble field and intelligence reports and to give his own judgment of the situation.

These three sections of S. 440 comprised the framework for insuring Congress's fulfillment of its war making responsibilities in partner with the President. The bill passed in the Senate on July 20, 1973, by a 72-to-13 vote.

Problems with S. 440

The detractors of S. 440 in the Senate were both those who thought it went too far in encroaching upon the President's powers and those who thought it did not go far enough in disarming the President.

Senator Abourezk, one of those in the latter group, voiced his concern that the bill created a loophole which actually expanded the President's war power by allowing him to repel attacks against U.S. armed forces outside of the United States:

> We now have some 2,000 bases or military detachments located in the far corners of this world. By giving the President the power to defend each of them, without congressional consideration of the location and wisdom of their placement, we are simply empowering Presidents to locate troops in such a manner as to provoke attacks to justify Presidential warmaking.[17]

Abourezk went on to "predict the result" of how a President might manipulate the requirements of the bill:

> A President will initiate war in some steamy corner of the world, claiming that an imminent threat to our troops exists. After 30 days he will come to Congress and to the public, and state that American forces are in danger, that we must rally to the flag. There is nothing in the history of this body which suggests that we can or would refuse to "support the troops" in a moment like that.[18]

Abourezk would have limited the President's unilateral power to repelling attacks upon the United States. Abourezk also dismissed the claim that presidential practice after the Constitution was ratified has established new constitutional authority for the President—so called "adoption by usage." His response was simply that "[t]o treat such incidents as altering the constitutional allocation of power is to give the President the unilateral right to amend the Constitution."[19]

During the Senate floor debate prior to the bill's passage, Senator Eagleton offered an amendment to remedy another loophole, that of covert operations. The bill, as it stood, and as the statute stands today, made no provision for military-type activities performed by non-military personnel—e.g., covert and paramilitary activities of the CIA. The amendment would have given a broad definition to "members of the U.S. armed forces":

> Any person employed by, under contract to, or under the direction of any department or agency of the United States Government who is either (a) actively engaged in hostilities in any foreign country; or (b) advising any regular or irregular military forces engaged in hostilities in any foreign country shall be deemed to be a member of the Armed Forces of the United States for the purposes of this act.[20]

This amendment was offered before there was any statutory oversight provisions to control the intelligence community. It was rejected ostensibly on the grounds that it was out of place in this particular bill and was a subject that should be considered independently. Noteworthy, however, was one of Senator Javits' rationales for opposing the amendment:

> Another important consideration is that there, outside the Armed Forces, . . . is no agency of the United States which has any appreciable armed forces power, not even the CIA. They might have some clandestine agents with rifles and pistols engaged in dirty tricks, but there is no capability of appreciable military action that would amount to war.[21]

Intelligence oversight legislation has since been enacted, and is presently undergoing reconsideration and drafting to include any type of military or paramilitary activities that are not covered by the War Powers Resolution as finally signed into law.

The House Version

While the Senate was debating its bill, the House was working on its version of a war powers resolution--H.J. Res. 542. The House version was not nearly as thorough as the Senate's. It did not define, to the exclusion of all other possibilities, those specific instances where the President could act unilaterally. Rather, it required only that the President seek prior approval wherever possible. Thus there was no statutory preclusion of the President's use of force. This version would bring Congress into play only when forces were already introduced, allowing 120 days before they must be withdrawn, absent subsequent congressional approval. The House bill passed on July 18, 1973—244-to-170 (19 not voting).

The Compromise

The conference committee then went on to work out a compromise between the two versions. The major point of

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departure between the Senate and House versions of the bill concerned the issue of defining the President's inherent war power. The House feared that the Senate's precise limitations on executive power was too rigid a restraint on future situations as yet unforeseen.

The conference committee settled this difference by putting, in somewhat amended form, the Senate language of section 3 describing the three emergency situations under which the President can act unilaterally into the non-operational section 2 of the bill on "Purpose and Policy."[22] In the other major compromise, the committee agreed on 60 days as the limit for unilateral presidential action, with an optimal 30 days extra in cases of "unavoidable military necessity."

At this juncture, Senator Eagleton withdrew his support for the bill, on the grounds that it failed completely to define the President's power or to assert Congress's power prior to the actual use of force. In his words:

> The bill in its present form, therefore, is worse than no bill at all. It fails to address directly the question of just what authority the President has to engage our forces in hostilities without the approval of Congress. It is of questionable constitutionality in that it creates a 60-to-90-day period of Presidentially declared war, in derogation of the war powers conferred by the founders on Congress. And it creates a legal base for the continuing claims of virtually untrammeled Presidential authority to take the Nation to war without a prior congressional declaration.[23]

Yet this version of the bill passed both houses in October, 1973. President Nixon vetoed the bill on October 24. He objected that the bill unconstitutionally encroached on the inherent foreign affairs power of the President and was improper on practical grounds as well:

> [The Resolution] would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. . . . I am also deeply disturbed by the practical consequences of this resolution. For it would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis.[24]

On November 7, both the House and Senate overrode the President's veto, and the War Powers Resolution of 1973 became law. (The text of the law is reprinted on page 5.)

The War Powers Resolution

The law, as passed and as it still stands, has three operative sections—consultation, reporting, and congressional action. The first, section 3, requires that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[25]

The second, section 4, requires that the President submit a written report to Congress setting forth the circumstances, authority, and the scope of his action:

> . . . in any case in which United States Armed Forces are introduced—
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployment which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.[26]

The third section, section 5(b), requires that any use of force under section 4(a)(1) (hostilities or imminent hostilities) be terminated within 60 days "unless the Congress (1) has declared war or has enacted specific authorization for such use of United States Armed Forces, (2) has extended by law such 60-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States."[27]

There is nothing in the law that prevents the President from introducing forces in any place, at any time, for any reason. While the President is encouraged to consult in advance, Congress can play no legal role until after troops have been committed. And that role is triggered by section 5(b) when the President's "report is submitted or is required to be submitted pursuant to section 4(a)(1)."[28] Thus the law allows the President unfettered discretion for at least 60 days (actually 90, with the 30 day extension).

The War Powers Resolution in Practice. Since its adoption, the President has made thirteen reports on incidents concerning the War Powers Resolution—only seven of those reports referrec directly to the War Powers Resolution, while the other six made no reference at all; there have been as many as fourteen instance where a report should have been made. [See chronology on pag 8.] In every instance but one, the troops were withdrawn befor the 60 day limit expired. The one exception was in Lebanon i 1983, when Congress passed legislation extending the 60 day lim for eighteen months. [See "War Powers and Lebanon" on pag 11]. However, in none of these instances did the Presiden actually invoke the war powers law. Every President has denie the legitimacy and constitutionality of the law. Thus, a presidential reports have been made "taking note of" or "cor sistent with" the War Powers Resolution, but never "pursuant tc (as the statute states) or in compliance with it.

In standard practice, the President must either consult w Congress in advance of or report to Congress within 48 h after deploying forces abroad. The two major areas of stem from the meaning of the word "consult" and the effect of the President's report.

It is all too easy for the President to call in the Congress and inform them of an action mom take place, and call that prior consultation. T were conscious of this problem. While co that the President needed Congress's c simple notification. The House Co

> A considerable amount of atte of *consultation*. Rejected was the no

> be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.[29]

Although this requirement is not meant to include all 535 members of Congress, there is still no formal or consistent structure in place to carry out the consultation prescript. In 1975, Senator Eagleton introduced a bill to establish such a procedure by amending the War Powers Resolution; his bill would have substituted the phrase "seek the advice and counsel of the Congress" for the words "consult with Congress," and then defined the new phrase as follows:

> For purposes of this section, the words 'seek the advice and counsel of' mean that the President, before taking any steps which would firmly commit United States Armed Forces to hostilities, shall in every possible instance discuss fully the proposed decision for using such Armed Forces with Members of Congress, including but not limited to the majority and minority leaders of the Senate and the House of Representatives, the chairmen of the Armed Services and International Relations Committees of the House of Representatives and shall fully consider their advice and counsel before committing the United States Armed Forces to any such proposed decision.[30]

The bill was rejected.

When the President does report to Congress under section 4 of the War Powers Resolution, that report does not necessarily invoke section 4(a)(1), which in turn triggers section 5(b) and allows congressional action. Of the thirteen reports made since 1973, only one of them actually referred to section 4(a)(1).[31] All of the other reports refer either to section 4(a)(2) (introduction of forces into non-hostile foreign territory) or section 4 in general, neither of which trigger the 60-day limit under section 5(b). The issue centers on whether the given situation is one of hostilities or imminent hostilities. The phrase was meant to be over- rather than underinclusive.

> The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "*Imminent hostilities*" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.[32]

Until section 5(b) is triggered, Congress is prevented from acting under the War Powers Resolution. It was originally assumed that no President would fail to report accurately under section 4(a)(1). In the words of Senator Javits:

> Any President who defies this would be in jeopardy not just because Congress can do this, but because if his actions are actually illegal, then he is challenged in any contact for procurement, he is challenged as to conscription, and he is challenged as to any action taken pursuant to what may be considered to be the war power.
>
> I do not believe that any President is going to fly in the face of that without batting an eye.[33]

Similarly, Professor Alexander Bickel testified to this same sentiment: "There is no way one can define [hostilities or imminent hostilities] other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law."[34]

The present experience involving the Persian Gulf has demonstrated that the President can indeed bat his eye and fly in the face of Congress by refusing to report. But the President's intransigence should not end the issue; section 5(b) is triggered when a report "is required to be submitted." The circumstance, not the report itself, is what is supposed to trigger the War Powers Resolution. But Congress has not been willing to assert, nor have the courts been willing to determine, that the War Powers Resolution is self-initiating. Therefore, without a report from the President, Congress's only available recourse is to vote to set it in action. To date, no Congress has been able to invoke a bill to trigger the 60 day deadline. And even should it do so, that vote is still subject to the President's veto.

Thus, notwithstanding the intent of the drafters of the bill, Congress remains at the mercy of the President to be brought into the decision-making process. Congress is held in limbo if the President chooses not to report of hostilities or imminent hostilities under 4(a)(1) or if he vetoes a congressional invocation, even where the circumstances would clearly fall within the intended meaning of that section.

Curing the Problem

There have been several attempts since 1973 to cure the problems of the War Powers Resolution by amending the bill and by reintroducing the original Senate version. Senators Eagleton and Cranston tried in the Senate in 1975 and 1983.[35] Numerous bills have been introduced in the House. But sufficient support has not been forthcoming. Now, with the congressional-executive impasse over invoking the War Powers Resolution over the U.S. presence in the Persian Gulf, several Senators have raised again the possibility of complete reconsideration of the war powers issue.[36] Such an effort could quell the confusion by strengthening of Congress's role along the lines of the original Senate version. ■

Endnotes

1. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (footnote omitted).
2. *See generally*, W. Reveriy, *War Powers of the President and Congress: Who Holds the Arrows and the Olive Branch* at 51-116 (1981); A. Sofaer, *War, Foreign Affairs and Constitutional Power* at 1-60 (1976).
3. S. Rep. 220, 93d Congress, Report of the Committee on Foreign Relations (to accompany S. 440) at 18-19 (1973).
4. *See* A.V. Thomas & A.J. Thomas, *The War-Making Powers of the President: Constitutional and International Law Aspects*, at 120 (1982) [hereinafter *The War-Making Powers*.]

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5. *Id* at 121; 116 *Cong. Rec.* H37398-408 (1970).

6. *The War-Making Powers, supra* note 4, at 127.

7. *Cong. Rec.* S13875 (July 18, 1973).

8. S. 440, section 3 (passed on July 20, 1973).

9. Senator Javits' written answers to Senator Goldwater's unanswered 25 Grave, Practical and Constitutional Problems, *reprinted in Congressional Record*, S14162 (July 20, 1973).

10. S. 440, section 5(a).

11. S. Rep. 220, *supra* note 3, at 28.

12. *Id.*

13. *Id.* at 29.

14. *Quoted in id.* at 29.

15. This provision was noncontroversial and was retained in the final version. *See* War Powers Resolution, P.L. 93-148, §§6 & 7, 50 U.S.C. §§1545 & 1546.

16. S. 440, section 4 (1973).

17. *Cong. Rec.* S14160 (July 20, 1973).

18. *Id.* at 14161.

19. *Id. See also* R. Berger, "War Making by the President," 121 *U. Pa. L. Rev.* 29, 60 (1972) (stating that if practice has no constitutional validity, then "the last precedent is not legitimated by repetition").

20. Amendment No. 366 to S. 440 (1973), *Cong. Rec.* S14187 (July 20, 1973).

21. Id. at S14190.

22. Senators Javits and Eagleton debated over the effect of this change. Javits said it did not change the meaning; Eagleton asserted that it undermined the whole intent of the bill. *See Cong. Rec.* S18995-96 (Oct. 10, 1973). The conference report stated that "[s]ubsequent sections of the joint resolution are not dependent upon the language of this subsection [2] . . . ." Conference Report No. 93-547, to accompany H.J. Res. 542 (October 4, 1973).

23. *Cong. Rec.* S18993 (Oct. 10, 1973).

24. Text of President Nixon's Message Vetoing the War Powers Resolution, 9 Weekly Comp. Pres. Docs. 12985, 12986 (*quoted in* W.T. Reverley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, at 294.

25. Sec. 3, 50 U.S.C. §1542.

26. Sec. 4(a), 50 U.S.C. §1543(a).

27. Sec. 5(b), 50 U.S.C. §1544(b).

28. *Id.*

29. H.R. Rep. No. 93-287, to accompany H.J. Res. 542 at 6-7 (93rd Congress, June 15, 1973).

30. *See Cong. Rec.* S13247 (Sept. 29, 1983) reprinting S. 1790 (1975)).

31. Report dated May 15, 1975, from President Gerald R. Ford to Hon. Carl Albert, Speaker of the House, in *The War Powers Resolution: Relevant Documents, Correspondence, Reports, prepared by the Subcommittee on International Security and Scientific Affairs of the Committee on Foreign Affairs* (97th Congress, June 1981).

32. H.R. Rep. 93-287, at 7.

33. *Cong. Rec.* S18995 (Oct. 10, 1987).

34. *Hearings before the Subcommittee on National Security and Scientific Developments of the House Committee on Foreign Affairs* at 185 (93d Cong., 1st Session) (statement of Alexander Bickel).

35. *See Cong. Rec.* S13244-255 (Sept. 29, 1983).

36. *See, e.g., Wash. Post*, Oct. 6, 1987, at A8 ("Senate Weighs Revising War Powers Resolution: Bipartisan Commission is Proposed"); Cranston, "Revise the War Powers Act," *Wash. Post*, Oct. 22, 1987, at A23.

Chronology of Events Concerning the War Powers Resolution

Editor's Note: The following chronology includes the 13 reports in reference to the War Powers Resolution (indicated in margin by number) and 14 instances where a report should have been made (indicated in margin by letter). Material for this chronology was compiled from Congressional Research Service, War Powers Resolution: Presidential Compliance, Issue Brief. No. IB81050 (March 9, 1984 and September 10, 1987).

	Nov. 7, 1973	Congress passed the War Powers Resolution (P.L. 93-148) over the veto of President Nixon.
(a)	July 22 & 23, 1974	Helicopters from five U.S. naval vessels evacuated approximately 500 Americans and foreign nationals from hostilities in Cyprus. No report was made.
(1)	April 4, 1975	President Ford reported, without citing the War Powers Resolution, the use of armed forces in the evacuation of refugees from Danang and other seaports to safer areas of Vietnam.
(2)	April 12, 1975	President Ford reported, without citing the War Powers Resolution, on the use of armed forces in the evacuation of U.S. nationals from Cambodia.
(3)	April 30, 1975	President Ford reported, without citing the War Powers Resolution, on the use of armed forces in the evacuation of U.S. citizens and others from South Vietnam.
	May 7 & June 4, 1975	The House held hearings to determine whether the President had complied with the War Powers Resolution when he reported to Congress on the Danang sealift, the evacuation of Phnom Penh, the evacuation of Saigon, and the *Mayaguez* incident.
(4)	May 15, 1975	President Ford reported, "taking note of section 4(a)(1) of the War Powers Resolution," the use of armed forces to rescue the crew of the ship *Mayaguez*, which had been seized by Cambodian naval patrol boats. This is the only instance where section 4(a)(1) has ever been invoked so as to trigger the sixty-day deadline in section 5(b).
(b)	June 20, 1976	A U.S. Navy landing craft evacuated 263 Americans and Europeans from Lebanon during fighting between Lebanese factions. An overland convoy evacuation to Damascus had been blocked by hostilities. No report was filed.
(c)	August 1976	Two American military personnel were killed when they entered a demilitarized zone in Korea to cut down a tree. Reinforcements were added to the area in the resulting tension. No report was filed.
(d)	May 19-June 1978	The U.S. made available transport aircraft to provide logistical support for Belgian and French rescue operations in Zaire. No report was submitted. The House held hearings on whether the President had complied with the War Powers Resolution. A bill was introduced requesting the President to file a report, but no further action was taken on this resolution.
(5)	April 26, 1980	President Carter reported, without reference to the War Powers Resolution, the use of aircraft, helicopters, and men in an unsuccessful attempt to rescue American hostages from Iran on April 24.
(e)	February 1981	The Department of State announced the dispatch of 20 military advisers (to augment the 19 sent there during the Carter Administration) in El Salvador. By March 14, the Administration had authorized a total of 54 advisers. The President did not report the situation under any war powers provision. A State Department memorandum said a report was unnecessary because U.S. personnel were not being introduced into hostilities or situations of imminent hostilities.
	April 6, 1981	Assistant Secretary for Congressional Relations Richard Fairbanks wrote Chairmen of the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, describing duties of the U.S. military mission in El Salvador and "to assure that the requirements of the War Powers Resolution will be complied with in a timely manner should they become applicable."
	May 1, 1981	In *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), eleven members of Congress filed suit against the President, challenging his actions of sending advisers to El Salvador on grounds that he had violated the Constitution and the War Powers Resolution. Eventually, there were 29 co-plaintiffs; but by June 18, 1981, an equal number of members (13 senators and 16 representatives) filed a motion to intervene in the suit, contending that a number of legislative measures were then pending before Congress and that Congress had had ample opportunity to vote to end military assistance to El Salvador if it had so wished.
(f)	Aug. 19, 1981	U.S. planes based on the carrier Nimitz shot down two Libyan jets over the Gulf of Sidra after one of the Libyan jets had fired a heat-seeking missile. No report was filed.
(6)	Mar. 19, 1982	President Reagan reported the deployment of military personnel and equipment to the Multinational Force and Observers in the Sinai "consistent with section 4(a)(2) of the War Powers Resolution."
	June 9, 1982	The Senate Foreign Relations Committee stated in its report on S.J. Res. 158 (S. Rept. 97-470) that it had specified in Section III of the proposed resolution that the President has "a clear obligation under the War Powers Resolution to consult with Congress prior to any future decision to commit combat forces to El Salvador."

	Aug. 11, 1982	The Senate adopted an amendment by Sen. Bumpers to the supplemental appropriations bill, stating that the Symms amendment it had adopted did not "constitute the statutory authorization for introduction of United States Armed Forces contemplated by the War Powers Resolution."
(7)	Aug. 21, 1982	President Reagan reported, without reference to the War Powers Resolution, the dispatch of 800 Marines to participate in the Multinational Force assisting the evacuation of PLO members from Beirut, Lebanon.
	Sept. 20, 1982	The second dispatch of Marines to Lebanon began. The President announced a multinational force consisting of forces from the United States, Italy, and France to keep peace in Lebanon.
(8)	Sept. 29, 1982	President Reagan reported, "consistent with the War Powers Resolution" (but not citing any section), the dispatch of 1,200 Marines to Lebanon to serve in a new Multinational Force formed to help maintain order in Lebanon. On November 28, at the end of the sixty-day period, the Marines were still in Lebanon.
	Oct. 4, 1982	U.S. District Court Judge Joyce Hens Green dismissed *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982).
	Mar. 9, 1983	Rep. George Crockett filed an appeal of *Crockett v. Reagan* in the U.S. Court of Appeals for the District of Columbia.
(g)	Mar. 18, 1983	The Administration dispatched AWACS to Egypt after a Libyan plane bombed a city in Sudan, and Sudan and Egypt appealed to the U.S. for assistance. No report was made.
	June 23, 1983	The Supreme Court struck down the legislative veto device in *INS v. Chadha*, 462 U.S. 919 (1983), nullifying section 5(c) of the War Powers Resolution which would have required withdrawal of troops upon a concurrent resolution.
	June 27, 1983	Congress passed the Lebanon Emergency Assistance Act of 1983 requiring statutory authorization for any substantial expansion in the number or role in Lebanon of U.S. forces. (P.L. 98-43).
	July 26, 1983	The House rejected an amendment to the Defense Authorization bill (H.R. 2969) that sought to limit the number of active duty military advisers in El Salvador to 55, unless the President reported them under section 4(a)(1).
(9)	Aug. 8, 1983	President Reagan reported, "consistent with section 4 of the War Powers Resolution," the deployment of two AWACS electronic surveillance planes and eight F-15 fighter planes and ground logistical support forces to assist Chad against Libya and rebel forces.
(h)	Aug. 8, 1983	First U.S. troops arrive for the initial series of maneuvers called "Big Pine" in Honduras. Several thousand ground troops plus warships and fighter planes were involved. No report was filed.
	Aug. 25, 1983	Marines began to land in Lebanon. President Reagan did not cite the War Powers Resolution at that time, and said the agreement with Lebanon ruled out any combat responsibilities.
(10)	Aug. 30, 1983	President Reagan sent a second report, "consistent with the War Powers Resolution," to Congress about the participation of U.S. armed forces in the Multinational Force in Lebanon, stating that the previous day Marine positions had come under fire and two Marines had been killed.
	Sept. 1, 1983	President Reagan ordered a naval task force, including 2,000 Marines, fighter planes, and artillery to the shores of Lebanon.
	Sept. 12, 1983	President Reagan authorized Marines in Beirut to call in air strikes against forces shelling their position.
	Sept. 13, 1983	The Administration announced that defense of the Marines could include the use of U.S. air power and artillery to assist other members of the Multinational Force or the Lebanese armed forces in certain circumstances.
	Sept. 20, 1983	Congressional leaders and President Reagan agreed in principle on a compromise resolution invoking Section 4(a)(1) and authorizing the Marines to remain for 18 months. The President still maintained, however, that he was not bound by the War Powers Resolution.
	Sept. 28, 1983	The House passed H.J. Res. 364 by a vote of 270-161, rejecting an amendment that would have cut off funds for the troop deployment in Lebanon unless the President invoked section 4(a)(1).
	Sept. 29, 1983	Congress passed S.J. Res. 159, determining that the requirements of section 4(a)(1) had become operative on Aug. 29, 1983 for the Marines participating in the Multinational Force in Lebanon and authorizing the participation to continue for 18 months. The Senate rejected Senator Byrd's amendment to require the President to submit to Congress the report required under section 4(a)(1). This was the only occasion where Congress has succeeded in invoking the War Powers Resolution itself.
	Oct. 13, 1983	President Reagan signed S.J. Res. 159, but said he did not agree with all of it and that the War Powers Resolution did not apply.
	Oct. 23, 1983	More than 200 Marines were killed in Beirut in a car-bomb attack against the building near the airport where the Marines were housed.
(11)	Oct. 25, 1983	President Reagan reported, "consistent with the War Powers Resolution," that U.S. forces had landed in Grenada.

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	Dec. 15, 1983	All combat troops were removed from Grenada; 300 support forces remained.
	Feb. 7, 1984	President Reagan announced he had ordered the Marines participating in the Multinational Force in Lebanon redeployed to ships off the shores of Lebanon, ending the U.S. military presence in Lebanon.
(i)	Apr. 1984	The United States' mining of Nicaraguan harbors was revealed and raised concern over congressional war powers.
	June 18, 1984	The Supreme Court refused to hear an appeal of *Crockett v. Reagan*, 467 U.S. 1251 (1984).
(j)	Nov. 23, 1984	Four members of Congress wrote President Reagan requesting that he report under section 4(a) on the presence of troops in Honduras. No reports had been filed.
(k)	Oct. 10, 1985	U.S. Navy pilots intercepted an Egyptian airliner and forced it to land in Sicily. The airliner was carrying the hijackers of the Italian cruise ship *Achille Lauro* who had murdered an American citizen during their control of the ship. No report was filed.
(1)	Mar. 25, 1986	Fourteen unarmed military helicopters with 50 American crewmen aboard were sent to ferry a battalion of Honduran troops to the Nicaraguan border area to repel Nicaraguan troops. No report was filed.
(12)	Mar. 27, 1986	U.S. forces, while engaged in freedom of navigation exercises around the Gulf of Sidra, were attacked by Libyan missiles on March 24. In response, the U.S. fired missiles at Libyan vessels and at Surt, the Libyan missile site involved. A White House statement said that U.S. forces were only protecting the 12-mile international water and airspace around the Gulf of Sidra. President Reagan provided a report (without mentioning the War Powers Resolution) "in accordance with my desire that the Congress be informed on this matter." The U.S. ships ended exercises in the area claimed by Libya on March 27.
	April 5, 1986	Several American servicemen were killed by a terrorist bombing of a West Berlin discotheque.
(13)	April 16, 1986	The President reported an air strike against Libya to Congress "consistent with the War Powers Resolution." He said the strike was conducted in the exercise of self-defense under Article 51 of the U.N. Charter. He also reported that the action was a pre-emptive strike directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya.
	May 8, 1986	Sen. Byrd and others introduced S.J. Res. 340 to amend the War Powers Resolution to add a new subsection establishing a permanent consultative body. The body would consist of 18 members; the Speaker of the House and the President Pro Tem of the Senate; the Majority and Minority Leaders of the House and Senate; and the Chairman and ranking minority members of the House Foreign Affairs and Senate Foreign Relations Committees and the House and Senate Armed Services and Intelligence Committees.
(m)	July 14, 1986	United States sent army personnel and aircraft to Bolivia for anti-drug assistance. Administration officials decided that the operation did not fall under the War Powers Resolution.
	Dec. 1986	Sixty U.S. soldiers and nine helicopters were involved in ferrying Honduran troops within approximately 20 miles of the Nicaraguan border where fighting was occurring between the Sandinistas and the contras. This action was consistent with a ban on U.S. personnel assisting in activities within 20 miles of Nicaragua.
	Mar. 31, 1987	An American military adviser, Staff Sgt. Gregory A. Fronius, was killed when the El Pariso military base was attacked by guerrilla forces in El Salvador. He was the first adviser to be killed in a combat situation, although five other military men in El Salvador had been slain, one on a university campus in 1983 and four in a cafe in 1985.
	May 1, 1987	The Senate passed an amendment to the Supplemental Appropriations Bill (H.R. 1827) requiring the Secretary of Defense to submit a report to Congress prior to the implementation of any agreement between the U.S. and Kuwait for U.S. protection of Kuwaiti shipping.
(n)	May 17, 1987	Missile attack on the *USS Stark* by an Iraqui aircraft. Thirty-seven men were killed. According to reports, President Reagan's advisers debated whether the situation required a report, but decided against it, although consultations or briefings would occur.
	May 20, 1987	Secretary of State Shultz submitted a report to the Speaker of the House and the Vice President similar to previous reports filed under the War Powers Resolution. It described an incident in the Persian Gulf and stated that the U.S. had maintained a naval presence there for nearly 40 years and that this had been done pursuant to the authority of the President as Commander-in-Chief.
	June 15, 1987	The Secretary of Defense submitted the required report entitled, "A Report to Congress on Security Arrangements in the Persian Gulf."
	Oct. 21, 1987	The Senate approved a compromise measure requiring the President to report to the Congress on the use of U.S. naval forces in the Persian Gulf. The bill holds off on determining whether the President can continue to maintain forces in the Gulf and delays for sixty days a congressional vote on invoking the War Powers Resolution.

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to

④

First Principles.

THOMAS PAINE
Dissertation on First Principles of Government, July 1795

NATIONAL SECURITY AND CIVIL LIBERTIES

Covert Paramilitary Operations

Without Congressional Approval, They Should Not Be Attempted

by Gary M. Stern

For at least the past four years the CIA has been funneling hundreds of millions of dollars of "secret" military assistance to rebel forces—the "mujaheddin" —opposing the Soviet invasion of Afghanistan. Details of the operation—sources and methods, shipment times, and the means of implementation—are secret, but the fact of U.S. involvement is well known to Congress, the media, the public, the Soviet Union, the government and people of Afghanistan and everyone else in the world who wants to know about it. Similarly, Pakistan's participation in the effort, while not officially acknowledged by the American government, is widely known. Despite the assertion that this is still a covert activity, the CIA operation was publicly authorized on October 4, 1984, by a concurrent resolution of Congress (S. Con. Res. 74) that opposed the Soviet invasion of Afghanistan and called for "effective support" for the Afghan rebels.

Though the Afghan assistance began as a true covert operation shortly after the Soviet invasion in 1979, it provides useful insights into the proper means through which the United States should engage in or support paramilitary operations. What is significant is that Congress debated the issue and publicly authorized the Reagan Admin-

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istration to aid the rebels who opposed the Soviets; this public debate and authorization, far from preventing the United States from supporting the mujaheddin, led to a larger and more effective operation. Congress should now take the next step and require prior public debate and congressional authorization for all U.S. support or engagement in military or paramilitary operations.

Public approval of this type of major foreign policy objective not only comports with constitutionally-mandated procedure, it also makes for more effective foreign policy. As former Secretary of Defense Casper Weinberger and others have asserted, the United States should not engage its armed forces in combat unless there is clear support for the policy within Congress and among the public. The same logic applies as well to covert paramilitary operations: they should not be attempted without clear public and congressional support.

A Near Constitutional Crisis

The recent Iran-Contra scandal is a vivid illustration of what can, and inevitably does, happen when a President tries to circumvent the need for public debate and approval. The effort to supply the Contras, in the face of an express congressional ban on such activity, led to a near constitutional crisis.

A cornerstone of our democracy is that the government shall be accountable to the people for all it does. President Reagan fostered a policy and environment where he was not accountable to the Congress or the people, and where his assistants in the National Security Council (NSC) were not even accountable to him. The NSC operated outside of the law and the Constitution to implement a policy that Congress had specifically rejected through its undisputed power of the purse. And the NSC staff performed the operation covertly not because the foreign policy objectives required that the U.S. role remain undetected; rather, they kept it covert to keep Congress from learning about it. As Robert McFarlane conceded in his testimony at the Iran-Contra hearings, the President and his advisors "turned to covert action [in Nicaragua] because they thought they could not get Congressional support for overt activities."

When, in November 1986, the covert diversion and assistance to the Contras did become public, as all major covert operations eventually do, the Administration's policy toward Nicaragua was hardly affected. The operation was not stopped; the aid continued; and new aid was approved. The obvious lesson from this, the Afghanistan effort and other earlier experiences is that public exposure and Congressional approval do not hinder foreign policy objectives (even though these factors may change the means by which those objectives are pursued) where there is adequate political support for that policy; but where there is no such public support, a covert operation simply cannot succeed.

Robert McFarlane learned the truth of this lesson the hard way when he testified that "it was clearly unwise to rely on covert activity as the core of our policy . . . [because] you cannot get popular and Congressional support for such policy." This is so because "it is virtually impossible, almost as a matter of definition, to rally the public behind a policy you cannot even talk about."

McFarlane: "It is virtually impossible . . . to rally the public behind a policy you cannot even talk about."

The Iran-Contra scandal has resurfaced the issue of whether all covert operations should be banned. For its part, the Report of the Congressional Committees Investigating the Iran-Contra Affair, while raising the question of whether "covert action [can] be authorized and conducted in a manner compatible with the American system of democratic government and the rule of law," never analyzed that fundamental problem. Instead, the Report simply asserts that "covert operations are a necessary component of our Nation's foreign policy."

A Total Ban is Not Simply Drafted

A prohibition on all covert paramilitary operations i
entirely consistent with the conclusions reached in 1976 by
the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, commonl
known as the Church Committee, when it investigate
widespread abuse, both at home and abroad, by the CIA, th
FBI and other U.S. intelligence agencies.

In its final report, the Church Committee considered bu
fell just short of proposing "a ban on all forms of cover
action." In preserving the covert operation option, th
Committee stressed, as its "most basic conclusion," tha
"covert action must be seen as an exceptional act, to b
undertaken only when the national security requires it an
when overt means will not suffice." This small crack in th
door, however,, was opened wide by the Reagan Admin
stration, which sponsored a new wave of precisely thos
kinds of operations the Church Committee had sought t
prevent.

Though it did not call for a ban on all covert action, th
committee concluded, based on its review of almost 30 yea
of covert paramilitary operations, that "[o]n balance, . . . th
evidence points toward the failure of paramilitary activity
a technique of covert action."

The Church Committee conclusions also indicate th
regardless of the effect paramilitary operations have on o
foreign relations, from a constitutional perspective, su
operations are objectionable if only because they fail
adhere to the procedures established in the Constitution th
guarantee an open and accountable system of governme
Since covert paramilitary operations are by their very nat
secret, they are not open to the normal process of full pu

debate by the people, the Congress, and the media; they avoid precisely the democratic process in this country that most of them are at least ostensibly designed to promote in the countries towards which the covert activity is targeted. Clearly, it was not intended, nor is it necessary, that we, in the words of the Church Committee, "adopt tactics unworthy of a democracy [or] . . . reminiscent of the tactics of totalitarian regimes" in order to maintain our national security.

The ACLU believes that the implementation of the Church Committee's suggestion of a complete prohibition on all covert operations would still be the definitive antidote against further damage from covert operations by venturesome and unchecked presidents. Yet, instituting such a ban poses serious legislative, not to mention political, difficulties. Moreover, a complete ban is not so simply drafted.[*]

However, a prohibition on covert paramilitary operations poses fewer legislative difficulties and is feasible now. Paramilitary operations clearly implicate Congress's power to declare war, thus requiring that Congress have a say as to when and how they may be used. Unfortunately, covert paramilitary operations have come into favor in large part to avoid giving Congress any such control over that decision. For the same reasons that Congress passed the War Powers Resolution—to restore its constitutional role, which had been diminished as a result of presidential end-runs—it is imperative that Congress take steps to institute full control over paramilitary operations.

The common understanding of a prohibition on paramilitary operations focuses on the operational level: stopping the CIA (or any other intelligence agency) from engaging in covert paramilitary activities. However, one can also approach the issue from a procedural standpoint: requiring that any "covert paramilitary activity" be constitutionally authorized by Congress and the President. The new phenomenon of "overt covert" paramilitary operations—as in Nicaragua and Afghanistan—complies in general with this understanding, to the extent that the operational details have been kept secret while the policies have been publicly debated and authorized; these two operations fail to fully conform, however, because they both started before there was public debate and congressional authorization.

Impact on Foreign Policy

Supporters of covert operations assert that the concern for constitutional procedure is irrelevant when vital issues of national security are at stake. Their primary objection to any kind of public acknowledgement of covert operations is that it will inhibit our ability to conduct necessary foreign policy initiatives. But, in the first place, inadvertent, and intentional, leaks have occurred on almost every major covert operation carried out over the last forty years. It is now virtually certain that any major covert operation, and all paramilitary operations, will become public during the course of the operation. If the press alone does not ferret it out, then the operatives themselves (U.S. government officials or the people in the field) will be hard-pressed not to reveal the policy. As then Representative (now Senator) Wyche Fowler (D-Ga.) commented with respect to the Nicaragua operation, "a paramilitary operation of the size being conducted was impossible to be kept covert. . . . We knew that from the beginning, and we found that within 3 or 4 weeks the participants were themselves announcing their thanks to the people of the United States for giving them the resources to try to overthrow a government down there."

When news of the U.S. covert operation to remove Guatemalan President Jacobo Arbenz leaked in 1954, the press dismissed it as communist propaganda. . . .

Secondly, notwithstanding the certainty of such exposure, covert operations are not stopped simply because they are made public; they are stopped only when they have no popular or Congressional support. Where support was widespread, or opposition indifferent, exposure did not undermine the outcome of the project. For example, when news of the U.S. covert operation to remove Guatemalan President Jacobo Arbenz leaked in 1954, the press dismissed it as communist propaganda; due to the political climate at that time, the public and policy-makers supported activity against perceived communist regimes in this hemisphere and did not harbor suspicion of our government's denials. Consequently, the operation rolled along unscathed.

President Kennedy is often quoted as having said that he wished the Bay of Pigs operation had been leaked to the press so that it may have been prevented. But, as with the Guatemala operation, even though enough public information did exist prior to the Bay of Pigs invasion to expose

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[*] A major problem is one of definition: how to ban covert activities without precluding the CIA from performing counterintelligence and counter-terrorist activities, as well as routine assistance to the Departments of State or Defense. Few would argue, for instance, that the CIA should not have covertly assisted in "Desert One," the Iran hostage rescue operation. A total ban is not intended to eliminate a role for the CIA in those kinds of operations. (Rescue operations themselves would not be implicated in a complete ban since there is no intention to keep them covert once they are performed and since they fall under the War Powers Resolution.)

It is as difficult to define a complete ban so as to include the myriad economic, political and propaganda techniques the CIA has been known to utilize, some of which are just as effective as paramilitary operations in destabilizing or overthrowing governments.

Thus, as desirable as it may be, a complete ban that effectively accounts for the above difficulties cannot easily be drafted. Moreover, at this time such a ban has virtually no support in Congress.

Covert Paramilitary Operations,

the operation, it proceeded unaffected because the general political atmosphere in Congress and around the country supported the goal of overthrowing Castro. Ironically, a pre-invasion news story could well have intensified the U.S. commitment to the operation and forced the United States to intervene directly. In this case, the President, having extended the goal beyond its means, was able to rein the operation in and cut its losses, notwithstanding congressional support to the contrary.

In 1975, the United States began to provide covert assistance to one side in Angola following decolonization and a subsequent three-sided civil war. President Ford, following the rules of the time, made a "finding" and notified the appropriate committees of Congress. But since it was impossible to keep the operation secret, the effect of plausible denial was completely lost. When the covert funding ran out, and with knowledge of the operation already public, Ford simply went to Congress for public authorization, as he should have done in the first place. At that time, Congress saw fit to deny the President such funds and stopped the operation; it also imposed an absolute ban on all covert assistance directed against Angola, the so-called Clark Amendment.

Congress played an instrumental role in assessing whether the United States should commit itself to intervene in Angola. The decision to do so was not the President's alone to make. The covert program was cut off in 1976 after careful consideration by Congress. In 1985, Congress repealed the Clark Amendment with the express understanding that it was not authorizing renewed covert assistance to Jonas Savimbi's UNITA forces, and that the Administration would not request such aid. The Administration, however, then went ahead and initiated a covert operation to provide paramilitary support to UNITA. In response, Senator Bill Bradley (D-N.J.) introduced a bill in July 1987 that would "require that any United States Government support for military or paramilitary operations in Angola be openly acknowledged and publicly debated." A parallel effort was made in the House to add similar language to the Intelligence Authorization Act. This bill would be entirely consistent with a prohibition of covert paramilitary operations.

Critics also object to the expansion of Congressional control over covert operations as an intrusion, practical if not constitutional, into the President's ability to conduct foreign policy. They state the old phrase that there cannot be 535 secretaries of state trying to run the country. This argument is buttressed by the general state of inefficiency that pervades congressional action, especially on foreign policy matters; witness Congress's inability to apply the War Powers Resolution to the President's order to escort the reflagged Kuwaiti ships in the Persian Gulf.

But Congress would not be so inefficient in responding to presidential initiatives if the President, as a practical matter, included Congress in the decision-making process. And as a constitutional matter, the President cannot exclude Congress simply to ensure himself a freer hand in implementing his desired policy. Unquestionably, covert operations are attractive to presidents largely because they are a convenient shortcut around the procedural hassles inherent in our democratic system. But mere convenience, unlike threats to the nation's survival, does not excuse unconstitutional or illegal conduct. As the Supreme Court stated in *INS v. Chadha*:

> There is no support in the Constitution for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Nevertheless, the temptation for presidents to use covert operations mounts in the face of protracted congressional resistance to a favored policy, especially following that first instance of success in avoiding the procedural morass through covert means. Yet covert operations were not intended to shield the President from domestic accountability. They have come into such favor, however, precisely because they are one of the President's last vestiges of unfettered power. They offer the President a tempting opportunity to avoid all the constraints Congress is able to impose on the President's policy.

These congressional tactics, however, have developed in large part in response to presidential efforts to minimize Congress's role—which is essential in our system of checks and balances. Indeed, congressional opposition need not be dismissed as an intrusion upon the operation; rather, it should be seen as a barometer on the political efficacy of the plan.

The present sentiment on Capitol Hill continues to favor retaining the covert option. So concluded the Iran-Contra Report.

Admittedly, a prohibition on covert paramilitary operations does narrow the policy options available to the President, because it would preclude the pursuit of that very small percentage of foreign policy objectives that can be achieved only through covert paramilitary means. But the Church Committee and the Iran-Contra investigations should have taught us that even the strictest provisions controlling the use of covert operations are inevitably abused. The only way to stop this pattern of abuse is to impose an absolute requirement of public approval.

But such a prohibition does not mean that we have to stand by in the face of a real threat to our national security

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Covert Paramilitary Operations, *continued*

and let the Republic crumble simply because the only means of defense is unconstitutional or illegal: for, as the Supreme Court has stated, the Constitution is not a "suicide pact." Where the President feels he must take paramilitary action in an emergency situation, he could do so in conformity with the War Powers Resolution or under his implied constitutional power to "repel sudden attacks."

Current Reforms Fall Short

As a result of Iran-Contra, Congress has been given an opportunity to reform the Intelligence Oversight Act. Much of that reform relies on language developed for the National Intelligence Reorganization and Reform Act of 1978 (the CIA Charter bill, the first effort to codify the recommendations of the Church Committee) and incorporated into Executive Orders of Presidents Carter and Reagan. Existing intelligence oversight legislation and the pending reform bills (S. 1721 and H.R. 3822), however, fall short of requiring prior public approval for covert paramilitary operations: S. 1721, for instance, states "nothing contained herein shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities." (The legislative status of these two bills is discussed in the box on pages 12-13.)

A public approval requirement as herein proposed would still allow the President to conduct secret operations without compromising his constitutional responsibilities to the people and the Congress. The three on-going paramilitary operations attest to this assertion. In Afghanistan, Angola and Nicaragua, the United States has conducted major paramilitary operations to overthrow or repulse sitting governments opposed by the Administration. While each operation was initially covert, they have been revealed in whole or in part in the media and by the foreign operations themselves; moreover, all three have retained the involvement of third countries who wished to maintain a fiction of non-involvement, even though their complicity was open knowledge. In all, no policy purpose was served in pursuing any of these operations covertly.

While the ongoing operations in Afghanistan, Nicaragua and Angola are useful models for instituting a prohibition on covert paramilitary operations, they are also indicative of the problems endemic to the existing system of conducting covert operations. Both the Contra and Afghan operations were initiated as covert operations, and received public approval only afterwards. Congress gave its assent only with the momentum of the operations already in full swing. The Administration presented Congress with a *fait accompli*, and left Congress with the ominous burden of bearing the blame for whatever "failure" might ensue should it stop the operation.

As is also the case when U.S. forces are overtly committed abroad, it is very difficult for Congress to pull the plug once U.S. commitments and resources are on the line. The proposed prohibition, like the War Powers Resolution before it, is designed to give Congress its opportunity to act before the operation begins and before the political pressure mounts. Indeed, the present and proposed intelligence oversight statutes require prior notification of all covert operations, except in the most extreme circumstances, for precisely the same reason.

Thus, a bill to prohibit covert paramilitary operations would prevent the United States from engaging in any paramilitary operation until the policy is openly acknowledged, publicly debated, and approved by a joint resolution of Congress. (The Bradley bill concerning Angola mentioned above—S. 1474—provides appropriate language for this purpose.)The bill should further require that funding for the operation be annually appropriated, although the dollar amount may be kept secret along with other operational details, where necessary. The reporting requirements of the Intelligence Oversight Act would still apply to all paramilitary operations controlled by this new proposal.

Conclusion

Congress definitely has the constitutional authority and the statutory means to prohibit the use or support of covert paramilitary operations for conducting major foreign policy initiatives. What it lacks is the political will. The present sentiment on Capitol Hill continues to favor retaining the covert option. So concluded the Iran-Contra Report. Even the strongest advocates of tighter congressional oversight have not been willing to go the next step in support of a ban on paramilitary operations. That reluctance stems in part from the fear of giving up a policy tool that has come to be used as a middle ground between military intervention and diplomacy. But as former Deputy Assistant National Security Adviser to President Carter, David Aaron, stated, "one of the tragedies about covert action is that it is often an excuse fo doing something without really doing it. It is something tha a policy-maker does because he does not have anything els [to] do. . . ."

This practice, reinvigorated by the Reagan Administration counters the Church Committee assessment that cover operations should only be used in extreme situations. Onc covert paramilitary operations are removed from commo practice and relegated to last resort status, requiring th they be publicly approved will not seem so drastic. Moreove public authorization will not necessarily eliminate the "midd option" from our foreign policy retinue; it will simply place in the public sphere where all major policy decisions of democratic society belong. ■

PREPARED STATEMENT OF SECRETARY FRANK C. CARLUCCI

Mr. Chairman, thank you and the distinguished members of the Committee for the opportunity to discuss the War Powers Resolution and the proposed legislation to amend it, S.J. Res. 323. I applaud the sponsors of S.J. Res. 323 as well as the Chairman and Committee members for taking the initiative to address this crucial national security issue.

Fifteen years have elapsed since the War Powers Resolution was passed by the Congress. As meaningful deliberations by the Executive and the Congress on this profoundly important subject have occurred only rarely during this period, I submit that we who now have this opportunity to reconsider the fundamental legal and operational aspects of war powers are duty-bound to be completely candid with each other. We owe as much not only to ourselves and to the public we serve, but to every man and woman who wears the uniform of our military services and faithfully answers to the call of the Commander-in-Chief.

What I have to say today about the War Powers Resolution may displease some members of the Congress. I offer no apology, however, because I will say only what I truly believe. On this subject, perhaps more so than any other, bureaucratic or political self-interest must be set aside, and we must let the unvarnished truth be our guide.

Mr. Chairman, the War Powers Resolution is a failure and should be repealed. Whatever worthy goals it may have been intended to serve have not been served, while in practice, it has directly undermined other important national objectives.

The Committee has already received testimony from Judge Sofaer of the State Department which conveys the legal views of this Administration. I fully and strongly endorse those views. The War Powers Resolution has failed a reasonable test of time, as four Presidents, representing both parties, have judged it to exceed the mandate given to Congress under our Constitution. Rather than recapitulate the Constitutional arguments presented by Judge Sofaer, I will offer a personal view based on my own experience and expertise and my present responsibilities as Secretary of Defense.

Like many members of the Committee, I have served in Washington long enough to acquire some perspective on the War Powers Resolution, both its origins and its track record since 1973. It seems crystal clear from the vantage point of 1988 that the War Powers Resolution was the product of several myths that have since been dispelled.

One myth prevalent in 1973 was that the Presidency had become too powerful, exceeding the intentions of the founding fathers. Looking back on that time, it is now more readily apparent that Presidential ability to exercise discretion over the affairs of the nation has, if anything, declined in recent decades, as the revolution in communications and information technologies has brought about a level of public and congressional participation in the daily Executive decisionmaking process unimaginable in earlier decades.

A related myth from 1973 is that the Congress, because of the so-called "imperial Presidency," had been powerless to stop the White House from pursuing the Vietnam conflict. This argument was premised on the fact that no Declaration of War against North Vietnam or its allies was ever passed by Congress.

The fact is that the Congress had the power to stop America's military involvement in the Vietnam conflict, using its Constitutional power of the purse, but did not choose to exercise this power to constrain and wind down the U.S. effort until the early 1970s. One need only chronicle the many appropriations bills passed by the Congress in support of our Vietnam operations, and the frequent Congressional visits to South Vietnam during that period, to grasp the reality that Congress, no less than the Executive, lent its Constitutional powers in support of the Vietnam effort.

It is also useful to recall the American public's disaffection and disillusionment with the use of military force by 1973. In voting for the War Powers Resolution, the Congress promoted the view -- a misleading and politically self-serving view, in my estimation -- that an excessive concentration of power in the presidency was to blame for the controversial embroilment in Vietnam.

As the years have passed, Vietnam-era attitudes have evolved with the times. In this decade, Americans have come to appreciate anew that the use of military force can be a prudent, fully legitimate, and successful tool of our national policy, as in Grenada, Libya and the Persian Gulf. But the unhappy legacy of the War Powers Resolution as an attempt by the Congress, in a transitory moment of Presidential vulnerability, to increase its power while decreasing its political responsibility, has stayed with us. Now, thanks to the far-sightedness of those in Congress who are willing to face up to the failure of the War Powers Resolution, including many members of this Committee assembled here today, the Congress may at last correct its misstep by removing this bad law from the books.

Congressional enthusiasts of the War Powers Resolution do not describe it as I have. They cite the desirability of having the President draw upon congressional wisdom as he decides whether to commit U.S. military forces abroad. They also point to the benefit to our nation's foreign policy of having the American people, through their representatives in Congress, endorse a military operation initiated by the President.

I wholeheartedly support both of these objectives. The problem with the War Powers Resolution is that it serves neither. Instead of encouraging the President to seek out the views of Congress, it confronts him by purporting to deny his constitutional authority as Commander-in-Chief of the armed forces after sixty to ninety days of a military operation. Instead of showing the world the will of the American people, the War Powers Resolution could, according to its terms, implement itself without a single vote being cast in the Congress.

This latter flaw, as much as the unconstitutionality of the War Powers Resolution, offends me and seems particularly out of step with the times. Public preoccupations have changed since 1973. Today the accent in government is on accountability, competence and efficiency, and the immense war powers responsibility places a premium on all three of these objectives.

Accountability is a basic concomitant of war powers. No President can evade full responsibility for the risks and consequences of employing U.S. military force -- nor has any President tried to do so. Franklin Delano Roosevelt was accountable for committing the United States to the war in Europe, as was Harry Truman for defending South Korea. President Eisenhower sent 17,000 Marines into Lebanon, while Kennedy, Johnson and Nixon all accepted the risks and the responsibilities for their decisions in the Vietnam conflict. President Ford did what he felt he had to do in the Mayaguez incident, as did President Carter in the aborted Iran rescue mission. President Reagan has continued this unbroken tradition of full accountability with the actions in Grenada, Libya, Lebanon and the Persian Gulf.

A President would be no less accountable for the risks and consequences of failing to employ force where the defense of the national interest required it. This responsibility is a burden which we put on every President, without exception.

The War Powers Resolution formula, by which Congress could seek to invalidate the action of the Commander-in-Chief after sixty to ninety days through the simple expedient of doing nothing, is the very antithesis of the accountability which lies at the heart of participatory democracy. I believe such a formula shortchanges the American people, who deserve and expect to have their collective will expressed in a time of international duress; and I find it unconscionable that any elected officeholder would seek to participate in the exercise of war powers without full public accountability, when our forces in the field have pledged their very lives and sacred honor to the national interest.

That is why the no-fault formula in the War Powers Resolution, wherein no member of Congress is required to stand up and be counted, is unacceptable. As President Nixon stated in his veto message of October 24, 1973, "[O]ne cannot become a responsible partner unless one is prepared to take responsible action," meaning "full debate on the merits of the issue and... each member taking the responsibility of casting a yes or no vote after considering those merits."

Mr. Chairman, since the debate over war powers arose in the early 1970s, the focus has been almost exclusively on "powers." This time, let us give equal consideration to the subject of "war," for there is much more to this issue than sorting out Executive and Legislative authorities. It does not surprise me that congressional commentary on the subject of war powers invariably emphasizes the importance of congressional support for U.S. military actions; who can deny that the imprimatur of the Congress confers greater legitimacy and force to the acts of the Executive? Certainly not I. But legitimacy, while necessary, is not the only factor involved in the government's responsibility to preserve the national interest.

Efficiency and competence are also central to the mission of government. The framers of the Constitution recognized this when they created the Executive, which has its own unique and vital purpose. In the framers' language, the prime characteristic of the Presidency is "energy," or the capacity for prompt action. The Congress, by its very design, is not capable of effective executive action.

When U.S. military force must be used, the American people not only want the action to be legitimately authorized -- they also want it to succeed. They want the tactical military objective to be accomplished with a minimum loss of life, and they want the underlying foreign policy purpose to be served by that action.

The successful employment of U.S. military forces may hinge upon the ability to act quickly. What we must do to defend our national and international interests is governed to a great extent by external forces and events over which we have no control and which seldom wait for us to act. Yet, for sixty to ninety days, or longer, the War Powers Resolution would leave in suspense the question of whether a military deployment was authorized.

Think about the factors upon which success may depend: high morale of our forces; high confidence in our resolve on the part of our allies; and -- most of all -- the perception on the part of our adversaries that the United States has the willpower, the means, and the intention to achieve our goals despite their opposition.

I cannot overstate the importance of this last objective -- convincing our adversaries that we as a nation intend to prevail on whatever point of contention has placed us at odds. Military strategists from Sun Tsu to Clausewitz to Admiral Bill Crowe all agree that the most successful battle is the one which never needs to be fought because one's adversary recognizes the futility of further confrontation.

Yet look at the signals the War Powers Resolution would have America send to allies and adversaries alike at the critical moment when our national resolve is being measured abroad. The first thing a President is asked to do is judge whether hostilities are imminent. If he says "yes," he is breaking a cardinal rule of military strategy by forfeiting the advantage of tactical surprise. One can only imagine the casualties Israel might have sustained in June 1967 had Prime Minister Golda Meir been obliged to engage in extensive War Powers consultations with the Knesset signalling Israel's imminent preemptive attack upon neighboring forces which it knew were poised to assault Israel.

If the President expresses the judgment that hostilities are not imminent -- assuming, as I do, that Presidents would report truthfully to the Congress even while forfeiting another key military advantage, that of deception -- our adversaries can breathe more easily. They know from the experience since 1973 that the Executive-Legislative disagreement over the War Powers Resolution slows down the decisionmaking process in Washington and renders major tactical military surprises by the United States almost inconceivable.

The sixty-day deadline, extendable to ninety days, is the feature of the War Powers Resolution formula most debilitating to the pursuit of strategic success in an exigent situation. The very notion of setting deadlines, however short or lengthy, plants seeds of doubt in the minds of our own forces as to whether their acts of courage are backed by their own nation. It plants seeds of doubt in the minds of our allies as to whether they should join in our military operational efforts, or wait to see whether War Powers disagreements in Washington will unravel the President's approach to a problem abroad.

Deadlines constrain our military planners from fashioning an optimal response to the threat. One wonders whether President Kennedy would have regarded a naval blockade as a viable option in the Cuban Missile Crisis had the War Powers Resolution deadlines and reporting requirements been in existence. Kennedy's misgiving would have had nothing to do with the Congress; obviously, all Americans rallied around their President in that terrible confrontation. Rather, he would have had to concern himself with Nikita Khrushchev's perceptions about the War Powers Resolution.

In my view, we are fortunate that no such thing existed in October 1962. In those tense circumstances, the White House wisely left it entirely to the Kremlin's imagination and intelligence capability to judge what sorts of forces the United States was deploying, where, how they were armed, their mission and rules of engagement, whether we anticipated hostilities, and how long we intended to maintain our escalated force posture.

Americans are, to put it mildly, gratified that President Kennedy prevailed in that test of wills -- that the other side "blinked" first. It is a mystery to me that anyone could expect a future President to engage successfully in a similar test of wills under the ticking clock of the War Powers Resolution deadlines, when an adversary could reasonably conclude that the

United States is unilaterally pre-programmed to "blink" after sixty days of a deployment of forces.

The plain fact is that whether the challenge to our security takes the form of nuclear brinkmanship, armed conflict, terrorism or any other type of threat to our national interests, deadlines simply encourage adversaries to wait us out until our own political system accomplishes for them what their own forces or terrorists could never achieve.

Nor is the problem with deadlines a matter of their length. It took, after all, several decades for the Ayatollah Khomeini and his clerical comrades to seize power in Iran. Khomeini himself waited in exile for fourteen years before settling his score with the Shah. When the United States initiated the reflagging operation in the Persian Gulf, the threat in the Gulf to U.S.-flag shipping, international commercial traffic and the security of Gulf states friendly to the United States emanated from the Iranian regime. Given the Ayatollah's mindset, any sort of self-imposed deadline on the enhanced U.S. Navy presence in the Gulf -- whether days, months, or years -- would surely have been self-defeating.

Indeed, the formula of the War Powers Resolution was entirely incompatible with the needs of the United States in its Persian Gulf deployment strategy. The purpose of increasing our forces was not to engage in hostilities, but to deter them. Had we imposed a deadline on the reflagging operation at the outset, the Kuwaitis might well have invited the Soviet navy to take up a major role in the Persian Gulf for the first time. The British, French, Dutch, and Belgians might well have refrained from following our leadership in providing naval protection to shipping in the Gulf.

Most of all, the regime in Teheran might have held off from its historic decision to end its war with Iraq, believing that if it only waited for the Americans to reach their time limit, it would again be able to exert effective pressure on the Gulf Arab states and weaken Iraq's leverage.

Thank goodness everything came out as it did. Our allies and adversaries believed us when we pledged that the United States would not back away from the defense of its national interests; and today, there is the hope of peace in the Gulf region.

Now let us recall how the U.S. Congress responded to the President's actions. In October 1987, the Senate debated a resolution concerning our policy in the Gulf. The resolution which passed, after initially being defeated, did nothing more than to schedule a Senate vote again several months later on a resolution not yet written. Senator Bumpers said that this resolution had been carefully designed "to do nothing."

In the House of Representatives, meanwhile, 110 members attempted to sue the President, claiming he had not fulfilled his obligations according to the War Powers Resolution. On December 18, 1987, Judge George H. Revercomb of the U.S. District Court for the District of Columbia dismissed the suit, saying, "The President must have flexibility in executing military and foreign policy on a day-to-day basis."

Had the 110 members of the House of Representatives been able to persuade a total of two-thirds of the House and Senate of their position on the President's Persian Gulf policy, there would have been no reason to solicit support from the courts. As Judge Revercomb stated when he dismissed their suit, their action was a "byproduct of political disputes within Congress;" and for him to rule on the issue would have been to "impose a consensus on Congress" that it had not achieved on its own. Congress, he said, is "free to adopt a variety of positions on the War Powers Resolution, depending on its ability to achieve a political consensus."

Mr. Chairman, I believe that fifteen years of experience with the War Powers Resolution is enough to see that it is incompatible with the Constitutional scheme set out by our founding fathers. The Executive branch, by design, is a hierarchy, ultimately responsive to a single Commander-in-Chief elected by all of the people. It alone is capable of immediate, clear, coherent and consistent action. The Legislative branch, by design, brings 535 independent actors into a deliberative process which hears the voices of Americans everywhere on every issue.

There is nothing deficient in Congress' Constitutional power of the purse, as every Executive agency head knows from painful experience. Schemes to inhibit the Constitutional powers of the President, or to substitute self-enforcing legislative mechanisms for the exercise of responsible leadership, only serve to obscure the real source of many members' frustration -- namely, their inability to persuade their own colleagues to agree with them and to vote with them.

When the American people overwhelmingly and strongly believe that the President's policy must be reversed, the Congress will reverse it. The simple test of whether the American people genuinely hold to this view is to count the votes in Congress. If the votes are not there, neither is the popular mandate.

A former Chairman of the Senate Committee on Foreign Relations, the late Senator Frank Church, offered some candid observations about the War Powers Resolution in a hearing much like this one held in July of 1977. An original supporter of the legislation, he subsequently came to doubt the utility of such a statute. Senator Church gave the following explanation for his change of mind:

> "First, if the President, as Commander-in-Chief, uses the Armed Forces in an action that is both swift and successful, then there is no reason to expect the Congress to do anything other than applaud.
>
> "If the President employs forces in an action which is swift, but unsuccessful, then the Congress is faced with a fait accompli, and although it may rebuke the President, it can do little else.

> "If the President undertakes to introduce American forces in a foreign war that is large and sustained, then it seems to me that the argument that the War Powers Resolution forces the Congress to confront that decision is an argument that overlooks the fact that Congress in any case must confront the decision, because it is the Congress that must appropriate the money to make it possible for the sustained action to be sustained.
>
> "So I wonder really whether we have done very much in furthering our purpose through the War Powers Resolution. I say that very respectfully because I appreciate the difficulty, and I also fully supported the motive....
>
> "I think that this whole exercise is something like trying to count how many angels can stand on the head of a pin. It is elaborately interesting and absorbing from a lawyer's point of view, and certainly is a good subject for a lot of learned writing in the constitutional field; but, as a practical matter, I think it is going to come down to the arena of politics and the tug of war between the two branches in the self-assertion of their two powers. There is no neat formula that can accommodate the needs of the future in this respect."

That is why I believe that the most prudent step the Congress can take to clarify the issue of war powers and to maximize the effective and legitimate exercise of authority by all three branches of government is to repeal the War Powers Resolution and return to the only formula I know of which will withstand the test of time, namely the Constitution.

****

Mr. Chairman, I recognize that the Committee is interested in exploring the merits of specific proposals embodied in S.J. Res. 323. Although I see no necessity for war powers legislation, I will comment briefly on aspects of the proposed legislation for the record, again emphasizing that I fully endorse the Administration's legal views that have already been provided.

Section 3 contains a proposal for an 18-member consultative group. My record demonstrates my strong commitment to close consultation between the branches. I also believe, however, that the Executive is entitled to maintain the integrity of its own deliberative process, just as Committees of Congress frequently mark up their bills and hold conference sessions behind closed doors.

That said, for the sake of better consultation I hope that the Congress will begin to look closely at the need to streamline its own internal management in the field of foreign affairs and national security. Thirty years ago, a President or Cabinet member could consult with a mere handful of senior members of Congress and be assured that their positions and pledges would be upheld, and their confidences maintained, within the halls of Congress. Those days are gone, as the Congress has expanded the committee system and given far greater voice to all members, regardless of seniority.

I think the broadening of responsible participation in Congress was a good thing. One consequence, however, has been that the Executive has never been certain whether a given Member or Committee of Congress was speaking for the whole.

From a management standpoint, this has led to uncertainty in the Executive as to how much consultation is enough on any given issue. It has frequently led to tremendous duplication of effort, as several Executive departments or offices have been asked by different Members or committees to provide similar testimony, briefings, written reports and responses to the same questions.

Usually, this inefficiency is regrettable but tolerable, and can be viewed as the price of having coordinated policy between the branches. But in a crisis, when the President must act and the reactions of our adversary must be monitored, analyzed and factored into the U.S. effort on a real-time basis, open-ended and duplicative reporting requests from all quarters on Capitol Hill can be a difficult burden on the senior policymakers and experts in the Executive branch.

It is an unfortunate irony, in this regard, that those situations which most urgently require the Executive branch to focus its finite energies on a national security problem tend to stimulate the greatest volume of congressional requests for high-level testimony and written submissions from the Executive branch. Because I believe that success of our national strategy in a crisis requires efficiency and competence, I hope that the Congress will take this into account in the future.

As to the feasibility of contacting or assembling an eighteen-member group in a crisis, it is a virtual certainty that in many situations this would not be feasible. My rule of thumb would be that the President will make best efforts at all times to consult adequately with the Congress, recognizing that no single format is likely to be satisfactory.

Section 4(a)"(c)" would purport to give any member of Congress standing in a court of law to obtain an injunction against the President's policy. This proposal seems to me utterly inconsistent with the system of government set out by the founding fathers. Bluntly stated, if a member of Congress cannot persuade his own branch of the government to vote as he desires, there is no justification for enabling him to bring another branch into the process. Obversely, if a member can persuade the Congress to vote as he desires, he will have no incentive to involve the courts.

As I have said, the Constitution already gives the Congress ample power to assert its collective will. There is only one requirement: it must have a collective will. The authors of S.J. Res. 323 would appear to have recognized this when they drafted Section 6, requiring a majority of both Houses to pass a joint resolution of disapproval which, if vetoed by the President, would then require two-thirds of both Houses to become law.

Section 5 contains prohibitions on the use of funds. I would like to state for the record my complete agreement with

Judge Sofaer's statement that the power to control spending cannot properly be used to interfere with the President's discretion over the actual conduct of military operations, such as by ordering the President to conduct a particular type of military operation in a specific manner. If the policy direction charted by the President is definitively rejected by the Congress -- even when Congress overrides his veto -- the President still retains his powers and responsibilities as Commander-in-Chief to determine the most prudent and effective way, in operational military terms, to give effect to the new policy direction mandated by Congress.

Section 5 also purports to give Congress the power to place future occupants of the House and Senate on collective "auto-pilot" by enjoining them from funding activities inconsistent with any aspect of war powers-related legislation already on the books. This strikes me as curious, if not naive. A central flaw of the War Powers Resolution was its attempt to preordain legislative action thenceforth, at the expense of responsible contemporaneous action by the sitting members. Surely the authors of S.J. Res. 323 do not wish to repeat the mistake.

The presumption, embodied in Section 6, that a Presidential action to deploy U.S. forces is authorized unless and until Congress takes effective action to alter that policy, is correct. As the Constitution already makes that presumption, only a

Constitutional amendment could change it. The President does not require this or any other statute to authorize him to exercise his Article II powers as Commander-in-Chief.

Although Section 6 deals with internal congressional procedures to consider joint resolutions, there is one aspect to this provision which may reflect a lack of realism about the ability of Congress to participate as we all would like it to in decisions to employ U.S. forces. I refer to the proposed time limits, measured in minutes, hours, and calendar or session days, which are to govern congressional deliberations on these matters.

Mr. Chairman, I have not added up the minimum time it would take both Houses to vote against a Presidential action and override his veto under the terms of S.J. Res. 323. But I do know that in the event of a warning of nuclear attack, a President would not be able to wait twenty hours before issuing orders to U.S. forces; he might only have twenty minutes, if that much time, to respond.

The nuclear scenario is not just a rare exception meriting an asterisk in the grand catalogue of war powers exigencies. My in-basket is frequently graced with reports showing that the threat environment of the future will include deadly conventional, chemical, space-based, and even more exotic technological threats which will afford very short warning times to the President.

National security analysts are heard from time to time exhorting the Pentagon's planners not to fight "the last war." This advice is particularly germane to the issue now before the Congress, as I am certain no member intends to advocate passage of a law which is transparently obsolescent. If we are serious about revisiting the ground rules for Executive-Legislative action relating to war powers, we must be realistic about the likely nature of "war" in the years, decades and centuries ahead.

Having tried to do so myself, I have come to the conclusion that no conceivable statutory scheme regarding war powers can improve on what we have had all along: an Executive which can act, plan, command and manage efficiently and successfully; and a Legislature which can use the power of the purse both to steer the broad direction of national policy and to terminate any Executive endeavor requiring an appropriation of funds to which the American people overwhelmingly object.

PREPARED STATEMENT OF MICHAEL J. GLENNON

Mr. Chairman and Members of the Committee:

Let me begin by thanking the Subcommittee for inviting me to be here today. I wish to note at the outset that, although I serve as counsel to the congressional plaintiffs in Lowry v. Reagan, the views I express here today do not necessarily represent those of my clients in that case. Our action in that case, challenging presidential non-compliance with the War Powers Reosoltion in the Persian Gulf, was dismissed by the federal district court. The appeal was argued before a panel of the D.C. Circuit on February 29, and we are awaiting the court's judgment.

My remarks will be directed at the constitutionality of the War Powers Resolution and also of the draft "Use of Force Act," which is set forth in Committee Print No. 1 and which, as I understand it, Senator Biden prepared not as a proposal but as a focal point for discussion and analysis. I believe that each of its provisions is constitutional, but I am less convinced that certain of those provisions are wise from a policy perspective. If the Subcommittee wishes to consider it, I would thus suggest that primary attention be devoted to policy considerations.

TESTIMONY OF MICHAEL J. GLENNON

THE LEGAL ADVISER'S TESTIMONY

In discussing issues of constitutionality it seems appropriate to begin with a comment upon the September 14 testimony of the State Department Legal Adviser, Abraham Sofaer. In that testimony and in his answers to the Chairman's written questions, Mr. Sofaer launched a broad attack upon the congressional war-making power, referring throughout to "independent" power conferred upon the President by the Constitution and reiterating the proposition, transposed in various forms, that independent presidential power is not subject to statutory limitation. That observation is of course true, and, indeed, truistic: what his claim comes down to is that Congress cannot act unconstitutionally. Yet Mr. Sofaer repeatedly overlooks the fact that there is a second category of presidential power that is subject to congressional regulation: concurrent power. This is constitutional power that may be exercised initially by the President in the face of congressional silence, but which Congress may nonetheless subsequently choose to restrict.

It is this class of power to which Justice Jackson referred in his famous concurring opinion in the 1952 Steel Seizure Case. That case presented the Supreme Court with a stark choice. A nation-wide strike had broken out in the steel industry. According to the Youngstown court:

> The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and

> that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.[1]

President Harry S Truman consequently issued an executive order directing the Secretary of Commerce to take possession of most of the mills and keep them running, arguing that the President had "inherent power" to do so. The companies objected, complaining in court that the seizure was not authorized by the Constitution or by any statute.

Congress had not statutorily authorized the seizure, either before or after it occurred. Congress had, however, enacted three statutes providing for governmental seizure of the mills in certain specifically prescribed situations, but the Administration never claimed that any of those conditions had existed prior to its action. More important, Congress had in fact considered, and rejected, authorization for the sort of seizure Truman actually ordered.

Justice Hugo Black delivered the opinion of the Court. The President, Justice Black wrote, had engaged in law-making, a task assigned by the Constitution to Congress.[2] The seizure was therefore unlawful, since the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[3] Yet Youngstown is remembered mostly for the concurring opinion of Justice Robert Jackson. In reasoning strikingly reminiscent of Marshall's in Little, Jackson wrote that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[4] Because of the importance of Jackson's opinion, key portions are set forth without paraphrase:

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[5]

The opinion is thus notable for its unwillingness to decide the case by reference to "independent" presidential power, and in the weight it accords congressional will. It remained for a former Jackson clerk, Justice William Rehnquist, to give Jackson's opinion the force of law. The Supreme Court formally adopted this mode of analysis in Dames & Moore v. Regan,[6] in which Justice William Rehnquist applied Jackson's approach to uphold President Jimmy Carter's Iranian hostage settlement agreement as having been authorized by Congress.[7] In so doing, Rehnquist wrote that Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area."[8] Rehnquist then quoted from Jackson a passage that, today, is as significant as it is timely. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."[9]

This, then, is the mode of analysis pursued by the United States Supreme Court in the assessing the reach of presidential foreign affairs power. It bears repeating: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[10] "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."[11]

TESTIMONY OF MICHAEL J. GLENNON

CONSTITUTIONALITY OF THE WAR POWERS RESOLUTION

The War Powers Resolution placed certain presidential use of armed force in third category of Justice Jackson's analysis, where his power is at its lowest ebb. Under this analytical approach, the time limits of the War Powers Resolution, as well as the "prior restraints" set forth in the earlier Senate version, seem clearly constitutional. The scope of the President's concurrent power is a function of the concurrence or non-concurrence of the Congress; once Congress acts, its negative provides "the rule for the case."[12] That analytical framework provides a general foundation for the Resolution's mandate of consultation and reporting as well as the time limit imposed upon the use of force abroad -- all of which, in the absence of a statement by the Congress, might fall within a "zone of twilight."[13] This was Corwin's analysis, too: "Clearly such legislation did not require a constitutional amendment, since it only spells out how a power already granted to Congress is to be exercised. . . . [O]n the basis of the precedent of the Steel Seizure case . . . it is probable that the Court would uphold the act of Congress."[14] In an important but largely unnoticed opinion of the Carter Justice Department, the Office of the Legal Counsel agreed:

> We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity." This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his

> constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.
>
> Finally, Congress can regulate the President's exercise of his inherent powers by imposing limits by statute.[15]

Mr. Sofaer ignores the learning of Steel Seizure, however, as well as that of the Justice Department, and proceeds to challenge the validity of the core of the Resolution, the 60-day time period. He can barely list the parade of horribles set to march by the time limits: they interfere with the "successful completion" of the President's initiative; they "may signal a divided nation, giving adversaries a basis for hoping that the President may be forced to desist"; they provide "an undesirable occasion for interbranch or partisan rivalry...."

The curious thing about these arguments is that every one of them is an argument, not against the War Powers Resolution, but against constitutional limitations on presidential war-making power. Every one of these arguments is an argument for untrammeled presidential discretion to use the armed forces whenever, wherever, and for whatever purpose the President may choose. Indeed, on close analysis it becomes clear that that is precisely his view: "explicit legislative approval for particular uses of force has never been necessary," he candidly states. The President thus could have used armed force in World War I, World War II, or Vietnam without any declaration of war or any other legislative approval. This view of war-making power is of course not new, but it should suffice at this point in our history to note that the divine-right-of-kings approach was ventilated and rejected in 1789, and I see no point in reopening the debate today.

CONSTITUTIONALITY OF THE USE OF FORCE ACT

The constitutional theory underpinning the War Powers Resolution is different from that underpinning the Use of Force Act. The War Powers Resolution confers no authority upon the President; as section 8 makes clear, it merely places limits upon the use authority that otherwise might lay unregulated. The Use of Force Act, on the other hand, affirmatively delegates power to the President to use armed force in certain specified instances. The distinction is critical. Early in our history it was held that Congress can authorize "imperfect" war in which authority is conferred upon the President subject to statutorily specified limitations. Writing in Bas v. Tingy in 1800, Justice Paterson that the war between the United States and France was not an unlimited was, but "a war for certain objects, and to a certain extent." He continued: "[A]s far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations." Similarly, Justice Washington underscored the validity of congressionally-imposed limits incident to the delegation of power:

> [H]ostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things. . . . [T]hose who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of

their commission.

Similar analysis is to be found in Talbot v. Seaman (1801).

Where Congress delegates authority, therefore, limits imposed incident to that delegation are constitutionally valid. This important premise undergirds the approach of the Use of Force Act.

Several additional constitutional provisions are pertinent to this discussion, although one only hypothetically.

THE COMMANDER-IN-CHIEF CLAUSE

The first is the Commander-in-Chief Clause: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. . . ."[16] In the Federalist No. 69 Hamilton explained the commander-in-chief clause:

> [T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature.[17]

Professor Henkin has noted in this connection that generals, "even when they are `first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others."[18] The "others," of course, consisted of Congress; James Wilson's comments at the Pennsylvania ratifying convention seemed to sum up his colleagues' belief concerning the power to initiate hostilities:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives . . . .[19]

No "independent" power conferred by the Commander-in-Chief Clause would interfere with the power of Congress to impose restrictions of the sort set forth in either the Use of Force Act or the War Powers Resolution.

THE WAR POWERS RESOLUTION'S LEGISLATIVE VETO

The so-called "Presentation Clause," however, does cause problems. Section 5(c) of the Resolution, allowing Congress by concurrent resolution to force the President to withdraw the armed forces from hostilities, is clearly invalid after the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*.[20] The Court found that Presentation Clause[21] requirements must be met whenever legislative action has the "purpose and effect of altering the legal rights, duties and relations of persons, including the . . . Executive Branch . . . outside the legislative branch."[22] Adoption of a concurrent resolution under section 5(c) would have the purpose and effect of altering the rights and duties of the President. Justice White, in dissent, was doubtless correct in reading the majority opinion as invalidating the legislative veto provision in the War Powers Resolution.[23]

To be sure, arguments can be made to the contrary, but none is persuasive. It might be argued, for example, that the legislative veto contained in section 5(c) of the War Powers Resolution is distinguishable from that in Chadha[24] in that the latter pertained to the exercise of a statutorily delegated power, whereas, in the case of the War Powers Resolution (and, arguably, the Impoundment Control Act[25] as well), the legislative veto in question applies to the exercise of a power that derives entirely from the Constitution. This argument, however, proves too much and only fortifies the conclusion that Chadha applies to the War Powers Resolution: if Congress is unable to attach the "string" of a legislative veto to a statutorily delegated power, surely it is on far weaker ground when it attempts to do so in connection with a power not delegated by it but conferred by the Constitution.[26]

A broader argument against the application of Chadha is that it would be inconsistent with previous cases that affirm the power of Congress to express its will in other contexts without adhering to the requirements of the Presentation Clause. In the Steel Seizure Case, for example, the Court found that Congress had expressed its opposition to presidential seizure of the steel mills by rejecting an amendment that would have authorized that seizure; the President never had the opportunity to veto the congressional rejection of that amendment since it was not contained in the legislation presented to him.[27] Similarly, in Dames & Moore v. Regan, the Court inferred congressional approval of the Iranian Claims Settlement Agreement from the failure of Congress to disapprove.[28]

In each case, the courts necessarily reasoned that "the legal rights, duties and relations of persons . . . outside the legislative branch"[29] were affected by congressional action accomplished without strict adherence to Presentation Clause procedures. Yet there is no suggestion in Chadha that the Court intended to overrule either case or to limit the power of Congress to so express its will. Although the Court disapproves of a "binding" expression of congressional opinion through simple or concurrent resolution and will give such expression no legal effect, it seems willing to infer congressional intent from sources far less precise.[30] Accordingly, whereas a concurrent resolution adopted under section 5(c) can have no mandatory effect in requiring presidential withdrawal of the armed forces, such a resolution could nonetheless suffice under Justice Jackson's analysis to place the President's power at its lowest ebb. Indeed, it is hard to see why a concurrent resolution adopted without reference to the War Powers Resolution should not be accorded such effect.

As to the time limits, the argument advanced by George Will and others -- that what Congress cannot accomplish through action it cannot accomplish through inaction -- applies to far more than the "inaction" incident to the expiration of the 60-day time limit.[31] All sunset legislation conferring statutory authority on the President for a limited period of time -- and, indeed, the 18-month Lebanon compromise itself -- is impermissible under Will's Constitution. However reckless the Chadha court may have been in failing to distinguish among the several different categories of legislative vetoes,[32] nothing in its opinion suggests that the hundreds of laws conferring statutory authority for a limited period of time were intended to fall within its sweep.[33]

FUNDING LIMITATIONS

Section 9 of the Use of Force Act prohibits any use of funds for purposes inconsistent with the provisions of the Act and imposes internal parliamentary procedures to give teeth to that prohibition. This provision is supported by the Constitution's plenary grant of appropriations power to Congress. Article I, section 9, clause 7 provides that "No money shall be withdrawn from the treasury, but in consequence of appropriations made by law." The point-of-order procedure is patterned after the that developed in the "Treaty Powers Resolution" of Sen. Dick Clark, Senate Resolution 24.[34] This was incorporated in section 502 of the State Department Authorization reported by this Committee in 1978,[35] and the Committee report describes the point-of-order procedure at some length. As transplanted to the war powers garden, the procedure would cause a point of order to lie in either body against any measure that contains funds to carry out a use of force found by Congress, by concurrent resolution, to be inconsistent with the provisions of the Use of Force Act. Because the concurrent resolution in question would not have effect beyond the halls of Congress, it is not proscribed by Chadha. The funding limitation provision of the Use of Force Act would be enacted pursuant to the plenary constitutional power of each House of Congress to determine its rules of procedure.[36] This, the Supreme Court has said, "is a continuous power, always subject to be exercised by [either] House, and within [constitutional] limits, absolute and beyond the challenge of any other body of tribunal."[37]

STATUTORILY-MANDATED JUSTICIABILITY

Finally, one provision of the Use of Force Act deserves special comment, only to note that its limited terms obviate whatever constitutional problems might otherwise arise. Section 10 of Committee Print No. 1 attempts to get the courts to resolve disputes over the application of the Use of Force Act. It creates standing on the part of Members of Congress to challenge non-compliance with the Act, which clearly can be done by statute. It then proceeds to direct the courts not to dismiss such an action on grounds of non-justiciability unless that action is required by the Constitution. Similarly, it directs the courts to decide such a case as expeditiously as possible consistent with the requirements of the Constitution. Because this section spurs the judiciary to action only to the extent constitutionally permissible, by its own terms the provision avoids constitutional pitfalls.

That concludes my commentary with respect to issues of constitutionality, Mr. Chairman. I reiterate my belief that serious issues of wisdom remain to be addressed, particularly concerning the scope of authority conferred by section 4(a) of the Use of Force Act.

I would be glad to answer the Subcomittee's questions.

TESTIMONY OF MICHAEL J. GLENNON

1. The Steel Seizure Case, 343 U.S. at 583.

2. Id. at 587-89.

3. Id. at 585.

4. 343 U.S. at 635 (Jackson, J., concurring).

5. The Steel Seizure Case, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

6. 453 U.S. 654 (1981).

7. Id. at 688.

8. Id. at 661.

9. Id. at 662. Compare Alexander Hamilton, no admirer of legislatures:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of . . . a President of the United States.

THE FEDERALIST No. 75, at 505-06 (A. Hamilton)(J. Cooke ed. 1961).

An important recent reaffirmation of this approach is found in Webster v. Doe, 56 U.S.L.W. 3880 (U.S., June 27, 1988), discussed further below. Despite the protestations of the two dissenters, the Court -- speaking again through Chief Justice Rehnquist -- grounded on congressional will rather than constitutional principle its conclusion that a former CIA employee was not precluded from seeking judicial review of the decision by which he was dismissed. Justice Scalia, dissenting, worried that the majority's opinion

> will have ramifications far beyond creation of the world's only secret intelligence agency that must litigate the dismissal of its agents. If constitutional claims can be raised in this highly sensitive context, it is hard to imagine where they cannot. The assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid.

10. 343 U.S. at 635 (Jackson, J., concurring).

11. The Steel Seizure Case, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

12. Youngstown, 343 U.S. at 634 (Jackson, J., concurring).

13. Id. at 637.

TESTIMONY OF MICHAEL J. GLENNON

14. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 110 (H. Chase & C. Ducat, eds., 14th ed., 1978).

15. Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A OP. OFFICE OF THE LEGAL COUNSEL, DEPARTMENT OF JUSTICE 185, 196 (1980).

16. U.S. CONST. art. II, § 2, cl. 1.

17. THE FEDERALIST NO. 69, at 465 (A. Hamilton)(J. Cooke ed. 1961).

18. HENKIN, supra note 8, at 50-51.

19. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed. 1859, 1861).

20. 462 U.S. 919 (1983).

21. U.S. CONST., art. I, §7, cl. 3.

22. Chadha, 462 U.S. at 952.

23. Id. at 974 (White, J., dissenting). Justice White concluded that "[t]he Court's Article I analysis appears to invalidate all legislative vetoes irrespective of form or substance." Id.

24. The legislative veto at issue in Chadha was contained in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1976).

25. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403.

26. Accord Note, The Future of the War Powers Resolution, 36 STAN.L.REV. 1407, 1453 (1984); Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A OP. OFFICE OF THE LEGAL COUNSEL, DEPARTMENT OF JUSTICE 185, 196 (1980).

27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952).

28. 453 U.S. at 682.

29. INS v. Chadha, 462 U.S. at 952 (1983).

30. The Court's holding in Chadha that Congress can speak legislatively only by following the requirements of the Presentation Clause finds support in some older cases suggesting that it is impermissible for a court to consult legislative debates to determine the meaning of a statute. See, e.g., Standard Oil v. United States, 221 U.S. 1, 50 (1910); United States v. Trans-

Missouri Freight Ass'n, 166 U.S. 290, 318 (1896). The law today is clearly to the contrary.

31. Will, War Powers Act and Common Sense, L.A. Times, Sept. 15, 1983, §2 at 7, col. 1; Moore, Rethinking the "War Powers" Gambit, Wall St. J., Oct. 27, 1983, at 30, col. 3.

32. For a collection of citations to statutes exhibiting the variety of legislative vetoes that exist, see Chadha, 462 U.S. at 1003-13 (Appendix to Opinion of White, J., dissenting).

33. Such sunset laws may have been within the intent of the Framers. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (M. Farrand ed. 1966) (quoting Madison as recognizing the possibility that limits in the duration of laws would be used by Congress), cited in Chadha, 462 U.S. at 954 n.18. The Chadha Court recognized that durational limits on authorizations "would be a constitutionally permissible means of limiting the power of administrative agencies." Id. at 955 n.19.

34. 95th Cong., 1st Sess. (1977).

35. S. 3076, 95th Cong., 2d Sess. (1978).

36. See U.S. Cons't., art. 1, sec. 5, cl. 2.

37. United States v. Ballin, 146 U.S. 1 (1892).

PREPARED STATEMENT OF JAMES NATHAN

Mr Chairman, members of the Committee, I am honored by your invitation. I come before you not as a constitutional lawyer; indeed, not as a lawyer at all. Neither am I a professional historian. I have been a US foreign service officer, with a specialization in political military affairs. My academic expertise, however, is of a general kind. I teach and write in the broad fields of US foreign policy and international relations. For the last fifteen years, I have seen two of my coauthor texts and other scholarly musing find their way to every kind of institution of higher education. I also have some knowledge of the requirements of military power. From time to time, the centers of advance study of the US armed services have offered me shelter so that I might contemplate the nexus between force and policy. So I come here with an awareness of my limitations. But, I also believe that I have some experience in contemplating the issues before you.

The Constitutional Design: A "decidedly inferior" form?

Scholars, policy-makers, and jurists give much weight to the"original intent" of the founders in arguing issues about "who makes war" in our democracy. If original intent is properly understood, then, it is asserted, we can understand how policy formulation should proceed in our day. The Founders had three central concerns:

@The men of Philadelphia were concerned about the oppression of "kingly wars." For years, the Colonies had been implicated in dynastic struggles far removed from the interests of the young republic. The Framers did not want to find themselves hostage to any future Executive (be he as mad as George 111 or no) who exploited citizens without their properly expressed consent.

@ The Founders knew that by arrogating to themselves too many functions, legislatures had the potential to become tyrannous. Adams observations on the the emergence of a legislature in France in 1787 were to prove especially prescient when, two years later, the new French Directorate and Committee on Public Safety proved monstrously totalitarian.

@ The men of Philadelphia craved efficiency[1] in foreign affairs. They had learned from bitter experience the requisites of waging effective war. For several winters, General Washington and his troops had shivered with cold while waiting for the Continental Congress to render them provisions. US emissaries carried on a year at a time without knowing their instructions. The results of 1787 were not seen as a perfect remedy.

The Founders tried to meet these requirements: efficiency; and avoiding, on the one hand, a tyrannous executive; and on the other, avoiding a tyrannous legislature.

Plainly, the Constitution was "a mosaic of everyone's second choice[2]."Like many good treaties, the Constitution was an exercise in studied ambiguity. The document contains deliberate silences about many issues in external relations. Justice Jackson characterized these absences of commentary as "zone[s] of twilight.[3]" But this lack of specificity was probably deliberately crafted.

The Founders knew their solutions might be both messy and unique to their time. They were not about to prescribe solutions to indeterminate problems in unknowable circumstances in the indefinite future. But they were men of a peculiarly practical bent. They knew that war was, too often, in the nature of a world comprised of sovereign, independent states. The Framers knew that if the young republic were to survive it would have to defend itself. They were not about to free themselves from one remote oppressor to become the easy prey of others.

The Founders were pragmatists. They believed they could work things out experientially. After all, they had much in common: And if they struggled, and debated, it was as men who were familiar with one another---as compatriots, colleagues, and brothers-in-arms.

It was a different world, of course. American republicanism of the 18th century did not envision the vast extension of the franchise; nor was it foreseen that there would be the incredible accommodation of peoples from innumerable lands; nor was it foreseen that a fundamentally rural backwater of Europe would ever come to occupy the political center of the world. The men of Philadelphia, however, knew that as long as the new United States could avoid extensive commitments and the temptations that Europeans called "high politics," their liberties would be safe.

11

The unwisdom of making ourselves over

In the twentieth century much changed. Liberty is now no less valued. Indeed, political freedom in America has expanded. Accountability has broadened. The franchise has become universal. There is a more intimate nexus between the voters and their representatives. And there is a great question if our 18th century patrimony is a good fit with the modern world. DeTocqueville's early 19th century observation-- that democracy is a "decidedly inferior[4]" form in dealing with the external world--- has become, in the 20th century, the starting place for countless texts on US foreign policy. But there is little evidence that autocracies are wiser or more adept in dealing with

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external relations. Nor, for that matter, are parliamentary systems manifestly better in their relations with the outside world than we are.

There is not much point, it seems to me, in making ourselves over into something else so that we can achieve purported but unproved advantages in stealth, speed and perseverance. We cannot contradict our laws for the abstract, hypothetical advantages of other systems. This would be a political oxymoron. And dangerous as well. When the "national interest" and the interest of the law are in conflict, then the Executive and the Legislature has no real choice but to opt for the law.

The arguments advanced about the ambiguities of the War Powers Act of 1973 -- the lack of flexibility the law grants the Executive to rescue US nationals, or deploy US forces for a host of purposes (all of which are asserted not to fall within the purview of the 1973 legislation) has always seemed to me a kind of excess of lawyering. When Congress acquiesces to these arguments, it is evidence of a self-defeating expediency. The victim is not just Congress. It the law and the integrity of the American political system.

We have but three choices regarding the War Powers Act.

*It can can be upheld,

*It can be strengthened;

*It can be abandoned.

The indeterminate position we now are in, where the law is sometimes given an occasional flaccid curtsey, while Congress, for the most part averts its' collective gaze, cannot be said to be healthy. It is for that reason, I am especially pleased that these hearings are being held. The current situation cries out for remedy.

I confess that I have argued that even an incomplete fidelity to the War Powers Act is better than nothing[5]. I have said that the act is not a nullity. I have called it a "moral firebreak." I have said that the current situation serves as a public marker for Congress. I have contended that the legislation did seem to work in facilitating the US exodus from Grenada within the deadline established by the War Power's "clock." And I have noted with approval the twelve Presidential reports which the Executive has issued from time to time when mandating force overseas. I have argued that these reports confirm that the War Powers Act remains in the Executive's field of vision. I have even used the dubious example of the Lebanon Peace Keeping Mission; arguing that, but for the War Powers Act, it might have been worse.

But I have changed my mind. The moral claim the War Powers Act makes on the Executive, I have come to believe, is doubtful because of is inconstant and unpredictable application. We have a situation in which Congress has become like one of those TV evangelists, who asserts high moral principle on Sunday; but by Thursday evening can be found somewhere out on Highway 40 in the "No Tell Motel." Dim Presidential awareness of his minimum responsibility to inform the governed as well as his constitutional partner, the Congress, of fateful decisions results has resulted in all too evident hypocrisies.

111

Why We Have the War Powers

Perhaps we need remind ourselves why the War Powers Act seemed to be needed in the first place. We should recall that Presidents Johnson and Nixon misrepresented their indefinite and indeterminate misadventure in Asia. We now have the sworn testimony of Secretary MacNamara. The Vietnam War, Mr. MacNamara believed, could not be won, militarily. These were his thoughts, he recalled in the Westmoreland trial, in the fall of 1965. Then, in 1965, the US had suffered 18,000 battlefield deaths. There were to be 40,000 more. Congress was well implicated in the origins of the war. But it had been duped[6]. The circumstances of the Gulf of Tonkin incident were not as they were portrayed. There had been no attack on US vessels steaming the high seas. Quite the reverse.

Finally, in 1969, the country had no more belly for war; but the Vietnam War insensately lumbered on. Each folly compounded the next. And neither Mr. Johnson nor Mr. Nixon, it seemed, wanted the loss they knew to be inevitable to fall "on their watch." That is what was meant by the high official who first use the expression, a "decent interval."

The truth finally made its way to daylight; and Congress repealed its enabling grant, the Gulf of Tonkin Resolution--something Mr Katzenbach, the Under Secretary of State, had called a "functional; declaration of War." But the war went on. Congress cut off monies. And more monies materialized--from contingency funds, from carry-over funds, from reprogrammed funds, from a "Feed and Forage" act that had not been used since the Civil War. Congress restricted the war; but the war expanded to Laos and Cambodia.

At long last, language was passed over a Presidential veto that unarguably ended funding for the war and its several bloody "side shows"(another expression attributed to US officials who hoped they could get on with matters elsewhere). In this context, after three years of hearings, Congress delivered the War Powers Act.

There were three political assumptions that accompanied the passage of the War Powers Act. Indeed, they formed at the time, something of a national consensus:

@First, that US armed forces should not enter hostilities without adequate domestic support. Evidence of this support should be explicit Congressional consent. Today, the call for this evidence has not retreated to just these halls. As Secretary of Defense Weinberger put it, in November 1984:

> "Before the US commits combat forces abroad there must be reasonable assurances we have the support of the American people and their elected representatives in Congress. This support cannot be achieved unless we are candid in making clear the threats we face; support cannot be sustained without continuing and close consultation with the Congress...[7]

@Second, "interest should dictate commitments; and not the reverse." Vietnam, of course, was a living contradiction to Mr Nixon's own dicta. But Messrs. Nixon and Kissinger hoped that by drawing down the Vietnam war, a more careful calibration of commitments and resources could be attained. Congress concurred. But added its own assurance that they would be part of the process of proportioning ends and means in US foreign policy. Thus Congress passed the War powers Act, the Intelligence Oversight Acts, and the Impoundment Control Act.

These legislative devices emerged to counter the possibility that an unmanageable commitment, despite the Nixon-Kissinger formula, could, once again, achieve a macabre life of its own. Congress did not see itself as some kind of institutional loose screw, flopping around the machinery of state. Rather, Congress viewed itself as acting to assist the Executive in fitting interests to national security policy, including the use of force. As Senator Javits was fond of saying, the War Powers Act was a "mechanism" of co-determining" a critical area of overlapping responsibility.

@ Finally, Congress believed itself to be capable of offering a kind of "reality test" to the Executive. If the President alone divined the national interests there was a well based fear that he might precede with deficient faculties.

This is no trivial matter. The 25th amendment recognizes that Presidents can have crippled judgement. Journalistic reports of Mr Nixon's decisional style, even before the "Final Days," were disturbing to say the least. Recently, we have heard alarming reports about the acuity of Mr. Johnson when Vietnam began to weigh heavily upon him. I will say nothing about the incumbent President. There are many good reasons for Congress to leave an impaired Executive where he is, insulated from close medical scrutiny. But it cannot be argued that Executives should be allowed to closet themselves from Congress when they are deciding issues of war and peace.

1V
The Continuing Validity of the War Powers Rationale

For most of the 1970s, there were few opportunities to claim that commitments could become, to paraphrase Clausawitz, "things unto themselves." But the 1980s have brought us at least four opportunities for disaster that two Executives have embraced with worrisome alacrity.

These were:

@The attempted rescue of American hostages in 1980.

The US, tragically, lost men in Desert One; but it is a cruel truth that we had good fortune in escaping the consequences of a "success."

1]Many of the hostages could well have died. The Joint Chiefs estimated that as many as 40% would not have survived their "rescue".

2]The kind of US firepower aloft over Tehran the evening of rescue was excessive. Airborne gunships might have assisted the rescuers by supplying the time that was needed to subdue captors and retrieve (from an area the size of the mall here in Washington) our personnel from their incarceration. So many people would have been killed that the wobbly regime of the Ayotallas could well have fallen. The only organized opposition to the Khomeni clique, at that time, was the Tudeh(*ie* Communist) party.

3] Iran would have been so chaotic, whether the Tudeh or some other group came to power, that the sclerotic leadership in Moscow, having misjudged the West once in North Asia, might have misjudged us again. The scenario I am drawing implies the fall of Iran to instruments of Moscow or worse. That the US could find itself in a hair raising face-down with the Russians over the fate of Iran was a real impetus for the funding of the Rapid Deployment Force. But it was a scenario that could only make the horsemen of the apocalypse grin with its cosmic ironies.

@The US efforts in Central America to undo the Sandanista regime.

The Contras, according to most reports, never believed they could win. Nor did anyone else who ever dealt with the Contras, including the JCS and the CIA. Even the the NSC never believed, in private, that the Contras were an effective fighting force. The Contras were trained in the American tradition at arms: of fixing the enemy and overwhelming him with superior force. But they never had the where-with-all, human or material, for that; and they did not have a sufficiently popular base to win as an insurgency force. They did not collect taxes. They could not even stay 48 hours in a village. Given the Contras hopeless position, they had few choices. They could provoke the Sandanistas into a reaction that would trigger a US intervention. They could simply "bleed" the Sandanistas. The Contras might would lose, eventually. But the point would be made. Or the Contras could come to terms with their old foes in Managua. There was little doubt that the Contras could do more than this. They were a losing force. But like Vietnam, the inevtible was capable of being put off until a different watch. Meanwhile, of course, there was always the possiblity that the desperate Contras could provoke the Sandanistas to "do something stupid[8]."

@The United States reflagging mission.

The US reflagging and oil tanker "shot-gun service" began shortly after the Iran/Contra story broke in the US. There was strong pressure to appear as if the Reagan Administration had a policy in the area.

The appearance of an immense US flotilla was an *ad hoc* response to a Kuwaiti request that had been around for months. The sheer scope of the US presence stunned the Kuwatis: a "Hollywood reaction," the Kuwaiti Deputy Secretary for Foreign Affairs uncharitably termed it.

The professional Navy was never an enthusiast of the mission. The US convoy seemed to ally the US to one party in a war in which the United States had no interest in befriending either side. In truth, US policy played all sides. US generals assisted the Iraqis. US intelligence and arms assisted the Iranians. And a US ship shot down Air Iran 655. Mr Bush speaking for the US at the UN ecoed the claim ofthe Navy that most of the blame should be shouldered by the Iranian Government. The Iranians, it was contended, should be held accountable for that fact that a commercial airliner heeded a flight plan over a war zone, even though Air Iran flight 655 ran five days a week, regularly as Amtrack. The Captain of the Vincennes, US officials said over and over, "did the right thing."

Now that the Gulf war seems to be over, there are claims that the mission has been "redeemed by events". Maybe. Or maybe it was the exhaustion of both sides, and the use of poison gas that brought the participants to the bargaining table. In any case, the US did not well position itself for the future with this undertaking; and we are lucky to have escaped without having become a more intimate party to the unsavory regime of Sadaam Hussean and the war he provoked.

@The second US peace keeping expedition to Lebanon begun in October 1982.

The US mission to Lebanon had shifting and effervescent purposes. The definition of the Administrations objectives went through four distinct permutations: peace keeping; assisting the Government of Lebanon; helping the Palistinian find safe harbor; and blocking the advance of the Soviets and Syrians.

The US marines found themselves with instructions to train a rump government in an an area wrenched and torn by bloody feuds so intertwined they would, by comparison, make a taut hangman's rope appear as if were but slack yarn.

The mission in Lebanon never made sense. Congress knew it; but Congress responded, as you remember, with a febrile extension of the "automatic" War Powers Act "clock". The Congress gave the Executive 180 days; or until after the next election to figure out what it was doing in Lebanon. The Executive is not the only branch to embrace pallid policies hoping they will not turn out to be a corpse until after the next election.

241 US Marines were killed in the bombing of their barracks. It was the worst slaughter of US Marines since the battle of Kai San. A fine historian, Barbara Tuchman, wrote about events in Beirut:

> "A peculiar vacuum exists.. Where is the outrage? Where's the anger that ought to have met the death of 241 marines ...? [9]

V

On the Persistence of Folly

Questions abound in this abbreviated recitation. When faced with manifest foreign policy folly, why do we find that the Executive persists? Why is there no real consultation and debate? That was the purpose of the the War Powers Act, (and it is the law, after all.) Why does Congress play such a miniscule role in this unhappy recitation of disasters so frivolously courted?

This is the stuff of long scholarly tomes. But I suggest three reasons:

*First, folly is an inherent danger in any decision made by only a few people.

A decision choked-off from the great bazaar of available debate and information, and taken in the shadows, especially when time is compressed, yields too easily to silly arguments, bureaucratic vanities, and personal eccentricities. The rational search for optimizing the "national interest" is often set aside when decision-making takes place in a small and inbred group. Such groups tend to be fearful and suspicious about what the outside world may say or know. So "reality testing" in these circumstances is at a discount. There is a vast body of literature in the social sciences that demonstrates the smaller the number of decision-makers, and the shorter the time to take action, the more likely that there will be a resort to faulty and usually dated routines.

We accept the part of DeToquevilles' aphorism that points to the importance of speed and stealth in foreign affairs. Conventional wisdom is that Congress is incapable of both. But if Congress is not speedy, neither is it prone to any of the pathologies associated with incestuous decision-making. Congress can keep secrets. At least some committees can.

*Second, Congressional acquiescence to Executive initiatives is related to the institutional fragmentation that accompanied the great reforms of the 1970s.

In the 1980s, the leadership of Congress seems to have been aware that the Executive engaged in actions fraught with danger. But the leadership of Congress has been much reduced in authority and domain. It can no longer, by itself, command the Executive to stop. Nor can Congress' leadership alert the rank and file to institutional dangers. Indeed, one senses, that institutional loyalties have waned in recent years. Congress has become more reactive and less coherent. Congress' leadership seems like Lear in the storm, crying unheard jeremiads.

*Third, the half life of the Cold War has persisted. Although it is a depleted vision, it is the only one around.

The goals, metaphors and policy routines of the 1940's and 1950's still inform US foreign policy and US policy makers. The post war international environment has been defined as a kind of permanent emergency. And the appropriate role of Congress in the face of that emergency has been, for forty years, defined as a bi-partisan posture of acquiescence to Executive portraits of imminent menace.

V1

Cold War Hyperbole and the Appropriations Process

The "track record" of the tactic of raising frightening prospects, measured by the successful teasing of funds and commitments from Congress, is almost, from the standpoint of the Executive, an unbroken record of success.

In 1947, the simple request for $400 million dollars in emergency assistance for Greece and Turkey was framed in terms of a civilization at risk from the dark forces of global barbarism. As Acheason put it, the US faced a time unseen since the "hoards of Islam" stood at the gates of Vienna.

The great planning document of the late 1940's, NSC 68, warned that if the United States did not re-institute conscription, triple the defense budget, and develop hydrogen weapons, "our very independence as a nation[would be] at stake."

In the late 1950's, a distinguished committee headed by General Gaither argued that if the US did not launch a full bore assault on the problem of missile technology, build a country-wide civil defense program, and expand US tactical and strategic forces, then the US would face, in the language of the report, a "desperate" period of vulnerability due to the impending missile gap with the Soviets.

In the early 1960's, there was a real worry that insurgent war, sponsored by the Soviets, and what was believed to be their intimate allies, the Chinese, would outflank the United States.

In the mid 1960's Messrs MacNamra, Rusk and Johnson believed that unless the US proved that it could manage insurgent warfare, central deterrence would be tested early and often. As a result of such constant trials, nuclear deterrence might fail. Vietnam, in this analysis, helped forestall and perhaps foreclose strategic nuclear war.

In the mid 1970's, groups in various Executive departments worried about developments in Soviet armaments that would leave the United States open to a potential "window of vulnerability." Sometime in the mid 1980s, they asserted the Soviets could use their "heavy" ICBMS in a concentrated attack on US land forces, leaving the US with no option save a mutual annihilation triggered by the US response, or surrender.

In the 1980's, the developing world once again was presented as new arena of great Soviet challenge. As Under Secretary of Defense Ikle argued:

> ".. small wars... are not just a collection of self cancelling insurgencies...There is a driving organizing force behind it all: here it stirs up and feeds an insurgency, there it exploits a coup d'etat, here it instigates terrorism to weaken democratic governments, there it provides police forces and Pretorian guards to perpetuate a regime beholden to it, it diligently, ruthlessly expands its dominance through the world..We in the west ..[have] checkmated...Soviet expansion. But..primarily [in] the so called Third World...the cold war [is being] followed by insurgency warfare.."[10]

Years after Dean Acheason served, he gave us an extraordinarily candid memoir. In the case of NSC 68 and the Truman doctrine, Mr. Acheason remembered, he simply tried to frighten the socks off Congressional elders who, he feared might slip back into isolationism if they were not presented, as he put it, the "door of Armageddon[11]."

NSC 68 was crafted in language which called up prospects so terrifying that he could "bludgeon" the "mass mind of bureaucracy" into accepting a new course in Soviet-US relations. Congress, after a long war, and only three years of peace, had to be persuaded, in Acheason's judgment, that an indefinite period of vigilance overseas and high taxes was warranted. Standing armies and overseas alliances in peace-time were the heavy anchors of US foreign policy for one hundred and fifty years. So Acheason cast the picture as bleakly as he could. Overstatement worked for Mr Acheason, of course, and few would gainsay him.

But all these soundings of the tocsin were overdone. When the US asserted that the Soviets would be in a strategic position to collectivize Europe and then the world, in the mid 50's, the Russians had but a handful of nuclear weapons and no means to deliver them to the United States.

The Vietnamese were never instruments of a Sino-Soviet conspiracy. The Soviets had long broken with the Chinese in 1957; and we know what poor friends the Chinese have been to the Vietnamese.

Even the Cuban missile crisis, perhaps the most dangerous episode of the Cold War, was probably pushed to a level of threat beyond what was warranted by events.

But Executive assertions of great danger were not just elaborate ruses. In part, the procedure had simply become habit. Stating a problem so starkly, shook loose funds. It became an expected, obligatory maneuver; and it worked.

But constant overstatement limits the future; for hyperbole constrains our ability to make fuller, more real and more subtle arguments. After so many dramatic assertions and dire forecasts, the great consensus surrounding containment and US alliances has been easier to conserve as it was originally stated, "at the creation," rather than to recast our understanding of the world in more subtile hues. After all, the American people have been asked to pay at a rate of something like $15,000 dollars per person per year. It is skimpy easier to justify such expense in familiar tones of alarm.

The assumptions of danger are now like the symbols of an ancient Kabuki drama: sublimable; almost a part of our cultural subconscious. The text is so well known that the audience, if it were not impolite to do so, could speak the lines. "We at risk", cries the Executive. "Well", Congress responds, "what can be done but grant most of the funds, issue the commitments, and even supply the expedition of US soldiers if that is requested. The portrait of "present danger" has become the great cant of the republic. "To move in another direction in the context of this now classic drama would seem not just out of step but nearly unpatriotic.

I think it would have been better for the republic, if the Executive could state its case as close to the mark as possible. Perhaps Congress would chose wrongly. There is no guarantee that Congress would react with wisdom. But to continue along the present path is to put our faith in a few, cloistered individuals, usually with an attention span no less fragmented than that of the Congress. Every time debate is cheapened, it makes it easier to coursen public discussion the next time. There is a long history to illustrate this; and there is blame enough to go around. But a determination has to be made to say: 'Stop!" "Enough!." Let's begin again to determine national security policy with the deliberation that a great republic deserves.

V11

Toward proper explanations and a more durable consensus.

My impression from years of studying military matters, is that most serving officers share the sentiments adumbrated 15 years ago by a distinguished Senator, John Stennis, of the Senate Armed Services Committee:

> "The last decade has taught us..that this country must never again go to war without the full moral sanction of the American people. The only practical way is for all parts of the nation to participate in such a decisions is through Congress"[12]

No "full sanction," however, can be said to derive from hasty and extreme representations. If the circumstances and purposes of US policy are not carefully explicated, it cannot be said that there has been forged any meaningful contract between those who command and those who serve. Nor can any "full moral sanction" logically emanate from anything but a complete articulation of what is to be achieved, how, and by whom.

Officers of the Executive argue that the military is now demanding, as a result of Vietnam, a pre-packaged, full-fledged, before-the-fact warranty of public support. The complaint is levied that the terms demanded by the military are excessively rigid: circumstances, force levels, terms of engagement, should be allowed to shift with the circumstances, it is argued. A full guarantee of support is hard enough, no less one predicated on a document which estimates costs and benefits, and the time and money required to fund any exertion (which I propose below, be folded into a revised War Powers Act.) Such a document can, it is contended,*per force*, only be worked in haste. It would not even be accurate. Since the the process of estimation is both lengthy and indeterminate, and the process of gaining consensus is unlikely to be as timely as it might be if this particular set of hoops had been not littered about in the first place.

The aggressor or the international malefactor will thus have the advantage, it is objected.

But Congress is hardly likely to be blindly obstructionist, although such things are not unknown, historically. Indeed Congress has supported most Executive initiatives at arms. And it is not excessive for Congress to request an explanation of the evidence that motivates the use of armed force. It seems, therefore, that the requirement of adequate consultation in structuring a meaningful consensus requires a war powers report that is more regular, fuller, and timely (in the normal sense of the word) than has been the case up until now. A strengthen War Powers Act, it seems, would try to extract a complete checklist of explanations as to why an action is:

1]Necessary.

2]Likely to be successful.

3]Proportionate as to means and ends.

The reporting document should:

1] Anticipate the length of the engagement with specificity.

2]Define the mission objectives with precision.

3]Provide the Congress the criteria by which it can judge the mission has been completed.

A more rigorous reporting requirement would be an asset in reaching the consensus our troops demand; and an exacting report would probably give the exertion, if well conceived, the requisite domestic boost it would need for success.

Some of the the details might have to be classified. The length of stay, and the rules of engagement, for instance, do not have to be spelled out in more than generalities. But Congress at large, and the American people should have some idea if an effort is open-ended or finite. Otherwise, all other budget, manpower and political decisions are held hostage to unspecified vagaries. If there is no criteria of success and no specificity as to how long an effort at arms might last, it surely that ought to be a matter that gives Congress pause. In any case, such information is vital to our collective destiny. It should not be withheld or distorted or wrapped in a bloody shirt just because "it works."

V111
The Perils of Self-imposed Ignorance

Much of Congress' ignorance, the Executive has rightly contended, over the years, is self imposed. It is reportedly difficult to get Senators to peer at the CIA budget when glimpses are offered. A few months before the Iran/Contra scandal broke, a lengthy section of a book I had sent to press detailed private aid to the Contras from dubious sources ; e.g. the World Anti- Communist League, Guardsman in Alabama. The book also noted the mysterious military assistance provided to the Contras by the Israelis, South Koreans and the Taiwanese. I noted that aid to El Salvador had been siphoned off to the Contras; and that exercises and troops in Panama and Honduras were also used to support an unwinnable war against Nicaragua. My information came from GAO reports, occasional law suits, and the press. Congress could not help know these things if it had been motivated.

If Congress is simply unwilling to face the issue of how public monies and the most essential issues of war and peace are being decided, I am not sure that the new War Powers proposals either in the form of my simple suggestions or the proposed SJ323, or any other legislative wrinkle, will make that much of an impact. But I would think any new legislation that underscores Congressional intent in this area, and fortifies Congressional courage would be welcome.

1X
The future of the Legislative Veto-

The current Byrd, Warner, Nunn legislation does not address the problem of covert activity. I agree with Mr Halperin[13] that the new proposed Consultative Body should also be informed of paramilitary plans, hostage rescues, and military assistance to allies involving a US commitment in any on-going disputes. The new Consultative Body ought to have the right of disapproval or approval.

Committee vetoes (no less one and two house vetoes) are under a cloud of judicial suspicion. I understand Professor Franks' subtle point that any new veto might be merely a way of positioning Congress so that the Courts cannot say later that Congress had failed to take a position at all.[14] I am not sure, however, if Congress need be reduced to this modest, indeed, humbling posture, especially if one believes the the war powers is rightly a co-determined activity.

Congress has continued to install legislative vetos since Chada; and the Library of Congress has counted some 102 vetos that have been appended to legislation from the time of Chada to the start of 1987. Since 1987, even more vetoes have been passed into law. The intelligence Committee seems to have exercised an effective *defacto* legislative veto. Arms sales and foreign aid have been managed with one House vetos and Committee vetos.

I am not a legal scholar, but there is good authority for the argument that the veto that was struck down in Chada was one that tried to devise a "legislative short-cut," in a "regulatory" matter as opposed to a constitutionally co-determined "policy" matter. So there are vetos and vetos, it seems. When it is clear that the constitutional design demands that power be shared, the court may not want to contest legislative vetos, since it has been both proper and customary for Congress to devise its own solutions for attending to over-lapping functions and responsibilities.

In any case, the veto should be, I agree with Professor Frank, stripped from the dead-mans switch of the 60-90 day clock. New, more exhaustive reporting requirements would cure most of the causes of complaint on both sides of Pennsylvania Avenue about procrustean deadlines-- more advantageous to our adversaries than ourselves.

X
Paramilitary Force

I am convinced that the shenanigans associated with the Iran/Contra affair ought to be firmly prohibited in new War Powers legislation rather than the older neutrality statues which have been even less well enforced than the War Powers.[15] But I am not sure that this old practice of using secret soldiers for secret wars should be inhibited, as Morton Halperin has suggested, by stripping the Executive of the capacity for para-military operations. Indeed, I am not sure, I would want to vest covert operations solely in Congress any more than I would want to vest them solely in the Executive. Use of covert military operations, if the world is taking a turn for more autonomous and independent security relations, ought to diminish in the future in any case. The use of US military or paramilitary forces to deal with terrorism ought to faceted into place in any new War Powers Act. There is, on the one hand, the terrorism propagated by insurgents, such as those irregular forces in Guatemala, and El

Salvador. One the other hand, there are acts of piracy, hijackings and bombings. These are acts that were called, in the 19th century, "propaganda of the deed." If the latter kind of terrorists threaten US life, then there is a use for US military and paramilitary assets. This is basically a constabulary matter.

The terrorism associated with civil war is quite something else. If we are to take sides in such matters, far more extensive consideration ought to be demanded by Congress. The former kind of action implicates the United States in a intervention in a civil wars and international wars; while the latter tends to support international order. The Executive has the responsibility to make the distinction between these different species of terrorism in a timely report. There has been great smudge pot at work in this area, stoked early and often by this Administration. It has befogged public understanding of what should be a reasonably clear cut matter.

Xi

A New War Powers Wish List

Let me summarize my notions of where we ought to go from here:

A] The Report

1]The reporting requirement should be more timely.

2]The reporting requirement should be more extensive.

3]The report should be signed by the President and deposited with the Senate. Never again should we be faced with a President who forgot, or actions which are taken in his name over a signature which may or may not be his.

4]The report should specify a declassification procedure by which the whole document would be made public.

5]The report should indicate when it is reasonable to re-evaluate, without prejudice, the initial form and purpose of the armed action.

B]The Legislative Veto

1] A concurrent resolution of approval should be required at the onset of any engagement of US military or paramilitary assets.

2] Approval and disapproval mechanisms should be required at regular but expanded intervals, related to the stipulations of the initial report made by the President.

3] Approval and disapproval should not be taken in the form of a joint resolution.

The approval mechanisms should take the form of one or two house or committee vote of approval or disapproval. A joint resolution would make matters worse than they are now. We might do well to recall, in 1973, how it was when a majority of both Houses wanted to bring the war to an end. Funding cuts and cut-offs were passed in both Houses. But the cuts and cut-offs were overridden; and Mr Nixon said he had the authority to continue the war. In one important court case, a US District Court Judge said:

> "It cannot be the rule that the President needs a vote of only one third plus one of either house to conduct war..[T]his would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized".[16]

C]Financing

1] Funds should be appropriated separately for war powers related actions. Congress was forced to resort to passing layers of multiple legislation in order to stop the Vietnam War. It has to be possible to stop wars in a less strange and ungainly fashion

2] Backdoor financing has to be precluded.

25

3] The use of funding from overseas and "private sources" is bazaar by any normal reading of the Constitution. It should be stopped.

New war powers legislation should strip away this fantastically dangerous and totalitarian expediency which not only unites the power of the purse with the sword but menaces us with the shadow world of multinational influence peddling.

D]Criminal Penalties and Court Procedures

1] There should be criminal penalties for using monies not authorized for actions specified by the document of notification. Future Lt Col Norths' should know that when they cavort with war there are criminal liabilities to be faced.

2] Congress should arrogate standing to itself in matters pertaining to the War Powers although it is likely the Court will take no action if Congressional assertions of approval or disapproval have not been made. That is, if an Executive refuses to issue reports when troops are sent, and Congress does nothing, then it is unlikely that several members of the House or Senate could appear in court and argue with success that they are not asking the Court to render a "political decision."

It is imperative, therefore, that a specified number of the new Consultative Body be given standing. I fear if the suggestion of Prof Frank is taken up; that is, if but ten members of either House bring the matter to the Court, then the Court will find that their appearance is not directly related to the functions of the Consultative Body. The Court could well contend that they are appearing in a "political capacity" (ie, as politicians) and not in their capacity as law-makers.

xii
Conclusion

The great generality of the Constitution in the area of the war powers was testimony to the Founders confidence in those who would serve the republic in the future. The Founders expected us to exercise our own judgement in terms of our own experience.

We have come to grips with the fact of a permanent American exposure to great power politics. This is something which would flabbergast the Founders. The requirements of containment forced our initiation into an interdependence with the rest of the world.

By and large, containment, as well as bipartisanism, even if the menace was overdrawn, was well suited the cold war the geostrategic reality. The Cold War world has passed. Todays' reality is an interdependent, and infinitely more complex world.

But old habits die hard. The custom of soliciting Congressional consent with scary conjures drawn from distant circumstances does not serve use well. There is peril enough in the world. Depicting dangers larger than life makes it more likely that one day either Congress will divine an incident to be like the Gulf of Tonkin: simple hyperbole; and then Congress will refuse the requisite support when it is most needed; or, more likely, Congress will continue to neurologically respond to overstatement, no matter what the facts may be.

This is the point when some kind of meaningful War Powers Act will be most needed. Perhaps, we will be lucky. Perhaps both the truth and the wisdom to deal with it will bubble-forth more quickly than was the case in our misbegotten time of trial in Asia. But it would be be far better to have meaningful legislation at the ready to restrain an on-going, but ill-conceived enterprise, than to try to beat out a new law when there is the accompanying din of real battle. Your Committee Mr. Chairman, is an especially valuable investment in the our nations' future security.

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[1] The most impressive exposition of Founders search for efficiency is Louis Fisher, "The Efficiency Side of the Separated Powers, Journal of American Studies, Vol 5,No.2,August, 1971. pp113-130. Fisher is a senior analyst in the Library of Congress and a national asset. My argument owes much to his indulge tutorials. Naturally, Dr. Fisher is responsible for none of of my arguments or my renditions of his arguments.

[2] See Louis Henkin,Foreign Affairs and the Constitution, Foreign Affairs; Summer,1987. p.310.

[3] Youngstown Sheet and Tube V Sawyer, (1952) as cited by Henkin,Ibid.page 285.

[4] Alexis DeTocquevile, Democracy in America, Vol(NY:Random House:Vintage Books,1945)p243.

[5] James A Nathan and James K Oliver, Foreign Policy Making and the American Political System, (2nd ed.)(Boston, Little, Brown),1987; pp168--190ff

[6] This is not to say that most of the implications of the initial deployments under President Kennedy and the subsequent deployments were mysterious. Nor could it be argued that Congress' appreciation of the dim military prospects was defective or the facts were not there to be known. Congress, like the Executive, plainly, did not "want to know." See on this point, Henry Farlie, "We Knew What We were Doing When We Went Into Vietnam," Washington Monthly,5,No 3(May 1973); page 7ff and James A Nathan and James K Oliver,Foreign Policy Making and the American Political System, op cit, 1987; p.111ff

[7] "The Uses of Military Power"Remarks prepared for the Delivery by the Honorable Casper W Weinberger, Secretary of Defense, News Release(office of the Assistant Secretary of Defense(Public Affairs) November 28, 1984; page 6.

[8] see the testimony of David MacMicheal former CIA analyst about Agency plans to provoke cross-border attacks cited by Robert Pear "wright Disclosers Termed Accurate, The New York Times,September 25 1988.page 15. and, James A Nathan, "Decision-making in the Land of the Pretend, Virginia Quarterly Review, January 1989

9 in the Financial Review (Australia, excerpting from the New York Review of Books.); September 25,1987 page 8.

10 Fred Ikle, a speech to the Inland Empire of the Southern California World Affairs Council, January 30 1986 cited by James Adams, Secret Armies,, NY The Atlantic Monthly Press,pp204-205

[11] In my prejudiced opinion one of the best reviews of Acheason Truman, Nitze and Kennan's views can be found in James A Nathan and James K Oliver, United States Foreign Policy and World Order,(3rd ed.)(Boston, Little, Brown), 1988; pp10100-108.

12Cited by Senator Thomas Eagleton in"War Powers', Hearings before the Subcommittee On National Security Policy and Scientific Developments of the Committee on Foreign Affairs, House of Representatives, 93rd Congress, 1st Sess. march 7,8,13,15,20,1973, page 30

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[13] Morton H. Halperin, "Lawful Wars," Foreign Policy, Number 72, Fall 1988; pp195ff

[14] See Testimony of Thomas M Frank before the Senate Foreign Relations Committee, September 20,1988 page 11ff.The language is taken from Justice Powell in Goldwater V Carter,(444,US 966. But four justices complained that it was not the issue before them was not "justicable." Rather it was apolitical question; and only Justice Powell used the argument that the case was not 'ripe." A Sixth Justice concurred and a seventh dissented, arguing that the President had the Power to act in the first place. The issue of "ripening," in this context, seems to me,at least, a bit chancy unless Congress decisively acts to *not* place the Court in the position of issuing a political advisory; but, rather requests from the Court an action that enforces extant legislation where intent is reasonably plain. But let me note again, I am no legalist.

[15] Title 18, paragraph 960 of the US criminal code makes it a criminal offense to participate in a group that takes armed action against the foreign property of nationals. It also prohibits assistance to "armed expeditionaries" 'begin[ing] or set[ing] foot or provide[ing] for or furnish[ing] the money [to] any expedition" with any nation with whom the United States is not in a formal state of war." See Jules Lobel, "The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War powers In United States Foreign Policy," Harvard International Law Journal, Vol 24, Summer, 1983.) There haven't been that many successful prosecutions against privateers using the several neutrality acts. Nonetheless, the defense that it was the executive that commissioned various forays aboard did meet with stinging rejection when they were tested as one Col. Smith found in the New York US Circuit Court in 1806:

[16] Holtzman V Schlesinger 361 F Supp P5,565, Reversed in Holtzman V Schlesinger 484 F 2d 1307(2nd Circuit after stays by the Court, 414 US 1304,1321(1973). The was reversed because the issue became moot when the war was finally over.

PREPARED STATEMENT OF CHARLES E. RICE

The conclusion I offer in this testimony is that the War Powers Resolution is an imprudent and probably unconstitutional restraint on Presidential authority and that it ought to be repealed. This conclusion, however, does not rest on any absolutist notion of Presidential supremacy in foreign affairs or in the exercise of the war powers. This Committee, in its February 9, 1972, report on the War Powers Bill, accurately described the treatment of the war powers by the Constitutional Convention:

> The Constitutional Convention at first proposed to give Congress the power to "make" war but changed this to "declare" war, not, however, because it was desired to enlarge Presidential power but in order to permit the President to take action to repel sudden attacks. Madison's notes on the proceedings of the Convention report the change of wording as follows: "Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." (The Records of the Federal Convention of 1787, 4 volumes (Max Farrand, editor, New Haven and London: Yale University Press, 1966), vol. 2, p. 318.) It is noteworthy that the delegates who spoke on this change of wording all expressed concern with the possible enlargement of Presidential power. [Report, War Powers, Senate Committee on Foreign Relations, Feb. 9, 1972, Report No. 92-606, 92nd Cong., 2nd Sess., 12-13]

The President's power "to repel sudden attacks," however, was not specified in the text of the Constitution. Congress was given, in Article I, Section 8, the powers to tax for "the common defence," to "declare war," to "raise and support armies," to "provide and maintain a navy," to "make rules for the government and regulation of the land and naval forces," to "provide for calling forth the militia," to "provide for organizing, arming and disciplining the militia," and "for governing" them when they are called into service and to "make all laws . . . necessary and proper for carrying into execution the foregoing powers." The President, in Article II, was vested with the "executive power" and the power to make treaties, "by and with the advice and consent of the Senate." He also "shall be commander in chief of the army and navy of the United States," and "of the militia" when they are called into service. But the Constitution did not particularize the division between the Congressional and Presidential powers with respect to the use of the armed forces.

The War Powers Resolution affects what Justice Jackson referred to as "a zone of twilight" in which the President and Congress "may have concurrent authority, or in which its distribution is uncertain." [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)] The armed forces have been used on Presidential initiative on approximately 200 occasions. There is no bright line indicating in advance whether such a use of military force is within or beyond the Presidential authority. In his veto message on the War Powers Resolution, President Nixon aptly noted "the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches. The Founding Fathers understood the impossibility of foreseeing every contingency that might arise in this complex area. They acknowledged the need for flexibility in responding to changing circumstances. They recognized that foreign policy decisions must be made through close cooperation between the two branches and not through rigidly codified procedures." [Cong. Rec., Oct. 25, 1973, p. 34990].

The reluctance of the courts, thus far, to decide constitutional issues presented by the War Powers Resolution would seem to be consistent with this view that the framers of the Constitution envisioned inter-branch "cooperation" as the preferred means for defining responsibilities in the "twilight" areas of foreign policy. [See [Crockett v. Reagan,558 F. Supp. 893 (D.D.C., 1982), affd., 720 F.2d 1355 (D.C. Cir., 1983), cert. den., 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C., 1983), affd., 770 F.2d 202 (D.C. Cir., 1985); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C., 1984), app. dis., 765 F.2d 1124 (D.C. Cir., 1985); and Lowry v. Reagan, 676 F. Supp. 333 (D.D.C., 1987).

Judicial involvement in conflicts under the War Powers Resolution could be argued to be more readily justified with respect to major "wars" rather than relatively minor military operations. Thus the court in Crockett v. Reagan said:

> Were a court asked to declare that the War Powers Resolution was applicable to a situation like that in Vietnam, it would be absurd for it to decline to find that U.S. forces had been introduced into hostilities after 50,000 American lives had been lost. However, here the Court faces a dispute as to whether a small number of American military personnel who apparently have suffered no casualties have been introduced into hostilities or imminent hostilities. The subtleties of factfinding in this situation should be left to the

> political branches. If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes. [Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C., 1982)]

If the courts were to intervene, however, with respect to a military operation of any size, the question could arise as to the extent to which the President would be bound to defer to a judicial command that he violate what he regards as his constitutional duty to defend the country. Fortunately, that issue has not been presented and it is unclear whether conflicts between Congress and the President over the War Powers Resolution would be regarded as justiciable by the Supreme Court. [See Goldwater v. Carter, 444 U.S. 996 (1979); Mora v. McNamara, 252 F. Supp. 819 (D.D.C., 1966), affd., 387 F.2d 862 (D.C. Cir., 1967), cert.den., 389 U.S. 934 (1967); Atlee v. Laird, 347 F. Supp. 689 (E.D., Pa., 1972), affd. summarily sub nom, Atlee v. Richardson, 411 U.S. 911 (1973)] This testimony is not concerned with the question of whether such conflicts ought to be regarded as justiciable, although it is difficult to see how, in such a controversy, there would be "judicially discoverable and manageable standards for resolving it." [Baker v. Carr, 369 U.S. 186, 217 (1962)] Such standards would seem to be particularly difficult to find in this matter which involves the delicate Presidential foreign policy and military powers. In U.S. v. Nixon [418 U.S. 683, 710 (1974)], incidentally, when the Supreme Court directed the President to surrender the Watergate tapes pursuant to subpoena, the Court noted that the President "does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."

Whatever the theoretical answer as to whether War Powers Resolution issues ought to be regarded as justiciable, the reluctance, so far, of the courts to intervene leads to the conclusion that the Resolution presents issues which are truly "political" in that the Congress and the President must work them out, preferably in a spirit of cooperation, without the expectation of a saving intervention on either side by the courts.

The stated purpose of the War Powers Resolution is "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations." It will be useful to set forth here the critical provisions of the Resolution [Public Law 93-148 [H.J. Res. 542], 87 Stat. 555, 50 U.S.C. 1541-1548, passed over President's veto November 7, 1973]:

> Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly

indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Sec. 4. (a) In the absence of a declaration ow war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and

> duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.
>
> x x x x x
>
> Sec. 5(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.
>
> (c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

In my opinion, the War Powers Resolution is unconstitutional in its infringement on Presidential decision-making power and in its violation of the requirements of presentment and bicameralism enunciated by the Supreme Court in Chadha v. Immigration and Naturalization Service [462 U.S. 919 (1983)]. The Resolution is not limited to major, threshold decisions on military involvement nor does it recognize the need for "flexibility" emphasized by President Nixon in his veto message. Instead, the Resolution applies so extensively and is so rigid in its prescriptions that it can justly be described as micromanagement. Senator John

Sherman Cooper relied on the "zone of twilight" comment by Justice Jackson in concluding, in his statement in the 1972 report of this committee, that:

> For this reason I doubt that the Congress has the authority to limit the exercise of Presidential authority to an exact term, such as the "30 days" prescribed by Sections 5 and 6 of the bill. If the President's exercise of authority is constitutional under Article II, Section 2 of the Constitution, that is--
>
> > The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States--
>
> I do not believe S. 2956--a statute--could prevail over his constitutional authority if he should determine that a period of time longer than 30 days would be necessary to carry out his responsibility as Commander-in-Chief of the armed forces of the United States to protect the armed forces, and the security of our country. My study of the powers of the Congress to limit the action of the President of the United States indicates that the denial of funds by the Congress is its only certain power. [Report, War Powers, Senate Committee on Foreign Relations, Feb. 9, 1972, Report No. 92-606, 92 Cong., 2nd Sess., 29]

This point by Senator Cooper is well taken. Whether the period is 30, 60, 90 days or whatever, the specification of an exact time involves an intrusion upon the flexibility which is an essential attribute of the Presidential authority in this area. The War Powers Resolution is a blunt instrument devised to deal with crises which necessarily involve delicate and precise judgments. It makes no effort to distinguish the magnitude of the involvement in hostilities or imminent hostilities which would trigger its provisions. Nor is it even complete when it attempts to enumerate the Presidential powers to use the armed forces. In Section 2(c), the Resolution says:

> (c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

This description omits the power of the President to use the armed forces to protect the lives or property of American citizens abroad and to evacuate them from dangerous situations. Section 2(c) would seem to include within its subsection (3) what James Madison called "the power to repel sudden attacks." Yet even this undoubted Presidential power is then treated indiscriminately by the Resolution with all other involvements of the armed forces in conditions of "hostilities" or "imminent" hostilities. With respect to all such involvements, the Resolution imposes on the President detailed, inflexible prescriptions.

Section 5(b) of the War Powers Resolution requires the President to withdraw the armed forces within sixty (or ninety in some cases) days from the beginning of involvement in hostilities or imminent hostilities unless Congress has declared war, authorized the involvement or extended the time period. Either house of Congress can block such Congressional action. This provision would seem clearly to violate the principles enunciated in Immigration and Naturalization Service v. Chadha

[462 U.S. 919 (1983)], that legislative acts must be the product of bicameralism and must be presented to the President for his approval or veto. These Chadha principles would seem to be violated as well by the provision in Section 5(c) that, even before sixty days have elapsed, armed forces "engaged in hostilities . . . shall be removed by the President if the Congress so directs by concurrent resolution." This concurrent resolution provision remains effective as part of the War Powers Resolution despite the later enactment of expedited procedures for any joint resolution or bill "which requires the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization." [Public Law 98-164; 97 Stat. 1062; Department of State Authorization Act, fiscal years 1984 and 1985, sec. 1013]

It would seem clear that both the Congressional inaction under Section 5(b) and the concurrent resolution under Section 5(c) are legislative acts within the meaning of the Chadha decision; they would alter the legal status quo. Each would alter the legal position of the President by requiring him to remove troops where he had lawfully committed them. The Resolution does not forbid the President to commit the forces; nor do Sections 5(b) and 5(c) say that the employment of the forces was itself illegal; but those sections do purport to make that employment illegal after the expiration of the sixty or ninety-day period or after the enactment of the concurrent resolution.

It has been argued that the Chadha principles are inapplicable to the War Powers Resolution because unlike the legislative veto statute held unconstitutional in Chadha "the War Powers Resolution delegates no authority to the President. In its area of operation, the use of armed force, the resolution merely confirms the congressional understanding of the authority that the President already does or does not possess . . . . The Chadha holding applies precisely to the type of congressional statute that does delegate broad rule-making authority to the Executive. . . . If, however, no authority has been delegated to the Executive, the Chadha holding does not apply." [Buchanan, In Defense of the War Power Resolution: Chadha Does Not Apply, 22 Houston L. Rev. 1155, 1161 (1985)]

The legislative veto in the War Powers Resolution is no less a legislative act than the provision involved in Chadha. And it appears that the War Powers Resolution was regarded at its adoption as a restriction on powers delegated to the President by Congress as well as on such powers as are inherent in the Presidential office. In its discussion of the Resolution's concurrent resolution provision, the Report of the House Foreign Affairs Committee, which accompanied the War Powers Resolution, said, "The constitutional validity of such usage of a concurrent resolution is based on the capacity of Congress to limit or to terminate the authority it delegates to the Executive." [House

Report No. 93-287, P.L. 93-148; U.S. Code, Cong. and Admin. News (1973), 2346, 2358] In any event, the broad sweep of the opinion for the Supreme Court in Chadha would seem to justify Justice Powell's conclusion, in his concurrence, that "The Court's decision. . .apparently will invalidate every use of the legislative veto." [462 U.S. at 959, Powell, J., concurring] And as Justice White said in dissent, Chadha "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto." [462 U.S. at 967, White, J., dissenting; and see Justice White's specific mention of the concurrent resolution provision of the War Powers Resolution, 462 U.S. at 970-71]

The War Powers Resolution does not define its most critical terms, including "hostilities," "imminent involvement in hostilities" and "consult with Congress." The Report of the House Foreign Affairs Committee, which accompanied the War Powers Resolution, did attempt to define those terms:

> A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, a consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.
>
> In the context of this and following sections of the resolution, a commitment of armed forces commences when the President makes the final decision to act and issues orders putting that decision into effect.

> The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict. [House Report No. 93-287, P.L. 73-148; U.S. Code, Cong. and Admin. News (1973), 2346, 2351 (Emphasis in original)]

These proposed definitions are set forth here, not to criticize them, but to illustrate the reality that some terms are so incapable of satisfactory statutory definition that they and the controversies in which their meaning would arise, would be better left to political rather than to specified, statutory resolution.

The inherent imprecision of definitions in this area underscores President Nixon's prediction that, through the War Power Resolution, a "permanent and substantial element of unpredictability would be injected into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war." [Veto Message, Cong. Rec., Oct. 25, 1973, 34990, 34991] Other practical objections raised in that Veto Message are also worth recalling:

> While all the specific consequences of House Joint Resolution 542 cannot yet be predicted, it is clear that it would undercut the ability of the United States to act as an effective influence for peace. For example, the provision automatically cutting off certain authorities after 60 days unless they are extended by the Congress could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of United States withdrawal and an adversary would be tempted

> therefore to postpone serious negotiations until the 60 days were up. Only after the Congress acted would there be a strong incentive for an adversary to negotiate. In addition, the very existence of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expired.
>
> The measure would jeopardize our role as a force for peace in other ways as well. It would, for example, strike from the President's hand a wide range of important peacekeeping tools by eliminating his ability to exercise quiet diplomacy backed by subtle shifts in our military deployments. It would also cast into doubt authorities which Presidents have used to undertake certain humanitarian relief missions in conflict areas, to protect fishing boats from seizure, to deal with ship or aircraft hijackings, and to respond to threats of attack. [Veto Message, Cong., Rec., Oct. 25, 1973, 34990, 34991]

In its fifteen years of operation, the War Powers Resolution has focused attention on sterile questions of procedure and on essentially unresolvable questions of constitutionality. In the process it has distracted attention from the need to foster the needed consultation between the President and Congress. This distracting effect of the Resolution is regrettable especially because the Resolution is unnecessary. It serves no good purpose that could not be achieved as effectively without it.

The President is obliged to obey as well as to enforce the laws of the United States. The ultimate remedy for an unconstitutional use of the armed forces lies in the Congressional powers of appropriation and impeachment. And, in a total fight to the finish, no Congressional enforcement of the law is possible against the President without an extraordinary majority in at least one house of Congress. During the Vietnam War, Congress was unable to override President Nixon's veto of legislation cutting off funds for that war. If Congress passed a joint resolution or bill mandating the President to withdraw the armed forces from a situation, or cutting off appropriations, it could become law only by a two-thirds vote in both houses if the President vetoed it. The withdrawal mandate or cut-off of appropriations would be frustrated if the President obtained one-third-plus-one of the votes in either house. If it did become law, the President could defy it. And conviction on impeachment requires concurrence of two-thirds of the Senators present. Even were the courts to intervene and order the President to obey that law, the President could still defy that court decree, in which case we come back to impeachment or the cut-off of appropriations as the only legal remedy.

Even under the War Powers Resolution, therefore, the ultimate Congressional remedies are the same as they would be without it: a cut-off of appropriations and impeachment. Against a defiant President there is no escape from the necessity of a two-thirds vote in each house to override a veto or of a two-thirds Senate vote to convict on impeachment. I suggest, however, that this is the way it should be. The ultimate decision as to whether a Presidential use of the armed forces is within his power rests with the people as they express their will through their Representatives and Senators. The Presidential power "to repel sudden attacks" and otherwise to protect United States citizens, property and interests, though unspecified, is so important that it is fair to require that his exercise of it be overturned only by extraordinary Congressional majorities. In any event, the obtaining of such majorities is the ultimate recourse even under the War Powers Resolution.

A constructive, alternative solution would be to facilitate and encourage consultation without the detailed specification of procedures and remedies. All that the War Powers Resolution has accomplished is the complication of the issue by the introduction of micromanagement procedures which focus attention on the procedures themselves rather than on the substantive issues involved and which can work against the interests of the United States, as President Nixon explained in his Veto Message.

It could be useful to enact a law stating, in general terms, the obligation of the President to consult with specified members of Congress whenever possible before and after the introduction of the armed forces into hostile situations. But it ought to be recognized that such a provision would be mainly precatory in effect. It could serve a useful purpose if it were regarded as an expression of a continuing, mutual commitment to cooperation by the President and Congress rather than as a mandate conceived in mistrust.

PREPARED STATEMENT OF ARTHUR SCHLESINGER, JR.

I am honored by the invitation to appear before this eminent subcommittee. The topic under your consideration goes to the heart of the conundrum of democracy: how to reconcile democratic control of the war-making power with the imperious requirements of foreign policy. My qualifications, such as they are, for addressing this problem are that it is one that I have had to study for half a century as a historian and also one that I have periodically encountered over nearly half a century as an occasional government official: in the Office of War Information and the Office of Strategic Services during the Second World War; as special assistant to Averell Harriman in the first months of the Marshall Plan; as special assistant for three years to President John F Kennedy.

Let me begin by recalling the constitutional purpose as laid out two centuries ago in Philadelphia. The Framers, determined to assure the survival of their republican experiment in a hostile world, established a strong national government and gave it the power to create a standing army and navy, to regulate commerce, to enforce treaties and to wage war. When they considered how to distribute these foreign policy powers within the national government, the Framers were unambiguous in their allocations. With the war-making predilections of absolute monarchs much in mind, they assigned the vital powers in international affairs to Congress: not only the exclusive appropriations power but the exclusive power to declare war, to regulate commerce with foreign nations, to raise and support armies, to provide and maintain a navy, to make rules for the armed forces and to grant letters of marque and reprisal -- this last provision representing the 18th century equivalent of retaliatory strikes and requiring Congress to authorize limited as well as general war (as the Supreme Court unanimously recognized in 1800 in Bas v Tingy). By giving Congress the power to "declare" rather than "make" war, the convention left the executive the power to repel sudden attacks.

The president, in addition, could receive foreign envoys. He could negotiate treaties and appoint ambassadors though in both cases he had to act with the advice and consent of the Senate. It was soon accepted, as Jefferson, the first secretary of state, put it, that "the transaction of business with foreign nations is Executive altogether"; but the exclusive power to communicate with foreign governments did not imply exclusive power to decide the policy communicated. If the president was in John Marshall's words "the sole organ of the nation in its external relations," a considerable difference remained, as Myres McDougal has observed, between the organ and the organ-grinder.

The president, moreover, was designated commander in chief of the armed forces. The Framers understood the commander in chief clause, however, as conferring a merely ministerial function, not as creating an independent and additional source of executive authority.

The commander in chief clause definitely did not bestow war-making power on the chief executive. It meant only, in Alexander Hamilton's words, that the president should "have the direction of war when authorized or begun." Hamilton contrasted this strictly limited assignment with the power of the British king -- a power that, as Hamilton said, "extended to the declaring of war and to the raising and regulating of fleets and armies, -- all which, by the Constitution under consideration, would appertain to the legislature."

The convention has no stouter champion of executive power than Hamilton. But even Hamilton vigorously rejected the notion that foreign policy was the personal prerogative of the president. "The history of human conduct," he wrote in the 75th Federalist, "does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and cirumstanced as would be a President of the United States." Abraham Lincoln accurately expressed the purpose of the Framers with regard to the war-making power when he wrote sixty years later that "they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

The Framers, in short, envisaged a partnership between Congress and the president in the conduct of foreign affairs with Congress as the senior partner. Hamilton's comment on the treaty-making power applies to the broad legislative-executive balance in the control of foreign policy: "The joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them."

One would think that this historical recital might impress an administration devoted to what the late attorney general has called "the Jurisprudence of Original Intention" and thereby settle some of the arguments that assail us today. For no one can doubt that the original intent of the Framers was to assure Congress the major role in the formulation of foreign policy and, above all, to deny presidents the power to make war on their own. Yet the present administration somehow manages to champion a theory of inherent presidential prerogative in foreign affairs that would have appalled the Founding Fathers.

This theory of presidential supremacy has only crystallized in recent times. While early presidents did not hesitate to use armed force without prior congressional authorization to protect American lives, property and interests, they used it typically against pirates, brigands, revolutionaries and tribes rather than against sovereign states; and, as Judge Sofaer wrote in his notable work War, Foreign Affairs and Constitutional Power: the Origins, "At no time did the executive claim 'inherent' power to initiate military action."

Nor indeed did Abraham Lincoln in 1861 and Franklin Roosevelt in 1941 claim that power. They undertook warlike and plainly unconstitutional actions because they believed that the life of the nation was at stake and that their actions responded, in Lincoln's words, to "a popular demand and a public necessity." They rested their case not on assertions of constitutionally valid unilateral presidential power but rather on versions of John Locke's old doctrine of emergency prerogative beyond the Constitution.

The claim of inherent presidential power to send troops into ongoing or potential combat began with President Truman in 1950. It rests doctrinally on an extravagant interpretation of the commander in chief clause as a grant of independent substantive power -- an interpretation rejected by the Framers and never sustained by the Supreme Court. It rests also on a misreading of the Court's 1936 decision in the Curtiss-Wright case. That case did not, as some argue, vindicate the idea of inherent and unilateral presidential power to go to war. It did not even involve the war-making power at all. It involved the commerce power; and what it did was to sanction presidential action within a framework laid down by Congress. As Justice Jackson wrote in the steel seizure case of 1952, Curtiss-Wright "involved, not the question of the President's right to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress."

The transfer of foreign policy power from Congress to the executive results most of all from our situation in the world. The republic has become a superpower. It has lived now for nearly half a century in a state of chronic international crisis, real, imagined and contrived, Under the pressure of incessant crisis, Congress has gladly relinquished many of its constitutional powers to the presidency. Perhaps it has done so because the congressional record of error between the wars -- from the rejection of the Treaty of Versailles to the rigid neutrality legislation of the 1930s -- had produced an institutional inferiority complex. Perhaps members of Congress are intimidated by executive claims of superior knowledge and wisdom. Perhaps they simply prefer to dodge responsibility and turn national decisions over to the president. For whatever reason, Congress has let constitutional powers slip away, and presidents now claim the war-making power as their personal property.

It is too bad that this should be the case. For history abundantly confirms Hamilton's proposition that the best security lies in partnership between the two branches rather than in separate possession of the war-making power by either one of them. Neither branch, after all, is infallible. Each can benefit from the experience and counsel of the other. It is a delusion -- sedulously encouraged by the executive branch -- that presidents are necessarily wiser or even better informed than Congress. Sometimes they are; sometimes they aren't. Franklin Roosevelt was wiser and better informed than William E Borah, Burton K Wheeler and the isolationist leaders of the 1930s. But which body made more sense about the Vietnam War twenty years ago -- the National Security Council or the Senate Foreign Relations Committee majority? Which body makes more sense about Central America and the Persian Gulf today? As the distinguished minority leader, Senator Dole, put it the other day: "I have learned over the years that occasionally there is some wisdom in Congress. It is not all vested in the White House or those who advise the President" (New York Times, 21 April 1988).

The War Powers Resolution of 1973 represented a high-minded and ingenious attempt to tap congressional wisdom and to reestablish the constitutional partnership as envisaged by the Founding Fathers. The Resolution aimed to reassert a congressional voice in war-making. It called on presidents to consult with Congress before introducing armed forces into dangerous situations and then to report to Congress after such commitment; and it provided for the automatic withdrawal of such forces after sixty days (in practice ninety days, since the Resolution offered presidents thirty additional days if needed in the interests of disengagement) unless Congress took positive action to continue the operation. Congress was further empowered to direct the removal of such forces at any time by concurrent resolution.

I speak as one who was skeptical from the start about the efficacy of the War Powers Resolution. The Resolution, it seemed to me, began by ceding the president what he had heretofore lacked: that is, statutory authority to go to war without congressional consent. Before the passage of the Resolution, unilateral presidential war represented executive usurpation of powers confided by the Constitution to Congress. Now unilateral presidential war becomes, at least for the first ninety days, an entirely legal action.

Practically speaking, the Resolution's machinery of restraint seemed to me a hoax. Most wars are popular in their first ninety days. People rally round the flag. The president who orders military action can overwhelm Congress and public opinion with his own rendition of the facts and his own interpretation of the crisis. Given the president's superior ability to define the emergency, to control the flow of information and to appeal to the nation, it would take an unwontedly bold Congress to reject a presidential request for the continuation of hostilities or to recall the fighting forces over presidential opposition.

My skepticism was not deep enough. For I naively assumed that presidents would at least go through the motions of honoring the act and seek to turn it to their own purposes. In fact, as we all know, presidents have simply ignored the act except for occasional and perfunctory compliance with the reporting requirements. Textual ambiguities in defining those requirements have left uncertain the point at which the 60-day clock starts ticking and thereby the hope that the Resolution would be self-activating and automatic in its operation. And the Supreme Court, when it declared the legislative veto unconstitutional in Chadha, presumably annulled the congressional power to terminate hostilities through concurrent resolution. Thereafter not a shadow of sanction remains to enforce or even to encourage presidential compliance. After fifteen years of trial, it is difficult to avoid the conclusion that the War Powers Resolution has been a failure.

Looking back, one sees that the Resolution counted too much on good-faith cooperation by presidents. This was a not altogether unreasonable hope. Presidents in their own self-interest should regard the requirement of congressional collaboration in foreign affairs not as a challenge to be evaded nor as a burden from which to be delivered but as an opportunity to be embraced -- a heaven-sent opportunity to give their policies a solid basis in consent.

Congressional criticism alerts a president to flaws in his policy. Congressional support strengthens his hand, increases his authority and diffuses his responsibility. As our wisest diplomat of the century, Averell Harriman, once put it, "No foreign policy will stick unless the American people are behind it. And unless Congress understands it, the American people aren't going to understand it."

But presidents, like other people, do not always understand their own self-interest. Nor can we always write statutes on the kindly assumption that good and cooperative men will always reside in the White House. As the Supreme Court once said in a celebrated decision, the republic has "no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." Even non-wicked presidents may be driven to diminish a congressional role by their own foreign policy obsessions or by the ambitions and delusions of their advisers. In natural defense of their own prerogatives, presidents are likely to resist efforts at congressional restraint.

Can the Resolution be amended in ways that will more effectively restore to Congress its constitutional role in decisions of peace and war -- and do so even in the teeth of recalcitrant presidents? I respect the thought and care that have clearly gone into S. J.Res. 323. But I must confess my fear that the revisions therein proposed would only make matters worse.

The proposed amendments redefine the consultation requirement to limit congressional consultation, initially at least, to an elite group of six persons: the speaker of the House, the president pro tem of the Senate and the majority and minority leaders of both houses. With presidential permission, the group can enlarge itself by adding twelve more chairmen and ranking minority members of key committees, leaving the rest of Congress, if I understand the proposal, a collection of second-class citizens. Limiting consultation to the senior leadership of House and Senate -- that is, to legislators who historically have been most vulnerable to seductions of statesmanship and most inclined to defer to presidents -- might well place one more weapon into the hands of a strong president. As Gouverneur Morris remarked when the constitutional convention discussed a proposal to surround the president by a council of state, the president "by persuading his Council ... to concur in his wrong measures would acquire their protection for them."

Under the current resolution, termination of American involvement in hostilities takes place automatically after sixty days unless Congress votes to continue the action. The Res.323 amendments would further shift the balance of power toward the executive by placing the burden of positive action on Congress, which would now be required to terminate military action by joint resolution. Such a resolution, moreover, would qualify for expedited procedures only if endorsed by a majority of the consultative elite. And, as a joint resolution, it would be subject to presidential veto. Under this system, in short, the president, so long as he retained the support of one third plus one of either house, would be free to pursue his unilateral war as long as he wishes.

The Res. 323 amendments offer one useful idea: the denial of funds for military operations undertaken in violation of laws passed pursuant to the War Powers Resolution. The provision permitting members of Congress to seek injunctive relief on grounds of presidential non-compliance is a pious hope. In practice it would almost certainly founder on a judicial retreat to the political questions doctrine.

Are there better ways to breathe new life into the War Powers Resolution? Some distinguished senators and commentators argue for a revival of the original Senate version of the Resolution. That version specified and thereby limited the emergency situations in which presidents could commit armed force to hostilities without congressional authorization: to repel an armed attack on the United States and to forestall the direct and imminent threat of such an attack; to repel and forestall attacks on U.S. armed forces abroad; and to rescue American citizens in foreign lands. In all other situations the president would be required to seek congressional authority before committing U. S. forces to hostilities. In fact, the Senate's "forestall" clause opened a dangerous loophole, offering presidents legal authority to send American troops in the direction of battle whenever they found, in their own personal and unchecked judgment, a "direct and imminent threat" of attack against American forces or citizens.

In any event, the House version triumphed in conference, and, while it wisely eliminated the "forestall" clause, it also failed to define, as the Senate bill had done, the president's powers in legally binding language. The result that, as Senator Eagleton said at the time, "provided a legal basis for the President's broad claims of inherent power to initiate war."

Would things be better today if the Senate version had prevailed? The supposition is that President Reagan would have had to seek congressional approval before sending the navy into the Persian Gulf. But suppose that, instead of complying with the act, the president treated the Senate version with the same contempt that all presidents have treated the existing version. Suppose he claimed that his role as commander in chief gave him the constitutional power to deploy armed force as he thought best for the republic. Historians might point out that this is a gross misconstruction of the commander in chief clause. But what recourse would Congress have against an uncooperative president? What court would find the issue justiciable? The Senate version in practice would probably be as impotent as the existing War Powers Resolution.

To be effective, congressional participation must precede any large-scale deployment of force overseas. For deployment may set in motion the march to hostilities and, by the time the War Powers Resolution is triggered, it may be too late for Congress to halt that march. Consider our present dilemma in the Persian Gulf. Many members of Congress are baffled by the Navy's mission in the Gulf and doubt that the administration has thought through its policy in its fullest implications. Had they been appropriately consulted, they would have demanded clarification and, had suitable clarification not been forthcoming, they might well have opposed the commitment. But the commitment, once made, creates a new situation. Legislators who might have challenged the policy at the start become the prisoners of a fait accompli. The consequences of congressional repudiation of an ill-judged policy may be -- or at least some so contend -- as grave as the consequences of the policy itself.

The Resolution does not effectively constrain presidential deployment of armed forces outside the United States. Indeed, the Resolution offers Congress no role until after armed force is already committed. Can Congress assert control over overseas deployment of American armed force in peacetime? The constitutional status of this question is obscure. Elihu Root, the elder Henry Cabot Lodge, the elder Robert Taft and Stuart Symington all thought Congress has the power to forbid sending at least the army outside the country in peacetime. William Howard Taft, William E Borah, Calvin Coolidge, Dean Acheson and Barry Goldwater thought not. Legal scholars have been equally at odds. W W Willoughby believed that the president's power to send troops abroad was a "discretionary right vested in him, and, therefore, not subject to congressional control." Alexander Bickel, on the other hand, believed that the power of Congress "to govern the international deployment of forces is really beyond question." Quincy Wright agreed with Willoughby, Raoul Berger with Bickel, and the great E S Corwin argued one side at one time, the opposite side at another.

Nor does history clarify the issue. Congress has generally let presidents deploy armed forces overseas but has occasionally asserted a power to govern such deployment. All this suggests that, like the war-making power itself, deployment is a shared power, falling into what Justice Jackson called "a zone of twilight" in which president and congress have concurrent authority or in which the distribution of that authority is uncertain. In this zone Marshall's old rule in Little v Bareme customarily prevails: the president can act unless Congress acts; if Congress acts, its legislation would supersede an otherwise valid order of the president.

The zone of twilight, in other words, is something Congress can enter at will. Whether Congress should, as a matter of prudence, try to exert detailed control over peacetime deployments is another question. The movement of ships, planes and men can be a valuable adjunct to diplomacy. So long as presidents do not move force provocatively or in the service of policies disapproved by Congress, there is the strongest argument for preserving a measure of presidential discretion. But when it comes to large-scale and long-term troop dispositions, there is an equally strong argument, in terms of presidential self-interest, for getting explicit congressional approval.

Is there a conceivable mechanism that would force unwilling presidents to seek congressional authorization for deployments that threaten to annul Congress's constitutional power to decide questions of peace and war? Such a bill to be effective would require a sanction, and the obvious congressional sanction is the appropriations power.

One can envisage a war powers bill with three major elements.

The first would be an obligation laid upon presidents, whenever they send armed force into or near situations involving or threatening hostilities, to report at once to Congress with full information and justification. The second would be an obligation laid upon presidents to seek formal congressional consent when the commitment of armed force involved exceeds specified limits in duration and magnitude.[1] The real object of the War Powers Resolution was to prevent another Vietnam, not to prevent hit-and-run rescue missions of a traditional sort. The third would be an automatic denial of funds for military action, beyond funds required for purposes of disengagement, if either of the first two provisions is violated.

I wonder, though, whether such a bill would be worth the trouble. The one thing that would compel presidents to attend to Congress is the appropriations power, and Congress does not need a war powers bill to invoke this power. The missing element in the equation has always been the political will to use powers Congress already has. In a sense the War Powers Resolution was embraced as a congressional alibi -- as a self-activating and automatic mechanism that would save members of Congress from making specific judgments on the substance of policy. I note in recent days that wrangles over the applicability of the Resolution to this or that situation tend to supersede an examination of the wisdom or folly of one or another executive policy. "The student of institutions as well as the lawyer," Lord Bryce well said, "is apt to overrate the effect of mechanical contrivances in politics."

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[1] John Norton Moore and Quincy Wright, for example, have proposed that congressional approval be required in all cases where regular combat units are committed to sustained hostilities or where a military operation would require congressional action, as by appropriations, before it is completed.

Judges, it seems to me, may well have a point in regarding the war powers issue as in the end a political question. Our Constitution is a flexible and resilient charter. Only devotees of original intent can read it as a rigid document set in granite -- and, if they really believe in original intent, they must reject contemporary heresies about presidential supremacy on decisions of peace and war. On reading the Constitution I stand with Woodrow Wilson, a political scientist and lawyer as well as a great president, who observed that the Constitution is "the vehicle of a nation's life" and that its meaning is determined "not by the original intentions of those who drew the paper, but by the exigencies and new aspects of life itself."

It may well be that the exact allocation of powers as laid down by the Framers for a minor 18th century power do not meet the needs of a 20th century superpower. But underneath that particular allocation lies a deeper principle. With regard to foreign affairs in general and to the war-making power in particular, the Constitution commands above all a partnership between the legislative and executive branches. The terms of the partnership vary according to the pressures, political and geopolitical, of the day. That, in my view, is the way it should be in a democracy. But the partnership must endure.

The vital problems of foreign policy belong in the political arena. They must be argued out before Congress and the electorate. The salient question -- the question to which Congress must above all address itself if it is to regain lost powers -- must be whether the measures proposed make sense. Neither branch of government has the divine right to prevail over the other. Congress must understand that it cannot conduct day-to-day foreign policy. The president must understand that no foreign policy can last that is not founded on popular understanding and congressional consent -- and that only a fool in the White House would take unto himself exclusively the fateful decision to enter or risk war. When we find means of making the partnership real, we remain faithful to the deeper intentions of the Framers. Perhaps some new version of a War Powers Resolution may strengtnen the partnership. Perhaps constant arguments over the proper allocation of war powers may unprofitably divert congressional attention from the substance of policy.

In the end the nature of the legislative-executive balance will be more a political than a legal question. "If the people ever let command of the war power fall into irresponsible and unscrupulous hands," Justice Jackson reminded us in Korematsu, "the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."

PREPARED STATEMENT OF J. TERRY EMERSON

Mr. Chairman, I appreciate the opportunity to participate in this series of hearings to evaluate the War Powers Resolution of 1973. From 1969 to 1987 I had the privilege of serving as Senator Goldwater's lawyer on his personal staff. As you know, he was a vocal and persistent opponent of legislative war powers restrictions - and still is. Today I will attempt to reexamine the issues he and other critics raised throughout the debates of the last 15 years.

Constitutional Issues

First, there is the Constitutional question, who holds the war powers, or the lion's share of those powers, the President or Congress?

It is clear that Congress has several express powers bearing on war, including the power to declare war and grant letters of marque and reprisal, to raise and support the army and provide and maintain a navy, to make rules for the regulation of those forces, to provide for calling forth the militia, and to punish piracies and offences against the law of nations, among others.[1]

From this, it is beyond question that Congress has a share in the war powers and the longest enumeration of them. But the President, too, is expressly granted a share of the war powers.

Article II, section 1, of the Constitution states that all "[the] executive power shall be vested" in the President. This is a broad, general allotment of substantive power.[2]

Article II, section 2, provides that the President "shall be Commander in Chief of the Army and Navy of the United States," a function having a direct bearing on warmaking.[3]

And section 3, often overlooked, provides that "he shall take care that the laws be faithfully executed." This provision has been construed by the Federal judiciary to include enforcement of "the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution."[4]

Related to his duty to execute the laws is the oath of office the President takes to "preserve, protect and defend the constitution" and the pronouncement of the Supreme Court that the right of a citizen abroad "to demand the care and protection of the Federal government over his life, liberty, and property" is included among the privileges and immunities of citizenship guaranteed by the Constitution.[5]

True, we can look at Article II, section 3, in a different way and ask why the President is not obligated to "take care" that the War Powers Resolution, a part of the laws, "shall be faithfully executed"? My response is that the statute is unconstitutional to the extent it interferes with the President's executive power, including his right and duty to protect the security of the nation, its people and their freedoms.

Fatal Flaw in War Powers Resolution

The fatal flaw in the War Powers Resolution is that it claims primacy for Congress is making all decisions relating to use of the armed forces. In this legislation, Congress is not just seeking to exercise shared powers, it is attempting to increase its own powers at the expense of the Executive Branch. The statute purports to say that Congress can shut off a military activity anytime the House and Senate agree to a Concurrent Resolution ordering the President to stop an action to which Congress objects. And it claims to give Congress by inaction (within 60 days of a hostility) a veto upon executive action.

This distinguishes the War Powers Resolution from the special prosecutor law upheld in the Morrison case[6] and puts it in the category of the legislative veto[7] and deficit reduction[8] cases where the Supreme Court found that the separation of powers doctrine was violated.

Congress can appropriate funds for the armed forces and put a ceiling on the authorized strength of the military services, but once those forces are established and equipped Congress cannot dictate when or where or under what circumstances those military units shall be deployed or engaged.[9]

Mr. Chairman, I would go further and claim that not even the power of the purse can validly be used to restrict the President's independent defense authority, except by setting the size of the services generally and the amount and nature of arms in the nation's defense arsenal.[10]

Just as Congress could not use an appropriation or finance measure to make "all redheaded females" ineligible for social security benefits because it would be an arbitrary distinction violative of due process, nor can the legislature overstep the separation of powers doctrine by telling the President he cannot protect U.S. shipping in international waters or other vital U.S. interests beyond an arbitrary time period.

Declaration of War

Moreover, the idea that a declaration of war is the only legal way to commence a military hostility is a myth. An "offensive" war, yes, but a defensive reactionto an imminent foreign threat, no.

At the time of the Constitutional Convention a declaration of war generally served as an official recognition or proclamation that a state of war already existed. In fact, during the 87 years preceding the Grand Convention, only one war of 38 in the Western world was preceded by a declaration.[11] As Alexander Hamilton discloses in the Federalist Paper No. 25,[12] declarations of war were in disuse during the late 18th Century, not just in our modern era.

Also, international law, as compiled by early authorities known to the Framers, widely held that a declaration of war was not required for "defensive" war.[13] Thus, when the Framers changed "make" to "declare" in the declaration of war clause, they were acknowledging that war might be made without a declaration.[14]

In the technologically advanced, interrelated society of the late Twentieth Century, the power "to repel sudden attacks" must be interpreted to allow the President to meet serious foreign dangers before they become insurmountable. The test has to be whether the risk to United States security is as grave and threatening in today's circumstances as a "sudden attack" was viewed in 1787.

Historical Practice

My construction of the Constitution is buttressed by the actual setting of the Constitutional Convention and subsequent practice.

The evolution in the early state constitutions from weak executives in the 1770s to strong executives after 1780,[15] the harmful interference by the Continental Congress with military activities of General Washington during the War of Independence,[16] and the consistent course of practice under the Constitution from the administration of President Washington until at least the early 1970s, combine to demonstrate that the President possesses independent power to employ the forces established by Congress in defense of U.S. citizens and the survival of their freedoms and country.

Almost 20 years ago, I began to compile a list of instances in which past Presidents had used or sanctioned the use of military force outside the United States without a declaration of war. By 1973, that list had grown to 199 incidents, even though I had removed all situations where the Executive is known to have disavowed or repudiated certain military engagements. If I added military actions happening since 1973, such as in Libya, Lebanon, Grenada and the Persian Gulf, my list would now exceed two hundred Presidential defense initiatives without a declaration of war.[17]

More than half of these military actions were outside the Western Hemisphere and 97 lasted more than thirty days. What they boil down to is a consistent pattern of response by the President to foreign dangers by the use of whatever degree of force might by needed and available at that moment in history. It is true that many early precedents represented actions against pirates or stateless areas, but there were many exceptions and as the number of nations increased, the number of Presidential military actions involving recognized states increased with them.

From this, I would suggest that if the term "living Constitution" has any meaning, surely it encompasses the notions that (1) in a society in which ultimate sovereignty rests with the people, that people's Constitution is reflected in how they live and act under that charter, and (2) one of the most important interpretative authorities in such a democratic system is found in the expectations the people and their chosen officials have created by such living and acting.

While repeated violation of the Constitution cannot make constitutional what was unconstitutional before, a long and unchallenged practice does put a gloss on society's understanding of the Constitution and may, under judicial precedents, fix the construction of the Constitution by the courts.[18]

Impractical and Dangerous Aspects of the War Powers Resolution

Granted that the Judicial Branch has never decided on the War Powers Resolution - and may never - the question must be asked, is it wise for Congress to use its powers, whatever they may be, in this manner? Even if the War Powers Resolution is constitutional, it may be unwise, impractical or dangerous in practice.[19]

The statute may be dangerous because it denies flexibility to the President in the conduct of foreign relations and conveys a message of disunity in the American government.

As one of the first opponents of war powers legislation, Professor James McGregor Burns, testified in 1970:

> Artificial restrictions ... may lead not to peace, but to war, as foreign adversaries estimate that the United States will not respond to a threat to world peace because of legal restrictions on the executive...
>
> If our friends and foes abroad must try to estimate not only how our President will respond to acts on their part, but also how a majority of the House or Senate will respond, the element of uncertainty is increased.[20]

The uncertainty of which Professor Burns speaks may bring insecurity, instability and a wrong calculation of U.S. intentions. Moreover, the War Powers Resolution does not stand up to the test of actual history.

What would have happened, let us consider, if the War Powers Resolution had been on the books when Franklin Roosevelt took bold initiatives in support of the democracies fighting Nazi Germany before the declaration of war of December 1941? Roosevelt had the vision to see that America and the rest of the free world could avoid disaster only if he acted independently of Congress (in the face of neutrality restrictions) to help Great Britain resist the Nazi onslaught on the civilized world. [21]

Public opinion of the time was convinced that Britain and Western Europe were doomed and that American aid would either be lost in the Atlantic or fall into Hitler's hands. There was no national consensus of an uncontestable danger to the life of the nation, no broad perception of emergency threatening the life of the Republic, criteria suggested by historian Arthur Schlesinger, jr. as conditions for resort to an extra-Constitutional emergency prerogative power.

Yet Roosevelt acted. He exercised the initiative of decision making reserved to every President through his possession of all the Executive powers. The steps he took were in the very nature of Executive power.

Congress was not consulted when President Roosevelt sent American troops to occupy and establish bases in Greenland and Iceland and to cooperate with British armed forces already there. Nazi planes overflew these bases and it could not be known whether a German attack was coming or not.[22]

Admiral Stark sent proposed instructions for Roosevelt's approval which, in Stark's words, "ordered the [Marine] force to cooperate with the British (in defending a British base operated by the British against the enemy)." Admiral Stark added: "I realize that this is practically an act of war." Nevertheless Roosevelt approved these instructions.[23]

What would have been the outcome had Roosevelt laid these instructions before the Congress and plainly reported that U.S. Marines were committed to engage in "practically an act of war"? This is one year, remember, after Congress had renewed the military draft by the smallest possible margin, a single vote. If Congress were then forced to vote on Roosevelt's risky action, isn't it likely the Legislative Branch would have failed to sustain his decision?[24]

Nor would Congress have been any more likely to approve of President Roosevelt's action in May of 1941, when he secretly lent long-range U.S. amphibian planes to Great Britian and assigned 80 Navy airmen to help with British operations to sink the German battleship, Bismark.[25] And I doubt if Congress would have ratified Roosevelt's instructions in September 1941 when he ordered American warships to escort British convoys west of Iceland and to destroy German submarines on sight.[26]

By forcing a vote in a divided and hesitant, if not isolationist Congress, the War Powers Resolution would probably have brought total disaster to the democracies in the 1940s.

Checks on Unilateral Presidential Wars

This is not to say that the President possesses unbridled war powers. He cannot constitutionally initiate a war of agression, an offensive war of ambition or conquest. He must use the forces Congress has put at his command. He cannot usually raise and equip an army on his own, although Lincoln did in the first days of the Civil War.[27]

He must receive the Senate's consent to his appointments of ambassadors, judges and cabinet officers, and he needs Senate "advice and consent" to making treaties.

And, he must stand for reelection after four years, if he wishes to have a second term, and he knows that his political party is subject to popular will in free elections held each two years. He also faces the constant scrutiny of a free press and ultimately the legislative power of impeachment and removal from office.

In short, he is subject to the political process of a free government and people operating under a written Constitution. He cannot legally suspend the civil process created by that charter of government.[28]

Yet he has the duty and responsibility of judging how best to defend the nation against foreign threats and may, as Thomas Jefferson suggested in his concept of the law of necessity, have to act in the interest of "saving our country when in danger" or when "some of its very high interests are at stake." In these circumstances, he must perform his duty and "throw himself on the justice of his country and the rectitude of his motives."[29]

In other words, like Franklin Roosevelt, of whom Robert Sherwood writes, he "never for a moment overlooked the fact that his actions might lead to his immediate or eventual impeachment," a President has an independent responsibility to defend the country in time of crisis in the way he judges best. He thereby subjects his action to the political will of the country. [30]

Byrd Resolution

Turning from an explantion of the arguments given by opponents of the War Powers Resolution fifteen years ago, I will move to an analysis of the Byrd, Nunn, Warner, Mitchell Resolution, S.J. Res. 323. Personally I credit the sponsors of this legislation with recognizing many of the most serious defects in the 1973 law. As I read the measure:

(1) Troops would no longer be subject to being automatically pulled out of a crisis area in 60 days if Congress fails to act on legislation authorizing the President's action. The arbitrary time for withdrawal would be repealed.

(2) Congress could no longer use a simple Concurrent Resolution to order a halt to the deployment or engagement of U.S. forces abroad. Instead the legislature would have to use a Joint Resolution which is subject to Presidential veto.

(3) Congress will identify who the President is supposed to consult with. Instead of contacting 535 Members of Congress, he would be expected to consult on hostilities and vital national security issues with a group as small as six Members and no larger than eighteen. The consultative body will be a permanent joint Senate-House group which I anticipate would mean only one consultation is necessary at a time, not multiple sessions with the two Houses and several different Committees.

As a student of history, I find the proposed panel comparable to the original Senate created by the Framers, which had 22 Members and (at least in concept) was small enough for intimate consultation but not too numerous to trust safely with state secrets. It is true that George Washington did not find that body helpful in his one meeting in person with the Senate regarding Indian treaties, but in the modern nuclear age a national unity of purpose on vital foreign policy decisions is more essential than ever to the survival of the nation. Therefore, I feel it may be constructive to experiment with a consultative group of this nature in the search for a new partnership among the political branches with respect to national ends and strategy in the most important national security matters.

Where I differ with S.J. Res. 323 is its assumption that Congress has power to legislate an end to a particular military action undertaken pursuant to the President's independent self-defense powers. Even if I am wrong on the Constitutional point, I believe the fast-track feature of S.J. Res. 323 is bad policy because it might bring about an unnecessary vote at a dangerous moment of history when public opinion is not yet informed or mature enough to render a reasoned judgment.

Proposed Amendment

My recommendation is to strike the entire War Powers Resolution, except for the proposed consultative group. In the event Congress rejects that view, I suggest one small amendment. Add to the reporting requirement of section 4 a new clause (D) of subsection (a) calling on the President for information (classified to the extent necessary) concerning the rules of engagement under which the military services are operating in the situation covered by the report.

Even if the President and Congress jointly agree he is conducting an authorized military action, the Congressional leadership, as represented in the consultative group, should be assured that the rules of engagement will adequately protect the American interests which are so vital that war measures are necessary.

My concern arises out of a study I am undertaking of the impact of the Vietnam rules of engagement on the course of that conflict. The text of these rules were only downgraded from Top Secret in 1985 after repeated appeals to the Secretary of Defense by Senator Goldwater. 31

Based on my research to date, I am of the opinion that is was not the military or Congress who lost the war in Vietnam, it was restrictions on military tactics written by civilian managers in the Executive Branch.

For example, in the mid-1960's, U.S. aircraft could not follow hostile North Vietnamese MIGs and strike their home bases, could not bomb enemy truck convoys if the vehicles parked or pulled 200 yards off the roadway and could not knock out enemy SAM missile sites under construction, but only after the missiles became operational and were actually fired against our pilots.

It is my thesis that civilian theorists were more interested in sending "a series of messages" to North Vietnam than they were in positive military action. Many military officers who served in Vietnam have revealed that those who fought the war were confused by conflicting and inconsistent policies never adequately explained to the servicemen and women, nor conveyed to the American people.[32]

At least 22 different justifications were claimed for the war by Executive political authorities.[33] Military analysts and historians claim it was impossible for strategists to form a successful plan of operations when the nation's political objectives were so muddled[34] and the application of military force required to achieve those objectives were tactically limited by overlying rules of engagement.[35]

My point is not to revisit Vietnam, but to suggest that it is not only the political decision to employ U.S. forces abroad that should concern you, but also the military problems arising out of the restrictive controls and limitations placed on our forces by the same civilian leaders who send those forces to war.

Military, political and diplomatic success may all depend on a continuous and realistic assessment of those problems and the nature of the conflict. The lesson of Vietnam is not that Congress must participate in the commitment to go to war,[36] but that national "resolve cannot survive repeated failure on the battlefield." [37]

Waging war without resolve may be worse than war without a declaration.

Footnotes

1. The "Necessary and Proper" clause of Article I, section 8, of the Constitution is related to Congress' enumerated war powers, but "is not a grant of power." It merely removes the uncertainty that Congress may implement the powers otherwise conferred by the document. *Kinsella v. Singleton,* 361 U.S. 234, 247 (1960). The Constitutional Convention did not intend a delegation "to Congress of the function of defining the primary boundaries of another of the three great divisions of government." *Myers v. United States*, 272 U.S. 52, 127 (1925).

2. It was Alexander Hamilton, in the *Pacificus* papers, who first argued the doctrine that Article II, section 1, is a positive, general grant of executive power. VII *Works of Hamilton* 80-81 (*Pacificus* No. 1).

3. In *United States v. Sweeny*, the Supreme Court said the Constitution confers upon the President "such supreme and undivided command as would be necessary to the prosecution of a successful war." 157 U.S. 281, 284 (1895). In *Swaim v. United States*, 165 U.S. 553 (1897), the Supreme Court affirmed a holding in which the Court of Claims stated that "Congress cannot in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief." 28 Ct. Cl. 173, 221 (1893).

4. *In re Neagle*, 135 U.S. 1, 64 (1889). Supreme Court Justice Nelson, sitting as a Circuit Justice, held that the President's duty to execute the laws includes a duty to protect citizens abroad. *Durand v. Hollins*, 8 F.Cas. 111 (No. 4186)(C.C.S.D.N.Y. 1860).

5. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

6. *Morrison v. Olson*, U.S. (July 2, 1988).

7. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

8. *Bowsher v. Synar*, 478 U.S. 714 (1986).

9. The Presidential defense prerogative is not an invention of the Vietnam era. As early as 1870, Dr. John Norton Pomeroy, Dean of the University of New York Law School, wrote in his textbook on constitutional law that Congress may "furnish the requisite supplies of money and materials" and "authorize the raising of men," but "all direct management of warlike operations, all planning and organizing of campaigns, all establishing of blockades, all direction of marches, sieges, battles, and the like, are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens." J. Pomeroy, *An Introduction to the Constitutional Law of the United States* 289 (1870).

Similarly, in 1910 Dr. David Watson wrote, in his two-volume work on the Constitution: "By reduction of the army and navy or refusal of supplies, Congress might seriously impair the *de facto* power of the President to perform these duties [for protection of our national interests]; but it cannot limit his legal power as Commander-in-Chief to employ the means at his disposal for these purposes." D. Watson, 2 *The Constitution of the United States* 914 (1910).

10. Congress cannot do what would otherwise be unconstitutional by attaching a rider to an appropriation law. *U.S. v. Lovett*, 328 U.S. 303 (1946).

11. L. Maurice, *Hostilities Without a Declaration of War* 12-27 (1883).

12. *The Federalist Papers* (Clinton Rossiter ed.) 165 (1961).

13. E. Vattel, *The Law of Nations* 316 (1863 reprint); C. Wolff, *The Law of Nations Treated According to a Scientific Method* 368 (1939 reprint of 1764 edition); N. Grothus, *On the Law of War and Peace* 57, 184 (1925 reprint of 1646 edition).

14. 2 *The Records of the Federal Convention of 1787* (M. Farrand ed.) 318-320 (1966).

15. See generally my discussion of the intent of the Framers in J. T. Emerson, "The War Powers Resolution Tested: The President's Independent Defense Power," 51 Notre Dame Lawyer 204-209, especially at 207 (1975).

16. A majority of the 55 Framers who attended the Constitutional Convention had performed military duty in the War of Independence. At least seven signers of the Constitution were intimately familiar with the harm done by legislative directives. Emerson, *id.*, at 205. They had reason to prevent the recurrence of this interference with military operations in the new system of government being designed at Philadelphia. Thus, in contrast to the Articles of Confederation, which conferred upon the Continental Congress the "sole and exclusive right and power of determining on peace and war," the Constitution specifically makes the President "Commander-in-Chief" without any limitations, except the principles of free government expressed in other parts of the document.

17. J. T. Emerson, "*War Powers Legislation*," 74 W.Va. L. Rev. 53, 88-119, 367-368 (1971-1972), and see the author's updated and edited list printed in "Hearings on S. 440, War Powers Legislation," U.S. Senate Comm. on Foreign Relations, 93rd Cong., 1st Sess., April 11, 12, 1973, at pages 126-156.

18. *Stuart v. Laird*, 5 U.S. (1 Cranch) 298, 308 (1803); *McPherson v. Blacker*, 146 U.S. 1, 27, 35-36 (1892); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915).

19. The judiciary may continue to find, as it has in the past, that issues involving ongoing military hostitlites present concerns of military and diplomatic expertise outside judicial competence and therefore refuse to consider the merits of the War Powers Resolution.

For examples of the political question rule, see *Holtzman v. Schlesigner*, 484 F.2d 1307, 1310 (2d Cir. 1973), *cert. denied* 416 U.S. 936 (1974); *Curran v. Laird*, 420 F.2d 122, 129 (D.C. Cir. 1969)(en banc).

20. Testimony of Professor of Government James MacGregor Burns in "Hearings on Congress, the President, and the War Powers," House Subcomm. on National Security Policy and Scientific Developments of the Comm. on Foreign Affairs (91st Cong., 2d Sess.), June 24, 1970, at pages 82-83.

21. The Neutrality Acts of 1935, 1936, 1937 and 1939 sought to keep the United States out of war in Europe with inflexible provisions, including an arms embargo to all belligerents, a loan ban and cash-and-carry requirements that belligerents pay for all American goods and ship them on their own vessels, among other restrictions. Certain provisions of the 1939 statute are still in effect. 22 U.S.C. 441 et seq.. In November 1941, a mild revision of the 1939 Act to permit the arming of American merchant ships passed the House by a vote of only 212-194. 87 Cong. Rec. 8891 (Nov. 13, 1941)(H.J. Res. 237).

22. The Selective Service Act of 1940 expressly prohibited the employment of any draftees beyond the Western Hemisphere, narrowly described in the Senate as the area of the Americas which "we have long engaged to protect under the Monroe Doctrine." Iceland and Greenland unquestionably fell outside of this geographical limit. 54 Stat. 885, 886 (1940); 86 Cong. Rec. 10,295 (1940).

23. Admiral Harold Stark served as Chief of Naval Operations. See Stark's proposed instructions quoted in J. Burns, *Roosevelt: Soldier of Freedom* 104-105 (1940).

24. 86 Cong. Rec. 11755 (Sept. 7, 1940)(H.R. 10132).

25. W. Stevenson, *A Man Called Intrepid* 236 (1976).

26. Burns, *supra* note 23, at 140-141.

27. In the ten week interval between the fall of Fort Sumter and the convening of Congress in special session, "Lincoln amalgated the available state militias into a ninety days' volunteer force, called 40,000 volunteers for three years' service, added 23,000 to Regular Army and 18,000 to the Navy, [and] paid out two millions from unappropriated funds in the Treasury to persons unauthorized to receive it ...." E. Corwin, *The President/ Office and Powers* 229 (fourth revised ed.)(1957).

28. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).

29. 12 *The Writings of Thomas Jefferson* (Lipscomb ed.) 418 (1903), letter of Sept. 20, 1810.

30. R. Sherwood, *Roosevelt and Hopkins,* quoted in Stevenson, *supra* note 25, at 255. See also *id.* at 238.

31. See previously classified documents relating to Vietnam rules of engagement reprinted in 131 Cong. Rec. 4636-4646 (March 6), 5248-5256 (March 14), 5277-5285 (March 18), 6261-6270 (March 26)(1985).

32. "We had no strategy while the other side did." Gen. T. R. Milton, USAF Ret.,"The Lessons of Vietnam," 66 Air Force Magazine 106, 109 (March 1983). "[T]here was not an agreed and well considered national strategy upon which sound operational planning could be based." Gen. William E. DePuy, U.S. Army retired, "Vietnam: What We Might Have Done and Why We Didn't Do It," 36 Army 40 (Feb. 1986). "We were confused by arbitrary and conflicting policies. We felt pressure to win, but suffered restrictions that prevented victory." Lt.Col. John H. Admire, U.S. Marine Corps, "Understanding Limited War," 67 Marine Corps Gazette 53 (Jan. 1983). "From the beginning of the Vietnam War, there was no agreement on what was at stake and which United States interests, if any, were involved." Lt.Col. David Twining, U.S. Army, "Vietnam and the Six Criteria for the Use of Military Force," 14 Parameters, Journal of the US. Army War College 11 (Spring 1985).

33. Hugh M. Arnold, "Official Justifications for America's Role in Indochina, 1949-1967," Asian Affairs: An American Review 42, 48 (Sept.-Oct. 1975).

34. "[W]ithout a thoroughly recognizable national objective, the military cannot adopt a reasonable and coherent strategy." Major Michael L. Brown, U.S. Army, "Vietnam: Learning from the Debate," LXVII Military Review 48 (Feb. 1987).

35. "The aims or objectives of an international political strategy may quite reasonably and legitimately be limited, as were ours in Vietnam, but the actual application of military force required to achieve those aims cannot and must not be tactically limited." Admiral U.S. Grant Sharp, U.S. Navy Ret., Strategy for Defeat/ Vietnam in Retrospect 270 (1979).

36. I have discussed elsewhere the pervasive role of Congress in authorizing the Vietnam conflict beginning with the Mutual Defense Assistance Act of 1949. J. T. Emerson, "Congress and the Commitment to Vietnam," in Congress, the President and Foreign Policy 57 (1984)(American Bar Association).

37. Stephen Peter Rosen, "Vietnam and the American Theory of Limited War," 7 International Security 83 (Fall 1982).

PREPARED STATEMENT OF THOMAS M. FRANCK

Mr. Chairman and Members of the Committee:

This is not the first time I have had the privilege of testifying before this, the senior committee of the senior Chamber. One aspires to deserve the honor by saying something new, which is difficult when a subject has received such careful scrutiny by the Committee's Members and Staff.

This is the War Powers Resolution's fifteenth anniversary. We have now had enough practical experience to be able to draw some conclusions from the perspective of hindsight. Though it tends to be maligned, there is much to be said for the wisdom of hindsight. It ought to be good, if only because we pay so dearly for it.

Experience with the War Powers Resolution transcends three Republican and one Democratic administration. That experience encompasses conflicts in Indochina, Iran, Libya, Lebanon, Grenada, Nicaragua, the Persian Gulf and Chad. A Committee print of the other House (The War Powers Resolution, Relevant Documents, Correspondence, Reports, Subcommittee on Arms Control, International Security and Science of the Committee on Foreign Affairs, U.S. House of Representatives. May, 1988 ed. Hereinafter: War Powers, 1988) lists no fewer than eighteen reports made after the Resolution's enactment by Presidents Ford, Carter and Reagan which, the authors claimed, were "consistent with the War Powers Resolution" or, to use the language preferred by Presidents Ford and Carter, "in compliance with" it.

We can thus follow both a formidable paper trail and also a broad path cut by U.S. foreign relations practice. In doing so we can hope to arrive at some evaluation of the Resolution's effectiveness.

Moreover, we now stand at the back door threshold of the Reagan era and near the beginning of a new presidency. This creates considerable opportunity to marshal whatever wisdom we may garner from hindsight in order to make structural and operational improvements in the way the act operates. A truly bipartisan and wise effort in this direction might well appeal to a new president open to new cooperative ventures with Congress. It also gives the Senate a rare opportunity to use the leverage which it has when a new administration wants its consent to key appointments. To take full advantage of this opportunity, however, the Senate needs a clear and credible picture of what is right and what is wrong with the Resolution, as well as an understanding of its options and how each would advance a true partnership between Congress and Presidency in the conduct of foreign relations.

There is a genuine opportunity for reform and there is a major need. One undesired and undesirable side effect of the War Powers Resolution, as it has evolved in practice, is that it has enveloped foreign policy in a miasma of legalism. It has transformed argument about the political wisdom of being involved in military encounters -- in the Gulf of Tonkin, or the Persian Gulf, or the Gulf of Sidra -- into an arcane debate about the legality and the constitutionality of various foreign policy initiatives. This impoverishes the marketplace of ideas and shrinks the dimensions of public comprehension and participation. It simply leaves most Americans bewildered and behind.

The purpose of the resolution was to encourage serious dialogue on war/peace issues between the branches of government, and between government and the public. In any reform of the War Powers Resolution, that objective must be restored as its centerpiece. This does not mean that the legal and constitutional separation-of-power issues do not matter. They most certainly do. But the Resolution's effect on the public life of our nation should be to resolve the constitutional issues with sufficient simplicity, clarity and certainty that the decks can be cleared to permit a concentration on the policy debate about the wisdom or folly of any particular engagement of the armed forces. Only if Congress can make sufficiently clear what is legal can we concentrate on what is wise.

The War Powers Resolution lacks textual clarity in several important respects, and its lack of clarity has been exacerbated in practice. This lack of clarity is due to textual problems which, in part, grew out of the imperfect synthesis achieved between the House and Senate drafts in 1973. It is also due to creative evasion by the executive branch, the reluctance of Congress to challenge executive non-compliance; and, finally, it is due to the Supreme Court's decision in the Chadha case (I.N.S. v. Chadha, 462 U.S. 911, 103 S.Ct. 2764, 1983), which effectively disabled one of the statute's two engines.

In these circumstances, the first objective of a law should be to establish as clearly as possible the respective authority of Congress and of the President.

Insofar as there is doubt about the scope of presidential authority to engage in limited hostilities without congressional authorization, the Congress has the power to resolve those doubts by exercising its article 1, section 8(18) power to "make all laws which shall be necessary and proper for carrying into Execution. . .all. . . Powers vested by this Constitution in the Government of the United

States, or in any Department or Office thereof." The point of clear legislative definition is not merely to clarify and invest with greater certainty the distribution of powers but, also, to reclaim those powers of Congress which have been abdicated by congressional inaction in the face of Executive initiatives. To define successfully is to limit. As Justice Jackson said in his Youngstown concurrence: "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637.) However, once Congress does express itself clearly, the same presidential action, if incompatible with that expression of legislative will, finds his power now "at its lowest ebb. . . ." (*Ibid.*) The powers of the President "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." (*Id.* at 635.)

Yet another reason to define clearly the applicable law is to help courts to decide to decide. In Baker v. Carr (369 U.S. 186, 82 S.Ct. 691), Justice Brennan, while denying that "every case or controversy which touches foreign relations lies beyond judicial cognizance" (369 U.S. 186, 211), nonetheless noted the difficulty judges encounter when the issues "turn on standards that defy judicial application. . . ." (*Id.*) While even the clearest of standards do not invariably make judicial application easy, particularly in the foreign relations field, clarity, simplicity and certainty of standards help convince the judiciary to play their umpiring function.

As the War Powers Resolution is currently drafted, it contains no standards whatsoever, no guidance to the President, the courts or the public as to when -- in what circumstances -- the President must obtain congressional assent before taking the armed forces of the United States into actual or anticipated combat. Section 2(c) at first appears to provide such guidance, but it fails: first, because it is a purely prefatory section, and, second, because the House-Senate Conference Report actually states that the operative provisions of the War Powers Resolution "are not dependent upon the language of this subsection. . . ." (War Powers, Conference Report, Joint Explanatory Statement of the Committee of Conference, in _War Powers, 1988_, _supra_.) If it _were_ intended that 2(c) restate Congress' notion of the extent and limits of presidential power, it would be a fatally flawed restatement. No provision, for example, is made for executive action to rescue Americans imperilled abroad.

Thus, the first object of a revised War Powers Resolution should be to establish in law Congress' view of when the President may use the armed forces without its consent. These circumstances should be: to repel an armed attack or imminent attack on the U.S. or its armed forces, and to effect the speedy and safe evacuation of U.S. citizens from the high seas or foreign territory if the government of the ship's flag or of the territory is unable to provide the requisite standard of protection required by international law. These standards, in approximately similar form, are spelled out in H.J. Res. 462, introduced in the House of Representatives by Congressman De Fazio. These are the circumstances in which a speedy response is likely to be most needed in the foreseeable future. It is also a circumstance in which presidential initiative has already received clear judicial approval (_Durand v. Hollins_, 8 Fed. Cas. 111 (1860)).

Even in areas where Presidents may have prerogative powers, however, it has been clear since Chief Justice Marshall's decision in Little v. Barreme (6 U.S. (2 Cranch) 170) that, in the absence of a declaration of war made in accordance with the Constitution, Congress may yet regulate the precise parameters of more limited hostilities. The prerogative power of the President becomes a limited power once Congress has spoken in law. The De Fazio bill activates this latent power of Congress, as did section 3 of the Senate version of what became the War Powers Resolution. Section 2(c) of the existing law, however, fails to take up the challenge.

Once Congress has legislated a clear definition of when the President is authorized to respond militarily without the prior specific consent of Congress, a discernible boundary will have been established. But how is such a boundary to be defended? The President, not Congress, speaks for the nation to the world. He, not Congress, controls the armed forces. He has demonstrated occasional willingness to act even in the face of specific and unambiguous legal prohibition, as best exemplified in the Mayaguez rescue. (See: Report dated May 15, 1975, from former President Gerald R. Ford, to Hon. Carl Albert, former Speaker of the House of Representatives, in compliance with section 4(a)(1) of the War Powers Resolution, relative to the Mayaguez incident, in War Powers, 1988, supra. For the view that this action was illegal see T. Franck, After the Fall: The New Procedural Framework for Congressional Control Over the War Power, 71 Am. J. Int'l L. 605 (1977). Who is to invigilate even the clearest of boundaries between permissible and impermissible presidential use of military power? The answer is that Congress, short of deploying either the sergeant-at-arms (too little weight) or the impeachment power (too much weight), has only two potential allies who could help it defend its boundaries of authority once those have been clearly marked. One is the federal judiciary, the other is the U.S. treasury. Both should be utilized, and the procedure for their utilization should be spelled out in the law.

It is by no means certain that the federal courts are willing to defend even a clearly marked boundary; but an effort should be made to give them the optimum opportunity to see it as both in the interest of the nation and of the judiciary that they should do so. To this end, the legislation, in addition to spelling out clear, applicable standards, should specifically authorize the courts to umpire and create the procedural requisites for a "case or controversy" between Congress and President.

Can the legislature tell the courts to umpire? The courts have used the political question doctrine as a shield against involvement in interpreting the War Powers Resolution. The most recent instance is the judiciary's specific refusal to consider a complaint by 110 Members of Congress that deployment of U.S. forces in the Persian Gulf triggered the reporting requirements -- and, by implication, the 60-day limit -- of the War Powers Resolution's sections 4(a)(1) and 5(b). (Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).) Yet, that is not necessarily the last word. Congress has not spoken to the judiciary by law on this jurisdictional matter and it should now do so. Judges ought to listen to a law that authorizes them to decide, and have done so in comparable circumstances. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the courts had refused to apply international law to decide on the legality of acts by foreign governments involving expropriation of U.S. assets. Thereafter, Congress enacted the "Hickenlooper Amendment" to the Foreign Assistance Act of 1961, which mandated the courts to decide such cases "on the merits giving effect to the principles of international law." (22 U.S.C. § 2370(e)(2) (1982).) So ordered, the federal judiciary responded. In Banco Nacional de Cuba v. Farr, the district court, acknowledging Congress' "considerable measure of power with respect to the courts" concluded that "when Congress, dealing with subject matter within the powers delegated to it by the Constitution, speaks with respect to a voluntary judicial policy of self-limitation, the courts are bound to follow its directions unless compelled not to do so by the Constitution." (243 F. Supp. 957, 975-76 (S.D.N.Y., 1965). Aff'd. 383 F.2d 166 (2d Cir. 1967), cert. denied, 39 U.S. 956, reh'g denied, 390 U.S. 1037 (1968).) The courts' use of the political question doctrine, like their use of the act of state doctrine in the Sabbatino case, is constitutionally based on separation of powers fastidiousness. But, as with all disputes turning on distribution and separation of powers, the courts are bound to give weight to the legislatively expressed views of Congress.

Equally, Congress can improve the prospects of judicial umpiring by addressing the issue of ripeness. In Goldwater v. Carter (444 U.S. 996), Justice Powell, in his concurring opinion, expressed the view that the courts should decide disputes between the Executive and Legislative Branches only when they "reach a constitutional impasse" (id. at 997) and "final disposition of the question presented. . .would eliminate, rather than create, multiple constitutional interpretations." (Id. at 1001.) To meet this test, he suggested, Congress would have had to have "challenged the President's authority" by "appropriate formal action. . ." (id. at 1002) and the resulting uncertainty would have to be perceived by the judiciary to have "serious consequences for our country." (Ibid.)

Using Justice Powell's signposts, the Congress' revision of the War Powers Resolution could include an amendment to its rules of procedure which would provide -- for example -- that, on motion by any ten members of each House and utilizing accelerated procedures, a vote would be taken on an unamendable resolution of disapproval which would signify the existence of a constitutional impasse. The resolution would stipulate that a specific presidential use of force had been found to constitute a violation of the limits on the authority vested in the President, on his own, to authorize use of the armed forces in, or in imminent anticipation of, combat.

Besides ripening the constitutional dispute so as to make judicial umpiring more likely, the same procedure could also begin the process of bringing into play the assistance of the treasury, over whose expenditures the Congress has undoubted supremacy. The War Powers Resolution could also provide that if the aforementioned resolution of disapproval passed the Senate and the House, and the President nevertheless persisted, a point of order, moveable by any member, would lie to foreclose consideration of any bill authorizing or appropriating funds for the Department of Defense. Both chambers would amend their rules of procedure to implement the effect of a concurrent resolution of disapproval. If further fiscal clout were needed, the War Powers Resolution could be further amended to provide that no funds previously or thereafter authorized or appropriated by any law could be used by the President to pay for the use of the armed forces or other forces under his command for purposes incongruent with his authority as stated in the Constitution and the War Powers Resolution.

The combined effect of these several provisions would be to ripen a political confrontation into a judicially cognizable dispute, and, simultaneously, to draw shut the purse strings when the President exceeds his constitutional and legislatively-ordained authority. The proposed revisions might make provision for suspending the fiscal remedy as long as the judicial remedy was being pursued.

These remedies seem to me preferable to those envisaged by the S.J. Res. 323, the draft amendments proposed by Senators Byrd, Nunn, Warner and Mitchell. (S.J. Res. 323, 100th Cong., 2d Sess., May 19, 1988, sec. 6.) Their proposal contains no standards for judging the validity of an executive act of war-making. It would also require the Congress to override a presidential veto, and, if that severe handicap on congressional action were overcome by the assembling of the necessary two-thirds majority, it would probably still be necessary to confront in the courts the Executive's argument that such a congressional enactment constitutes an unconstitutional trespass on presidential prerogative powers. My proposal is simpler and clearer. It would legislate guidelines for use of the military on presidential initiative. It would set in place procedures by which Congress, if those guidelines are ignored by the President, could ask for the help of the courts. If that help is not forthcoming and the presidential war-making continues, funding (both retrospectively and prospectively) would cease.

This envisages a scenario of inter-branch conflict which the law primarily is designed to avoid. By making it more difficult to circumvent the clear standards and expedited procedures it envisages, the law intends to take the legal issues off the front burner, where the policy issues should be. The revision of the War Powers Act should not merely help restore the presidential/congressional balance and help the Congress defend that historic, if always precarious, balance; its primary mission should be to improve the prospects and procedures for encouraging policy consultation in place of confrontation. S.J. Res. 323 is helpful, in this respect. The consultation of all those in Congress is so patently impossible that it provides the Executive with an undeniable reason not to consult with any Members. I agree that the bill's proposed process of prior and continuing consultation with the House and Senate leadership, and the leadership of its foreign relations, intelligence and defense committees, can help to avoid the sort of legal confrontations over distribution of powers which has hitherto been all too common and has marked America as a divided, uncertain and unreliable actor on the world stage.

It may be objected that, in establishing such a leadership group as is contemplated in draft section 3(b)(1)(A) of the S.J. Res. 323, as well as the larger permanent consultative group envisaged in sec. 3(c)(1), the bill would invite executive cooption of Congress. It may also be argued that neither of these contact groups would be any match for the superior resources of information and staffing which are at the disposal of the foreign relations establishment of the Presidency.

This may be true. However, these inequalities can be reduced by ensuring that the two contact groups are adequately staffed and endowed with the legal power to obtain access to all relevant information in the possession of the Executive. In the last analysis, however, even if the dangers of cooption are real, it is hard to see how Congress is ever to be consulted by the President, if not through some such authorized contact group. The notion that the President and Congress should not consult except in legislative form or adjudicative forum, while perhaps constitutionally pristine, seems to me much too costly to be an effective routine remedy for Executive solitude.

One safeguard against cooption is to vest the power to initiate a resolution of disapproval in _any_ ten members of each chamber, rather than solely in the leadership contact group as provided by the Senate bill. That group, of course, will wield much power of persuasion; but ultimate authority should remain with the individual members of Congress, if only to protect the contact group's own integrity against the suspicion of being coopted.

Although the resolution of disapproval herein proposed would take the form of a concurrent resolution which does not require submission for presidential signature, this does not mean that its validity is in doubt by operation of the Supreme Court's decision in _I.N.S. v. Chadha_ (_supra_). The proposed resolution of disapproval is not intended to have the force of law. The essential purpose of such a resolution would be procedural: to ripen the controversy between the branches, in order to conduce to a litigated solution, and to bring into operation certain procedures pertaining to Defense Department money bills. For neither purpose need Congress resort to law-making, nor need it obtain the President's signature. (See: M. Glennon, The War Powers Resolution Ten Years Later: More Politics Than Law, 78 Am. J. Int'l L. 571, ___.)

Congress will have done all that is legislatively possible, once the War Powers law has clarified its view of the limits of presidential authority, has created the requisites for judicial enforcement of those limits, has brought its undoubted power of the purse to bear, and has set up reasonable and effective procedures for inter-branch consultation. The stage will have been set for voluntary compliance, for negotiation, for adjudication and, if all else fails, for Congress to confront a heedless president as expeditiously as possible.

There remains much dead underbrush to clear from the existing War Powers Resolution. The concurrent resolution procedure for ending on-going conflicts -- sections 5(c) and 7 -- is void under the rule in the Chadha case and should be repealed. Section 5(b), automatically terminating on-going conflicts that have not been approved by Congress, has never been invoked and is both unwise and, in part, perhaps unconstitutional. Its unwisdom is in alerting every enemy to the advantages to be gained by prolonging a conflict and exploiting our constitutional divisions. This being widely perceived, it has not been particularly costly for the Executive to ignore the reporting requirements imposed by section 4(a)(1), which start the 60-day clock ticking.

After 60/90 days, section 5(b) appears to require the recall of U.S. forces from combat even when their despatch by the President was both constitutional and lawful. It is difficult to sustain the argument that Congress can terminate what it concedes the President could initiate on his own initiative. The D.C. Circuit Court, in Mitchell v. Laird (488 F.2d 611 (D.C.C. 1973)) has said that once U.S. forces are engaged, the President's constitutional duty, even in the face of an effective congressional withdrawal of authority for the war, cannot come to more than "trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation -- its defense, its honor, its morality." (Id. at 616.) This does not mean that Congress can compel hostilities to cease by a legislated date certain -- a surmise which is dictated not only by the Constitution but by common sense about national survival.

Section 4, the reporting requirement, logically should be repealed in its entirety along with section 5(b) to which it relates, although, as noted, the Executive concurrently should be made subject to consultative procedures such as those envisaged in section 3 of S.J. Res. 323. Section 6 would also become redundant in its entirety if section 5(b) is repealed, and, as noted, section 7 is made redundant by the Chadha case's voiding of section 5(c), except to the extent expedited procedures are utilized in the new context envisaged by S.J. Res. 323 or by my proposal for a resolution of disapproval.

Finally, section 8(d)(1) of the existing law -- providing that the law is not intended to alter either the Constitution or provisions of existing treaties -- should be repealed in the name of common sense. It either says nothing -- of course a statute can't amend the Constitution! -- or it speaks too much. For example, it seems to contradict section 8(a)(2) of the Resolution, which retroactively purports to interpret all treaties as not authorizing presidential use of force unless such authority is specified. Both the NATO and Rio pacts can be construed as giving the President the authority to respond to an attack on a treaty partner as if it were the U.S. that had been invaded i.e. by acting without further authorization. If this is the power the Senate meant to give the President, it probably had the constitutional license to do so. The War Powers Act, as presently drafted, manages both to say that this was not the intent of the Senate and, that if it was the Senate's intent then the Act does not purport to alter that implicit delegation of power. It might be better to say nothing, or else to decide what Congress wants to do about these treaty commitments and then to say that.

In summary, my impression is that it comes to this: The legislature cannot implement or enforce the laws it writes, it can only seek to enlist the support of the courts, the U.S. treasury and the public. Clarity and simplicity are essential to enlisting the support of each. The law can also establish procedures for consultation and for responsible congressional participation in a genuine partnership with the executive branch, if the mutual will exists. So far, the partnership created by the War Powers Resolution resembles only that between a horse and a rider.

The War Powers Resolution was a good idea, but its drafting and execution were faulty. Instead of authorizing the President to use the armed forces in limited circumstances for as long as necessary, it authorized their use in unlimited circumstances for a fixed period. This stands the Constitution on its head. (See: Franck, After the

Fall: The New Procedural Framework for Congressional Control Over the War Power, 71 Am. J. Int'l L. 605.) Moreover, it struck a bad deal. In return for giving the President what was taken to be carte blanche as to the circumstances in which he could utilize the armed forces, he never once gave the Congress what it had asked in return: the report which would trigger the 60-day limitation on that exercise of force.

Today the Senate has the benefit of hindsight and the opportunity which the beginning of a new administration presents. Congress can, and must, do better if the policy-making process is to disentangle itself from those legal knots which divert our attention from the crucial war-peace issues and undermine our credibility as a reliable world leader.

PREPARED STATEMENT OF EDWIN B. FIRMAGE

I. Summary Statement

The War Powers Resolution is deeply flawed. It seems to delegate congressional war power to the President, at least for sixty days. If hostilities are commenced and concluded within that time, Congress is unlikely to challenge presidential initiative, however much such actions violate congressional war power under the Constitution. If hostilities continue once American troops are committed to combat, it becomes excruciatingly difficult -- often practically impossible -- for Congress to oppose the President and extricate American forces.

The War Powers Resolution provides a legalistic mode of consultation and reporting, repugnant to a President jealous of executive powers. Collegial dialogue between the political branches would be far better. But it was the dramatic failure of such dialogue during the Cambodian and Vietnam experience that forced Congress, in desperation and frustration, to pass the War Powers Resolution over presidential veto.

The War Powers Resolution, unfortunately, assumes continued unchecked presidential initiative in committing troops into hostilities or into situations where hostilities are likely. Both the reporting and consulting roles of Congress are premised on a continued position of congressional subservience. According to original constitutional understanding, and I believe consonant with present need, the War Powers Resolution should speak instead of congressional authorization rather than consultation; and in place of reporting, refusal of funding, censure, and if necessary, presidential impeachment for violating the war power of Congress.

For these reasons, the War Powers Resolution at best is the least worst approach to the problem of the erosion of congressional war power and the aggrandizement of presidential prerogative. Only disaster in the use of the American military -- like Vietnam, or the Iran-Nicaragua crisis under presidential leadership less adroit in public relations and document shredding -- is likely to compel leaders of government to make the radical change necessary to right this shocking imbalance in the use of the war power.

Yet because the War Powers Resolution presents the only practical vehicle for change toward restoring congressional power over the decision for peace or war, amendments might strengthen this effort significantly.

The War Powers Resolution[1] became law in an attempt to restore congressional governance over the decision for war or peace. There is no doubt that the original understanding of the Framers of the Constitution was that Congress possessed the sole power to decide for war, whether declared or undeclared, waged in secret or openly acknowledged, fought with the public forces of the nation or by private mercenaries. The sole exception was that the President possessed the power to respond to surprise attack on this country. The fundamental assumption behind the constitutional grant of the war power solely to Congress was that the condition of peace -- not war -- was the norm, the status quo, and was to be protected against change by the people's representatives, the Congress of the United States, lest war be brought upon us by intemperate and ill-considered acts of one person. Instead, the status quo, a condition of peace, could only be changed, absent an attack on us, by a decision publicly arrived at by protracted and thoughtful debate.

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[1] Pub. L. No. 93-148, 87 Stat. 555 (1933) (codified as amended at 50 U.S.C. § 1541-1548 (1982 & Supp. IV 1988)).

The enormous value of these public decisions has not been lessened, I believe, by the development of nuclear weapons and missile delivery systems. Quite the contrary. The horror of nuclear war makes all the more necessary the maintenance and strengthening of every possible institution of law and government to preserve the peace and place squarely upon anyone who would move us toward war the full and public burden of persuading the nation to acquiesce in the decision for war.

The temptation to resort to covert action and covert war when the existence of nuclear weapons make all-out war too dangerous and too costly must be constrained. Our fierce ideological struggle with the Soviet Union, lasting since the end of World War II, must not be allowed to distort and finally destroy our natural inclination toward peace and our constitutional commitment of the war power to Congress. The end we seek, the enjoyment of peace and liberty, must be congruent with the means we select to ensure our liberty and our peace. Secret, unacknowledged or illegal acts of war violate the principles of a peaceful and democratic state.

The War Powers Resolution correctly reflected congressional consensus, I believe, that the condition of perpetual cold war with the Soviet Union, coupled with presidential usurpation and congressional neglect of congressional war powers, had led to a dangerous aggrandizement of presidential power at congressional expense. Several years' experience have revealed inadequacies in the War Powers Resolution. Much more important, however, this time has powerfully confirmed the validity of the assessment, following the Vietnam war, that Congress must reassert its original dominance over our decision for war or peace.

Congress should strengthen the War Powers Resolution. First, the consultation provisions require specific definition of the term *consult*. Second, the consultation requirements should be made applicable to all section 4(a)(1) reportable events. Third, the Act should self-invoke whenever any United States forces are introduced into any situation in which there is armed conflict. Fourth, the Act should require congressional authorization as a prerequisite to funding and the withholding of funds if the President fails to comply with the Act. Fifth, the Act should seek to address a prominent problem of our decade -- covert, or paramilitary, operations. Sixth, Congress must devise some method of keeping congressional leadership in the decision-making loop regarding the strategy, development, deployment and use of nuclear force. Seventh, justiciability and standing for violations of the War Powers Resolution should be mandated through amendments. Finally, Congress should ensure that the bulk of the War Powers Resolution survives constitutional attack under *Immigration & Naturalization Service v. Chadha.*[2]

II. The War Power[3]

The Constitution of the United States grants Congress the power "to declare War" and to "grant Letters of Marque and Reprisal."[4] There is no question that the original intent of the Framers of the Constitution was to vest in the Congress the complete power to decide on war or peace, with the sole exception that the President could respond to sudden attack on the United States without congressional authorization. This position is supported with absolute clarity of intent of the Founding Fathers. In the Constitutional Convention, debates in the Committee on Detail centered around an original draft of the war power providing that "[t]he legislature of the United States shall have the power ... to make war." One member of the Committee, Charles Pinckney, opposed giving this power to Congress, claiming that its proceeding would be too slow. Pierce Butler said that "he was voting for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Butler's motion received no second.

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[2] 103 S. Ct. 2764 (1983).

[3] Portions of this argument are taken from F. Wormuth & E. Firmage, **To Chain the Dog of War: The War Power of Congress in History and Law** (1986); The Reynolds Lecture, *Ends and Means in Conflict*, given at the University of Utah, Salt Lake City, Utah (Oct. 15, 1987); *Rogue Presidents & the War Power of Congress*, 1988 **Geo. Mason L. Rev.** ______ (forthcoming), presented before the American Bar Ass'n Standing Comm. on Law & Nat'l Security, Conference on Separation of Powers (Mar. 30, 1988); and *Covert War and the Democratic State: An Essay on Ends and Means*, 15 **Present Tense** 55 (1988).

[4] **U.S. Const.** art. I, § 8.

James Madison and Elbridge Gerry, however, were not satisfied with the proposal of the Committee on Detail that the legislature be given the power to make war. Instead, they moved to substitute *declare* for *make*, "leaving to the Executive the power to repel sudden attacks." The meaning of this motion, which eventually was carried by a vote of seven states to two, was clear. The power to initiate war was left to Congress, with the reservation from Congress to the President to repel a sudden attack on the United States.[5]

In 1789, Thomas Jefferson made this insightful statement: "We have already given ... one effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay."[6]

The power given Congress rests on the constitutional text that Congress be empowered to "declare War and grant Letters of Marque and Reprisal."[7] This empowerment entails the power to decide for war declared or undeclared, whether fought with regular public forces or by privateers under governmental mandate. While letters of marque and reprisal originally covered specific acts, by the eighteenth century letters of marque and reprisal referred to sovereign use of private, and sometimes public, forces to injure another state. It was within this context that the Framers of the Constitution vested Congress with the power to issue letters of marque and reprisal.[8] Clearly, only Congress has the constitutional power to wage war by private parties as well as by the armed forces of our country.

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[5] *See* 2 **M. Farrand, The Records of the Federal Convention of 1787** § 3.3(a), at 313, 318 (rev. ed. 1937); **F. Wormuth & E. Firmage** *supra* note 3, at 17-18.

[6] **Papers of Thomas Jefferson** XV 397 (J. Boyd ed. 1978), as quoted in F. Wormuth & **E. Firmage**, *supra* note 3, at 179.

[7] **U.S. Const.** art. I, § 8.

In Korea and Vietnam, Presidents, their counselors and some academics asserted a presidential power apart from congressional act to wage war under whatever name. The State Department in 1950 attempted to justify President Truman's entry into the Korean War by referring to the President's executive power, his power as Commander in Chief, his power to conduct foreign relations of the United States, and to the United Nations Charter.

The abuses of executive prerogatives in foreign affairs during the Korean and Vietnamese wars proved the traditional constitutional provisions alone to be insufficient. Congress responded to this realization by passing the War Powers Resolution of 1973 and the Intelligence Authorization Act of 1981, in order to provide a means of congressional control and oversight over the power to initiate hostilities and over the intelligence-gathering process.[9]

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[8] Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035 (1986).

[9] The Intelligence Authorization Act of 1981 imposes duties on executive branch officials, in particular the Central Intelligence Agency: (1) to keep the congressional intelligence committees "fully and currently informed" of intelligence activities; (2) to provide prior notification of "significant anticipated intelligence activities," chiefly covert operations; (3) to furnish any information or materials requested by the intelligence committees concerning intelligence activities; and (4) to "report in a timely fashion" on any illegal intelligence activities or significant intelligence failures. *See* Intelligence Authorization Act for 1981, 50 U.S.C. § 413(a)(1) (1982).

The Neutrality Act, an additional restriction on executive military discretion, has existed since 1794. Congress passed the Neutrality Act to prevent foreign interference in United States affairs and to strengthen the authority of the central government in

In the past, Presidents have bolstered their presidential power as Commander in Chief with citations to occasions when acts of war were commenced by executive act rather than congressional authorization. History tells quite a different story.

In 1967 the State Department compiled an official list of 137 instances where it asserted that the President, as the Commander in Chief of the Armed Forces, committed acts of war on his own authority beyond the borders of the United States. Careful scrutiny of the examples provided by the government belies this assertion; eight of the acts involved enforcement of the law against piracy, for which no congressional authorization is required; sixty-nine of the acts, many of which were statutorily authorized, were landings to protect American citizens; twenty of the acts which, although illegal, were not acts of war if the United States claimed the territory, concerned invasions of foreign or disputed territories; six of the acts were minatory demonstrations without combat; another six involved protracted occupation of various Caribbean states, which occupations were authorized by treaty; and at least one of the acts was an act of naval self-defense, which is justified under both international and municipal law. Even in the one- or two-dozen instances when the President has acted without congressional authorization, he has done so by relying, however correctly or incorrectly, on either a statute, a treaty, or international law, never on his power as Commander in Chief or as the chief executive. Clearly, neither the Constitution nor historical precedent empower the President to initiate a state of war or engage in an act of war on his own authority beyond the borders of the United

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respect to its citizens. The Act was also designed to further the war powers of Congress. The Act accomplishes this by denying the executive the power unilaterally to authorize hostile expeditions and foreign recruiting, and the discretion not to enforce the statute's prohibitions. By doing this, the Neutrality Act reaffirms the original constitutional intent of collegiality, ensuring that no individual is allowed to threaten the peace by unilateral acts of warfare. *See* Act of June 5, 1793, ch. 50, 1 Stat. 381 (1794) (current version at 18 U.S.C. § 960 (1938)); Lobel, *The Rise and Fall of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 **Harv. Int'l L.J.** 1 (1983).

States. The presidential war-making power is strictly limited to defending against sudden attack.[10]

III. Covert War

Since World War II we have engaged in overt and covert war and acts of war, most often initiated by the President without the authorization of Congress. By presidential directive we have conducted full-scale war; initiated coups; mined harbors; encouraged political assassinations; aided insurrection and sabotage; trained, equipped, and set loose our own brigands and terrorists; and responded to terrorist acts against our citizens by executively approved reprisals. We do this in violation of the Constitution, in disregard of the laws and prerogatives of Congress, in open defiance of international law and morality. Both the scope and the notoriety of such violence conducted by this administration has changed the meaning of covert war from secret war simply to formally unacknowledged war, brazenly supported in contravention of world law and the United States Constitution, in contempt of Congress.

No statute of Congress authorizes presidential covert war or acts of war. The National Security Act of 1947, usually relied on by Presidents for their illegal acts, makes no mention of covert action or paramilitary operations. While providing for intelligence acquisition and analysis, this statute additionally authorized the CIA to perform only "such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." On its face, this phrase is not authorization for any paramilitary action and is most certainly no authorization for covert actions unrelated to the acquisition of intelligence.

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[10] *See* **F. Wormuth & E. Firmage,** *supra* note 3, at 133-49.

The term *covert action* could be used to include at least three categories of activity. First, and clearly within the presidential power under an authorizing statute of Congress, is the acquisition and interpretation of intelligence. Some of this activity will occur by covert means. Short of war and acts of war, or violence and illegality prohibited by international law and acts of Congress, this activity is within presidential power.

The second and most troubling area conceptually is covert action beyond intelligence-gathering but short of war, acts of war, or violence and illegality prohibited by statutes of Congress and by international law. Such activities might include some degree of manipulation of another country's media, their electoral and governmental processes, or their economy. As such covert action approaches acts of reprisal, acts of war, or violence threatening the property or the integrity of another state, Congress should authorize such action before the President possesses clear authority to act.

The third category is more clear, more serious, and is unequivocally within the war power of Congress. This category includes covert war and acts of war, reprisals, and other acts of violence. These acts usually share one or both of two criteria: violence at such a level as to be forbidden by municipal and international law; and direct intervention in another state designed to affect that state's sovereign autonomy. Such activity is prohibited from presidential undertaking without congressional authority. Even with congressional authorization, a large part of such activity, nevertheless, is prohibited by international law.

Conclusions can be drawn and lessons learned from our experience with covert action since World War II. First is an observation about the tension between a democratic society and covert operations. A democratic state is built on decisions made openly in public debate. Public debate is a compelling necessity when questions of war and peace, life and death are at issue.

Consensus, which is vital in the establishment and the conduct of foreign policy, cannot be achieved in secret. Consensus between the President and Congress can hardly occur when the Congress is deliberately kept ignorant of covert actions of the government. By nature and definition, covert actions cannot be preceded by public debate and public consensus. Nostalgic reminiscence of Vandenburg era consensus by supporters of so-called *strong* presidential leadership in the conduct of foreign policy is understandable. And the goal -- consensus between the political branches in the conduct of foreign policy -- is desirable. But the proponents of a strong presidential leadership in foreign policy must understand the relationship between covert action kept secret from the target of such action and covert action kept secret from Congress. Consensus between the political branches becomes impossible by definition. Covert action possesses limitations yet more devastating to real consensus. For consensus between the political branches in reality only mirrors consensus achieved among the electorate. The nature of covert action makes this impossible, at least before the fact.

By definition in covert action, debate, legitimization, and wisdom from the electorate are unavailable. Critical flaws that would be apparent in the light of day do not appear. No debate occurs within government generally. Congress plays almost no role, "notification" at best going to a select few, dangerously close to an "old boy" network of senior committee chairmen and party leadership. Even debate between the White House and the Departments of State and Defense may be dangerously limited or nonexistent. Crucial parts of the Iran-Nicaragua affair, for example, saw White House control over the operations of clandestine activity go directly from the National

Security Council to the CIA, excluding or ignoring the advice of Cabinet officers at State and Defense.

Intelligence gathering in our imperfect world may well be necessary. Clandestine intelligence operations, of necessity, may be part of this. But the huge majority of our intelligence comes through means both open and legal. The CIA and other parts of government read thousands of documents from other lands. Individuals, private and public actors, cross increasingly porous borders. Professional groups conduct exchanges and read each other's literature. Formal governmental relations provide vital contacts. Electronic devices, more exotic and not unambiguously illegal, allow us to see each other and hear each other almost without the capacity to interdict.

This is enough. Our record of covert war and acts of war is one of short-term embarrassment and long-term disaster. The advantages we achieve are overwhelmed by the violence we do to others and ourselves. No system of congressional oversight realistically can meet this challenge. If acts of violence and war are contemplated, let us debate this possibility in the open. I prefer the obvious risks of open communication to the corruption of our government and our souls that is unavoidable in covert decisions to engage in covert war.

IV. Changes in the War Powers Act

Many legal academicians and commentators agree that the War Powers Resolution, while correct in its viewpoint, needs significant strengthening to solidify congressional control over the use of our armed forces.[11] This preponderance of opinion seems to be based on two concepts: (1) The War Powers Resolution reflects the correct constitutional posture on congressional control of the military;[12] and (2) The War Powers Resolution, while having some deterrent effect on the executive branch, has been ignored all too often by Presidents and requires substantial revision to empower the Act.[13]

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[11] *See, e.g.*, W. **Reveley, III, War Powers of the President and Congress** (1981); Buchanan, *In Defense of the War Powers Resolution:* Chadha *Does Not Apply*, 22 **Hous. L. Rev.** 1155 (1985); Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 **U. Pa. L. Rev.** 79 (1984); Note, *The Future of the War Powers Resolution*, 36 **Stan. L. Rev.** 1407, 1410 (1984); *contra* **R. Turner, The War Powers Resolution: Its Implementation in Theory and Practice** 107 (1983).

The destructive powers inherent in our nuclear capabilities compel a strong proclamation of the congressional power to declare for war or for peace. Ideally, the legislative and executive branches would confer, consult and decide for war under the foreign relations powers given both political branches by the Framers without the need for a war powers resolution. History and experience repudiate this ideal.[14] Indeed some commentators and politicians doubt that the enormous power that has inured to the President over the last decades can be curtailed in any way short of a constitutional amendment.[15]

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[12] *See supra* notes 3-10 and accompanying text; *see also* Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 **Loy. L.A.L. Rev.** 579 (1984); Note, *A Defense of the War Powers Resolution*, 93 **Yale L.J.** 1330 (1984).

[13] Vance, *supra* note 11, at 90; *see generally*, Symposium: The War Powers Resolution, 17 **Loy. L.A.L. Rev.** 579-802 (1984).

[14] One commentator counted 199 military engagements that have occurred without a declaration of war. *See* Emerson, *War Powers Legislation*, 74 **W. Va. L. Rev.** 53, 88-110 (1971); *id.* at 367-68 (1972). *See House Comm. on Foreign Aff., Background Information on the Use of United States Armed Forces in Foreign Countries*, **H.R. Doc. No.** 16, 91st Cong., 2d Sess. 50-57 (1970). For categorization of these undeclared wars, *see* **E. Keynes, Undeclared War** 91 (1982); **F. Wormuth & E. Firmage**, *supra* note 3, ch. 9, *Lists of Wars* at 133-60.

[15] *See, e.g.*, Comment, *A Bicentennial View of the Role of the Congress, the President, and the Judiciary in Regard to the Power Over War*, 7 **Pace L. Rev.** 695, 751-55 (1987) (proposing amendment to Commander in Chief clause "subject to any and all reasonable restrictions which may be imposed by Congress"); Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 **Stan. L. Rev.** 1543 (1988).

The Goldstein proposition is as follows:

> Congress shall be required to supervise and oversee military

A more realistic solution to the problem is an overhaul of the War Powers Resolution of 1973. If the experiences of the past decade have taught us nothing else, they have revealed that the President will use whatever means at his disposal to circumvent the intent and purpose of the War Powers Resolution.[16] In order to avoid such circumvention, Congress should identify the weaknesses in the present Resolution and cure them.

First, the consultation clause needs definition.[17] The purpose of the consultation clause is to promote collective decision-making. Therefore, *to consult* must be a true executive consultation with the Congress.[18] Specifying the exact nature of the

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> planning, capabilities, and readiness. Congress, as part of its ordinary legislative powers and its extraordinary power to declare war, shall have absolute authority to govern, control, and direct all aspects of the structure and functioning of the armed forces. This power includes the right to issue orders to the Commander in Chief, as well as subordinate civilian and military authorities.
>
> This power shall be delegable in whatever way Congress sees fit including, but not limited to, congressional committees and subcommittees, the Executive department, or to technical systems.
>
> The failure of Congress to provide adequate oversight to war-planning shall be a justiciable cause of action against Congress as a whole. If the court hearing such a complaint finds that Congress has adequately discharged its responsibilities to consider fully all the requisite factors related to military planning, capabilities, and readiness, the court may grant an injunction directing Congress to consider the particular factors at issue and to come to a rationally based plan. No substantive outcome may be ordered by the court. The court's final order shall be appealable through normal judicial channels.

Id. at 1587.

[16] *See* Torricelli, *The War Powers Resolution After the Libya Crisis*, 7 Pace L. Rev. 661, 672 (1987); Highsmith, *infra* note 22, at 342.

[17] *See, e.g.*, Vance, *supra* note 11; Highsmith, *infra* note 22, at 343.

[18] The House Foreign Affairs Committee originally addressed the proper definition of *consult* under the Resolution:

> Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision

consultation and the exact group to be consulted will promote a better understanding of the congressional role in the governance of the armed forces and the decision for war. The vagaries implicit in the phrases "in every possible instance" and "immediately" need to be removed to give the executive branch some guidance on its responsibilities. One proposal would amend the War Powers Resolution to require the executive to "discuss fully and seek the advice and consent" of the Congress,[19] or a specially defined sub-group of Congress.[20]

Second, the consultation clause should be extended to cover all situations where the President is presently required to report under section 4(a)(1).[21] In essence, every event that is important enough to require a report under the War Powers Act should

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> means that a decision is pending on a problem and the Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

H.R. Rep. No. 287, 93d Cong., 1st Sess., at 6-7, *reprinted in* U.S. Code Cong. & Admin. News 2351 (1973).

[19] This phraseology was originally suggested by Senator Thomas Eagleton (D-Mo.). S. 1790, 94th Cong., 1st Sess. (1975).

[20] *See* Glennon, *infra* note 30, at 581; Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 **J. Legis.** 1 (1986); Vance, note 11, at 92; *FAS Statute--1975*, 39 **F.A.S. Pub. Int. Rep.** 5 (Jan.-Feb. 1986).

Vance would require consultation with the Majority and Minority Leaders of both houses, the Speaker of the House of Representatives, and the Chairpersons and ranking minority members of the Armed Forces and Foreign Affairs Committees of both houses. Vance, *supra* note 11, at 92.

The Federation of American Scientists ("FAS") proposal would require a majority vote of a special committee to authorize presidential first use of nuclear weapons. The committee would be composed of the Speaker and Minority Leader of the House, the Majority and Minority Leaders of the Senate, and the Chair and ranking member of each of the House and Senate Committees on Armed Services, the Senate Committee on Foreign Relations and the House Committee on International Relations. *FAS Statute--1975*, *supra* at 7.

[21] *See* Vance, *supra* note 11, at 92.

also require a consultation with the Congress or the appropriate sub-group. Presidents have often used the reporting requirements as an afterthought, completely ignoring the consultations provision.[22] Requiring consultation *before* the reportable event occurs will promote fuller legislative understanding of the venture and greater control over presidential military or paramilitary activities. Furthermore, the consulting and reporting requirements should specify compliance with a particular portion of the Resolution.[23] This mechanism should prevent the presidential artifice of asserting compliance with the Act, but not specifying the applicable portion.[24]

Third, the "imminent hostilities" portion of the War Power Resolution is too vague. By using his own definition of the term *hostilities*, a president may evade the entire premise of the War Powers Resolution.[25] Although the House report on the War Powers bill originally imparted broad meanings to *hostilities* and *imminent hostilities*,[26] the executive branch traditionally interprets those terms narrowly.[27] The reportable events of section 4(a)(1) need to be amended so that the President must "consult before and report after introducing U.S. forces 'into any situation in which there is armed conflict.'"[28] A broader framework would require reporting any time a danger of armed conflict exists.[29]

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[22] *See* Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 **Harv. J. Legis.** 327, 345 (1982); Collier, *War Powers Resolution: Presidential Compliance*, 9-12 (CRS report, updated June 23, 1988).

[23] *See* Vance, *supra* note 11, at 92; Glennon, *infra* note 30, at 36.

[24] Collier, *supra* note 22, at 1.

[25] *See* Note, *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 **Va. L. Rev.** 1037, 1049, 1052 (1984); *see generally* Collier, *The War Powers Resolution: A Decade of Experience* (CRS report, Feb. 6, 1984).

[26] The Report stated:

> The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. *Imminent hostilities* denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

H.R. Rep. No. 287, 93d Cong., 1st Sess. (1973).

Fourth, Congress can regain control over the war-making power with an amendment to the War Powers Resolution withholding funds from unauthorized presidential use.[30] Congress has always wielded the power of the purse-strings and that power is unquestionably an *exclusive* power of Congress.[31] Absent compliance with the consultation and reporting requirements under the War Powers Resolution, funding should be subject to immediate cut-off by congressional resolution.[32]

Fifth, this Congress needs to address the current dilemma of paramilitary operations and the war power.[33] The proliferation of covert war under the guise of intelligence-gathering operations suggests that certain paramilitary operations should be covered under any refurbished war powers resolution.[34] As Newell Highsmith suggested in a 1982 article:

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[27] *See, e.g.*, Comment, *A Tug of War: The War Powers Resolution and the Meaning of Hostilities*, 15 **Pac. L.J.** 265 (1984); Note, *The War Powers Resolution: An Act Facing "Imminent Hostilities" a Decade Later*, 16 **Vand. J. Transnat'l L.** 915 (1983).

[28] Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 **Am. J. Int'l L.** 605, 638 (1977); *accord* Glennon, *infra* note 30, at 380; Vance, *supra* note 11, at 93; Comment, *supra* note 28.

[29] Report of the House Foreign Affairs Committee on H.J. Res. 542, 93d Cong., 1st Sess. (June 15, 1972).

[30] Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Resolution*, 60 **Minn. L. Rev.** 1, 23-28 (1975).

[31] *Id.* at 32-33; **U.S. Const.** art. I, § 9, cl. 2.

[32] Cyrus Vance, former Secretary of State during the Carter Administration, recommended an amendment to the War Powers Resolution providing, "Notwithstanding any other law, no funds made available under any law may be obligated or expended for any use of United States forces prohibited by section 5(b) of the Resolution or by concurrent resolution of Congress under section 5(c) thereof." Vance, *supra* note 11, at 93-94; *see also* S. 1906, 98th Cong., 1st Sess., 129 **Cong. Rec.** 12,345 (1983).

One should note that the Vance suggestion may suffer from the *Chadha* problem. *See infra* notes 41-42 and accompanying text.

> A reformation of the WPR in light of Title V would also place paramilitary operations under the same standards as military operations. The committees specified in the WPR and Intelligence Committees would consult with the Executive Branch whenever possible before an operation and screen out operations that amounted to war. Operations of this type would be referred to [the] full Congress for expedited consideration and action. A declaration of war or specific statutory authorization would be required.[35]

Sixth, the possibility of nuclear warfare or nuclear conflicts should not force Congress from its constitutional role as sole decider for war and peace.[36] The utter devastation that surely would follow detonation of even a small portion of our nuclear stockpile weighs heavily in favor of congressional approval before any use of nuclear weapons.[37]

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[33] For an excellent discussion of the need for congressional control of covert war and paramilitary operations, *see* Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035 (1986).

[34] Glennon, *supra* note 30, at 581. One of the original sponsors of the War Powers Resolution, Senator Thomas Eagleton (D-Mo.), suggested that covert intelligence operations should be under the same standard as other military operations. 119 Cong. Rec. 25,079-80 (1973). *See also* Highsmith, *supra* note 22, at 368-76 (discussing the "paramilitary loophole" in the War Powers Resolution and other statutes).

[35] Highsmith, *supra* note 22, at 379 (citation omitted).

[36] Banks, *supra* note 20.

[37] *See, e.g., The Effects of the Atomic Bombs on Hiroshima and Nagasaki*, The United States Strategic Bombing Survey (1946) (detailing the effects of nuclear weapons). *See also* Committee for Compilation of Materials on Damage Caused by the Atomic Bombs in Hiroshima and Nagasaki, *Hiroshima and Nagasaki: The Physical, Medical and Social Effects of Nuclear War* (1981); Office of Technology Assessment, the Congress of the United States, *The Effects of Nuclear War* (1979). Physicians recently are becoming increasing concerned about the devastating effects of nuclear war. The seminal, and still key, research in this area of the medical consequences of nuclear war is Ervin, *et al., The Medical Consequences of Thermonuclear War*, 22 New

Seventh, the War Powers Resolution should be amended by Congress to allow court adjudication for violations and to create standing for congressional plaintiffs.[38] Currently, courts avoid adjudicating war powers controversies by referring to the political question doctrine.[39] Plaintiffs who are members of Congress may be prevented from bringing suit because they lack sufficient "standing."[40] Congress can rectify this situation by clearly granting the courts jurisdiction to hear war power disputes and granting congressional plaintiffs standing to sue for relief. Allowing disputes about violations to be adjudicated by our court system will promote presidential compliance with the statute.

Finally, section 5(c) of the War Powers Resolution arguably is subject to the *Chadha* proscriptions on legislative veto. Although many scholars believe that the War Powers Resolution survives the *Chadha* test,[41] prudence dictates that the legislative

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Engl. J. Med. 266, 1127-37 (1962); *see also* Hiatt, *The Final Epidemic: Prescriptions for Prevention*, 5 **J. A.M.A.** 252, 635-44 (1984). Long-term consequences of nuclear war, or "nuclear winter," are discussed in Sagan, *Nuclear Winter: Global Consequences of Multiple Nuclear Explosions*, 222 **Sci.** 128 (1983); Ehrlich, *et al.*, *Long-Term Biological Consequences of Nuclear War*, 222 **Sci.** 1293-1300 (1983).

[38] *See* Firmage, *The War Powers and the Political Question Doctrine*, 49 **U. Colo. L. Rev.** 65 (1977); **F. Wormuth & E. Firmage**, *supra* note 3, at ch. 15; Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 **Am. J. Int'l L.** 571, 578-80 (1984); *cf.* Goldstein, *supra* note 15, at 1587 (proposing constitutional amendment allowing justiciability and standing for inadequate congressional oversight).

[39] *See, e.g.*, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *aff'g*, 558 F. Supp. 893 (1982); *cf.* Baker v. Carr, 369 U.S. 186 (1962) (seminal case on nonjusticiability of political questions).

[40] *See Crockett*, 720 F.2d at 1357; *but see* Warth v. Seldin, 442 U.S. 490, 500-01 (1979) (Congress may statutorily confer standing).

[41] *See* Note, *The War Powers Resolution: Congress Seeks to Reassert Its Constitutional Role as a Partner in War-Making*, 18 **Rutgers L.J.** 405 (1987); Banks, *supra* note 20, at 11-20; Carter, *The Constitutionality of the War Powers Resolution*, 70 **Va. L. Rev.** 101 (1984); Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of the Legislative Veto After* Chadha, 132 **U. Pa. L. Rev.** 1217 (1984); *see also* sources cited *supra* note 11, *contra* Comment, *Applying* Chadha: *The Fate of the War Powers Resolution*, 24 **Santa Clara L. Rev.** 697 (1984).

veto provision be made clearly severable from the rest of the Resolution, or that a mechanism be devised to trigger congressional action.[42]

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[42] One suggestion would amend the War Powers Resolution "to require Congress to pass a resolution declaring presidential compliance with the War Power Resolution whenever troops are deployed by a president onto foreign soil." Note, *The War Powers Resolution: After a Decade of Presidential Avoidance Congress Attempts to Reassert Its Authority*, 8 **Suffolk Transnat'l L.J.** 75, 108 (1984).

"PRESIDENTIAL HANDCUFFS"

(by John Silber)

SINCE the Vietnam War, U.S. foreign policy has become a matter of constant and embittered controversy, not merely between the party in office and its opponents, but within parties. No president, however farsighted and decisive, can now conduct an effective foreign policy. Increasing challenges to American interests in Central America and elsewhere, and the War Powers Act and other congressional restraints on the executive branch, have created a dangerous whipsaw which renders our foreign policy erratic and ineffective.

Nicaragua, dominated by Cuba, and apparently determined to emulate the Cuban example of totalitarian government, military aggressiveness, and subservience to the ambitions of the Soviet Union, has embarked upon a policy of militarism—a course that threatens the Nicaraguan people as well as the peace and security of the isthmus. Nicaragua provides a safe haven for Salvadoran terrorists and radio facilities to coordinate their attacks; and it participates in the Soviet-Cuban spy network blanketing Central America and the Caribbean. Nicaragua is training an army far larger than any other in Central America, and threatens peaceful countries such as Costa Rica and Panama. The leaders of both of these countries told the Kissinger Commission they believe that if the Nicaraguan buildup continues, they will be attacked within a few years.

Yet it was the United States—not Nicaragua, not Cuba, not the Soviet Union—that was condemned by the World Court in 1984 over the mining of Nicaraguan harbors. The United States was charged with helping Nicaraguan insurgents mine Nicaragua's harbors, and was found to be violating international law. The regular and flagrant violations of international law by the Soviet Union and its surrogates are well known, yet the Soviet Union, which has never acknowledged the court's jurisdiction, goes unpunished. Indeed, the majority of the judges who decided against the United States are from countries that do not accept its jurisdiction.

In dealing with the problem of restraining power without destroying it, the framers of the Constitution made the president the commander in chief of the nation's armed forces. Congress shares in the determination of foreign policy, but the president is responsible for its conduct. Abraham Lincoln conducted the opening stages of the Civil War as an executive act. After the attack on Fort Sumter, he gave Congress 80 days to assemble, but in the interim he called up the militia, blockaded southern ports, raised an army of 300,000 volunteers, and suspended habeas corpus. It is doubtful that he could have gotten most of these actions approved by Congress, although when Congress met, it tacitly approved his faits accomplis.

This separation of powers remained in place until the close of the Vietnam War. Ever since the War Powers Act of 1973, the separation of powers has been compromised. The provisions of this act deprive the president of the authority to back his diplomacy with military action short of declared war. Confronting challenges of the sort posed by the Nicaraguan government and the Salvadoran guerrillas, the president has three choices, all bad: (1.) to do nothing; (2.) to ask for a declaration of war; or (3.) to try to find his way through a thicket of legal restraints that inevitably give rise to accusations of illegal conduct. President Reagan rejected the first two options when faced with the situation in Nicaragua; and the whipsaw has caught him on the third. It would catch any president.

TO UNDERSTAND WHY, under the prevailing circumstances, any president will be ineffective in the conduct of foreign policy, we must understand how the president's essential freedom of maneuver has been restricted by a series of laws, amendments, and continuing resolutions that transfer responsibility for the conduct of foreign policy, especially its military aspects, to a deliberative body. The constitutionality of many of these measures has yet to be thoroughly tested: it should be.

The War Powers Act, passed over the veto of President Nixon in 1973, was a drastic response to the continuation of the Vietnam War. Presidents Johnson and Nixon had tried to conduct a full-scale war as if it were a police action, an error in which Congress was complicit. The effects of the act, perhaps unforeseeable in 1973, have now become manifest. In a world filled with subversion, terrorism, and shifting geostrategic pressures, Congress must be consulted, "in every possible instance," on the deployment of our military forces. Troops may not be deployed outside the United States without immediate reports to Congress. The president may not, without approval from Congress, keep troops more than 90 days in any area where hostilities are ongoing or imminent. The difficulty in deciding whether hostilities are imminent or ongoing is obvious. Without a specific act of Congress, the president will always be open to the accusation that he is defying the law.

This means that by doing nothing Congress can force the president to withdraw troops within 90 days; short of declaring war, Congress must pass a bill announcing on what terms U.S. troops will be allowed to remain; in areas of foreign policy and military action where secrecy is often essential, publicity has become mandatory. Military considerations have thus become political issues. The president must now consider, not the efficacy of his actions, but the reaction of Congress to them. By limiting the president's ability to deploy U.S. forces, Congress essentially took upon itself the control of crucial military actions.

THE War Powers Act has been joined by a host of other restrictions on the president's power to act. Various amendments to the Foreign Assistance Act of 1961 have sharply restricted the kinds of security assistance to countries whose human rights records do not meet our standards, even if such assistance is in our national interest, and even if the denial of such assistance leads to the abrogation of all human rights. Had these amendments been on the books in 1942, they would have ruled out all lend-lease assistance to the Soviet Union. For example, it is illegal under the act to provide antipersonnel bombs to the Salvadoran air force. The Salvadorans must buy these weapons elsewhere or use expensive and inappropriate U.S.-made anti-tank rockets against guerrilla fighters, who do not move about the Salvadoran countryside in compact units.

Our room for non-military action is also jeopardized. The Foreign Assistance Act prohibits us from assisting in the development of police activities in other countries. It thus keeps us from helping Costa Rica to strengthen its security forces, which are technically policemen rather than soldiers. Similarly, the act keeps us from assisting with legal reforms in El Salvador.

The Clark Amendment of 1976 was an early milestone in making the covert overt: it forbids the president to provide "assistance of any kind" that would promote, "directly or indirectly," the "capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola" without submitting detailed plans to the Congress. The effect of the Clark Amendment was to give free play to Castro in Angola, who was not similarly restrained by a Cuban legislature. Cuba's ability to send its forces to Africa and anywhere else in the world with impunity is an extension of the Clark Amendment.

The Boland Amendment of 1982 further restricted the president: it specifically forbade him from assisting any group for the purpose of overthrowing the government of Nicaragua. The tangled web of legal and constitutional issues that this has created was revealed in its full confusion in 1983 when the House debated the covert-overt issue and made this topic a major item for newspaper and television reports.

But perhaps most damaging to an effective foreign policy has been Congress's unwillingness to recognize that secrecy can be essential in the conduct of international affairs. This results in an inescapable contradiction. When the details of our covert support for the Nicaraguan rebels are the subject of editorials in the newspapers and debated in Congress, we are forced to conduct our foreign policy by oxymoron: we must be either overtly covert or covertly overt. Either position leaves us open to tendentious criticism and to prosecution under international law. The Nicaraguans, while covertly supporting terrorists in neighboring countries, at least have the sense to deny it.

There is an inherent ambiguity in the current Central American situation that Congress and the American people must accept. Is pressure on the Sandinistas designed to move them toward the democratic government which they promised the Organization of American States and their own people in 1979, or to overthrow them? Is it designed to force them to stop supporting the insurrection in El Salvador and elsewhere in Central America, or to overthrow them? How do we pursue the one objective without taking steps that might achieve the other? If we put pressure on the Sandinistas, how do we know that it is enough to change their policy, but not enough to bring them down? The answers are inherently uncertain, but that is not reason not to act. The president cannot conduct foreign policy by oxymoron.

None of this is to argue that Congress should not help determine our foreign policy, or that it should not be consulted and informed on the actions taken by the executive branch. The objectives of our foreign policy must be an expression of our national will. But this requires that Congress provide leadership rather than politically motivated second-guessing, and that foreign policy be decisive, flexible, coherent, and resourceful. The current situation is deficient in each of these regards. There is always the temptation of doubting the president when he undertakes a course of action that is, in the short run, unpopular. But leadership requires looking beyond the next election and pursuing a course that is, in the longer run, in the national interest.

To require, in the absence of a declared war, that the president clear the detailed implementation of foreign policy with Congress denies him a wide range of tools needed for the effective conduct of diplomacy. The result of this policy may well be national suicide, since we in effect say to our enemies that we cannot draw a line and hold it unless they land on our beaches, and that there is consequently almost no limit to how far they can go.

THE RISE of Nazi Germany provides a clear parallel to the rise of the Soviet presence in the Americas. Hitler made himself master of Europe by small increments. At each step, the Western Allies refused to stop him. Hitler cannot be blamed for thinking that he could take Poland without opposition, for nothing in the behavior of Britain and France had suggested that they would draw a line and fight a war to defend it. Rather, whenever he stepped up to the line, Neville Chamberlain, the British prime minister, would erase it and draw a new one. When the Allies finally demanded that Hitler stop, it required World War II to enforce their demand.

The Soviets similarly probe to see where or whether we will draw the line. They have, for example, bit by bit discovered that we will tolerate a major Soviet offensive capability in Cuba, including squadrons of MiGs, a well equipped Soviet combat brigade, an intelligence network and a major submarine base. All of this violates the 196 understanding between John Kennedy and Nikita Khrushchev that ended the missile crisis. The Soviet Union withdrew its offensive weapons and promised an end to Cuban adventurism if the United States would not invade Cuba. The conditions to which the Soviets and the Cubans agreed have been incrementally violated, without U.S response. Even before the passage of the War Powers Act our reluctance to proceed militarily against Soviet proxies in our hemisphere has led to their increasing presence The act exacerbates the problem. If we do not repeal the act and remove the other restrictions on the effective management of foreign policy, we may find the Soviet Union willing and able to wage covert war in Central America or Mexico, at such a level of intensity that the refugee problem in the United States becomes catastrophic.

This is not inevitable. The Soviet Union and its proxies are led by realists in the use of power. Castro responded cautiously to our liberation of Grenada, and the extremist government of Suriname, immediately after the invasion of Grenada expelled its Cuban advisers. Had the administration submitted legislation for the invasion of Grenada, Congress would still be debating it, and while we dithered about what to do in Grenada, the Cubans would have so reinforced their military presence on the island that it would have taken major military action and the loss of many more lives to remove them.

Not the least of the bad legacies of the Vietnam War is the extent to which Lyndon Johnson's compromised attempt to defend the imperfect democracy of South Vietnam against the totalitarianism of North Vietnam has come to be regarded as the model of what happens when the executive is free to implement foreign policy. This catastrophic event has purged the national memory of other examples. Harry S. Truman promptly supported South Korea in 1950. Johnson himself took resolute action, in concert with the Organization of American States, by sending Marines to the Dominican Republic in 1965 to protect democracy. In the two decades since, power has changed hands in the Dominican Republic without violence. Any president should be free to be as resolute as Truman and Johnson were. We have, through the War Powers Act and through the amendments that have followed it, institutionalized Neville Chamberlain as the model for American presidents. If we remember what Chamberlain's policies led to, we may yet decide that it is time to reverse this disastrous trend.

JOHN R. SILBER

John R. Silber, the president of Boston University, was a member of the National Bipartisan Commission on Central America.

PREPARED STATEMENT OF WILLIAM M. GOLDSMITH

Mr. Chairman and Members of the Committee, I'm indeed honored and pleased to be invited to appear before your distinguished Subcommittee. I'm quite aware that I follow and perhaps precede a number of eminent Americans and public servants who have testified on this troubling question. Although I cannot match their records of public service in positions of influence in our government, perhaps as a teacher and a student of history, particularly the history of our political institutions, I can try to put the problem you are wrestling with in a somewhat broader historical perspective.

For several decades now, a tedious debate has been going on with regard to the division of power between the President and Congress in the conduct of foreign affairs, particularly in those situations that may require the deployment of the armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by circumstances."The failure to resolve this dispute is troubling, and goes beyond its discussion in academic and law journal articles. Our lives may depend on its outcome.

Two basic positions have dominated this debate. On one side of the question are the constitutional fundamentalists who insist that the Founding Fathers, in constructing the Constitution in Philadelphia in 1787, settled this issue once and for all, and that we should leave inviolate their understanding of the problem. Opposing them are those who argue for what they term a more realistic view, a view which considers major changes which have taken place in the world since 1787, changes which require the President to wield far more power in making these decisions than the Framers ever considered.[1]

Of course the Constitution designates the President to conduct the nation's relations with foreign countries, appoint and receive ambassadors, and serve as Commander in Chief of the armed forces. But the Constitution also assigns to the Senate of the United States the final approval of these appointments, and the ratification of all treaties negotiated by the President. But most important, despite the fact that the President is made head of the armed forces in time of war, the Constitution assigns to the Congress the unequivocal power to declare war. The constitutional fundamentalists argue that in this distribution of power, Congress must approve, in fact authorize the use of the armed forces outside the United States in times of peace in situations in which armed conflict with foreign powers appears likely or even possible.

While not denying the constitutional provisions outlined above, John Norton Moore and others opposed to the fundamentalist position argue that changing world conditions require greater presidential discretion:

> In the one hundred and eighty years since the adoption of the Constitution our nation has moved from a position of comparative isolation, epitomized by Washington's warning to stay clear of entangling alliances,to one of intense international involvement evidenced in 1968 by agreements in collective defense with forty-two countries .... The increasing involvement of the United States in world affairs, the shift to an intensely competitive bi-polar system (between East and West),

> and the limitation of the lawful use of force to defense have greatly strengthened the hand of the executive with Congress over the war power....[2]

Moore goes on to state that while Jefferson and Hamilton argued over the need for American frigates to be authorized by Congress to use force against marauding Tripolitan corsairs, today we are dealing with major wars where a half million American armed forces are involved.[3] Perhaps the philosophical axiom applies here which argues that at a certain point a difference in degree becomes a difference in kind.

This is, of course, not simply a theoretical dispute among academicians. Although the constitutional fundamentalist's argument rests upon the judgement of James Madison, Thomas Jefferson and Alexander Hamilton, to say nothing of an overwhelming majority of contemporary constitutional legal scholars,[4] it has been violated in real life by many Presidents who argued one way and practiced another.

Thomas Jefferson publicly adhered to the fundamentalist theory of the Constitution, yet in practice he violated this principle, and not only deceived the Congress on this question, but also fooled his biographers and the historians who borrowed from them for the the next one hundred and seventy-five years.[5]

But Jefferson was not alone in his abuse of the constitutional fundamentalist principle in applying the war powers. His example was followed by Polk, McKinley, both Roosevelts, Wilson, Truman, Nixon, Ford and Reagan.[6] The question then arises: have their actions established a new constitutional precedent which overrules the older principle that imposes strict limits upon the President's power to decide when and where to deploy the armed services in hostile areas where conflict is inevitable, probable, or even possible?

Of course the answer is no. Not even great Presidents can overrule the Constitution for the sake of expediency. We are "a government of laws, and not of men," and even the best and brightest cannot change this principle, individually or collectively.

On the other hand, as Justice Brandeis argued:

> Our Constitution is not a strait-jacket. As such it is capable of growth - of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things. Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever developing people.[7]

Is there any reconciliation possible between these two positions? Perhaps. The Constitution is capable of change through the amendment process in which the people, through their State legislatures, participate in the decision. The Supreme Court in fulfilling its responsibilities of judicial review illuminates complex questions of constitutional interpretation. Precedents can also be established when they are supported by all three branches of Government. But if only the President and not Congress, the Supreme Court nor the people are involved in such a decision, it cannot claim the growth Brandeis expounded. Congress "weighed in" during the Vietnam debacle with the War Powers Resolution, but this has now proved to be totally ineffective in asserting Congress' constitutional role, and it must be strengthened to make it effective or erased from the books. Yet no President has confronted this question of executive prerogative in principle before the the Supreme Court or the American people since it was enacted by Congress.

But the fact that numerous Presidents have asserted, if not fully defended, this prerogative does create concern, and demands further investigation that goes beyond the debate we have been discussing. It is time that some critical questions be raised that have not been examined in the previous prolonged discourse. Is this shift of power from Congress to the President necessary in terms of contemporary national security threats? Is it really in the public interest and representative of the growth to which Justice Brandeis appealed?

At this point our most reliable guide is history. If one examines the historical cases when this provision of the Constitution was breached, was the assertion of prerogative really necessary? Did the subsequent results of the action demonstrate its urgency, its necessity, and ultimately its success?

Even before engaging in this investigation we should remind ourselves that in creating this critical division at the nexus of power in our government, the Framers were not only interested in restricting despotic rule, although that was one of their major obobjectives, but they were also concerned with the process of making decisions of this nature. This concern seeps through the pores of Federalist 10 and much of what James Madison is saying in many of his other Federalist papers. It is the concept of dialectic, which the Framers may not have identified in a formal sense, but it certainly permeates their writings and speeches, and is woven into the fabric of almost every line of the Constitution. What is lost in the decisions made by an "Imperial President," or an "Imperial Congress" is that clarifying and frequently illuminating quality of policies spun from the dialectical process of rational discourse.

The dialectical process then is not something left over from Karl Marx and Georg Hegel, although they applied it rather effectively; but it is essentially a process of discourse handed down by Socrates and Plato, a process which raises searching questions which are meant to probe the heart of the matter and not be content with what Rear Admiral Poindexter referred to as "disinformation."I think this is what Madison had in mind when he wrote:

> ...the great security against a gradual concentration of the central powers in the same department, consists in giving to those who administer each department the necess constitutional means and personal motive to resist the encroachments of the others.[8]

If there was any idea central to his basic beliefs it was this. By checking power with power, not only is one restricting the dangerous potential of absolute power in the hands of a President or Congress, but one is also asserting a process of discourse, that when operating effectively can refine and improve policies by testing them in the crucible of sharpening debate.

Two examples taken from my ongoing research will illustrate the weaknesses inherent in the growth of Presidential power in this area. This country went to war against Spain in 1898 in a constitutional manner. In fact, the Congress pressured an unwilling President to take action and ultimately to go to war because most Americans, including members of Congress, were horrified at the tactics Spain was using to put down a popular native rebellion. Several hundred thousand innocent Cuban men, women and children were literally starved to death because of the inhuman policies of the military commander of the Spanish forces in Cuba, the general the Americans called "Butcher" Weyler who took Cuban peasants off their land, imprisoned them in towns and cities in filth and intolerable living conditions, and ultimately starved most of them to death.

The United States won the war against Spain in less than four months by virtue of two brilliant naval victories and one major battle in Cuba. Spain was rendered helpless to defend its colonies by the loss of most of its ships of war. At that point the character of the war changed. Spanish opposition collapsed and the government negotiated an end to hostilities. But the objectives of the war also changed. This country had won its struggle to end Spain's savagery in Cuba, but now we shifted our goals and demanded booty in the form of land that had never been mentioned in the Congressional declaration of war. We quickly annexed Puerto Rico without a glance towards its population's desires, and then demanded some smaller islands and the Philippines before we would sign a peace treaty with Spain. America was far behind the empires of Britain and France, even the Netherlands and Belgium in the possession of a worldwide network of colonies, but we would rapidly play catch-up with a vengeance.[7]

War between the Filipino insurgents (as we called them) and the American forces broke out just before the treaty with Spain was ratified by Congress. Getting it through the Senate was not easy for the President. Just before the ballots were to be cast, he lacked two votes and only obtained them by a promise of patronage and a pledge to support a resolution which prevented annexation, but which later was defeated in the House. The incident that led to the fighting in the Philippines was an encounter between several members of the armed forces of both sides that was caused by racial epithets as much as anything else in the tense situation that existed between the armies at that time.

In the beginning the insurgents had been encouraged by Admiral Dewey who brought their exiled leaders back to the Islands from Hong Kong. The Filipinos under Amilio Aguinaldo quickly created a formidable but ragged army, and drove the Spaniards out of most of Luzon forcing them back to barricades on the outskirts of Manila. The Filipinos were enthusiastically pro-American, and initially Aguinaldo looked up to Dewey as the liberator of his country. But as the buildup of American army personnel continued and the Filipinos were rebuffed in their efforts to continue the earlier alliance and share in the occupation of what they considered to be their capital city, resentment increased and racism surfaced among the Americans until conflict became inevitable. After the Filipinos were ignored when they attempted to plead their case at the treaty negotiations, they were outraged and humiliated, and they fought to defend their honor as much as to control the land which they believed was theirs. But it is clear that they were always willing and even eager to negotiate a protectorate agreement with the United States.

Exploiting his powers as Commander in Chief, President McKinley made no attempt to conciliate the Filipinos' legitimate interests, striking the pose of a benevolent conqueror, and relying totally for his information on military personnel with whom he had no previous contact. He used them to represent him and also in the beginning to impose military control over the civilian population. McKinley indicated that he prayed for divine guidance on what to do about the future of the Philippines and how they should be governed, but he never humbled himself to consult with those who had lived in these Islands for generations and who believed they had a natural right to their sovereignty. The President made little effort to educate himself on the history and culture of the Islands, and in the early days sent no diplomatic representatives to deal with their inhabitants. We were simply an army of occupation, and the native inhabitants finally reacted to us as such.

The war against the native Filipinos lasted for three years. It was a presidential war, unauthorized by Congress, a war fought for ill defined and exploitative purposes, resulting in a disaster. Before it was over, 126,468 American servicemen were sent to these Islands, five times the number dispatched to Cuba in the war against Spain. Our army suffered over 7,000 casualties in this struggle, including 4,234 dead, which was ten times the number killed in Cuba. This count does not include serious diseases contracted by thousands of Americans fighting in the Islands which shortened many of their lives.

The Filipino casualties were much higher. Approximately 16,000 soldiers were killed and over 200,000 civilians died from hunger and pestilence when their homes and villages were burned out in the American army's scorched-earth policy. Space doesn't permit going into the details of the atrocities committed in this war, but they were described in testimony before a Senate Investigating Committee over three years later. Stephen Bonsal, an outstanding American journalist who had covered the war in Cuba as well as in the Philippines, reported that our policy in the Philippines was identical, and if anything worse than that of the hated Spanish General in Cuba, "Butcher" Weyler.

The awful part of all of this is that this was such an unnecessary and unproductive war. The Filipinos initially had been enthusiastically pro-American and welcomed American advice and assistance when Admiral Dewey's squadron first arrived in Manila. They would have accepted an American protectorate arrangement as long as they were afforded a substantial degree of independence. Instead of seizing upon these circumstances and working with their natural leaders, we alienated them, and killed off in this pointless war what might have turned out to be the Philippines' most courageous and independent future leaders. And after almost a century of constant and ill advised major American interventions into Philippine affairs, the country is worse off today than many of the other ex-colonial nations that surround it.

The critical point for our inquiry is, however, that this was the first war in our history that was fought without Congressional authorization and without any thorough consultation with the legislative branch until it was over. To call this a continuation of the Spanish-American War is a fraud on its face. It is certainly true that the circumstances surrounding the problem in the Philippines was an outgrowth of the war with Spain, but there was nothing in Congress's declaration of war in 1898 that remotely encompassed the Philippine situation. Before the major build-up of our military might in the Islands was undertaken, and certainly before actual warfare was initiated, the President was obligated under our Constitution to go to the Congress and obtain its approval and authorization for what was taking place. And the treaty with Spain could not justify our actions in the Philippines, because the massing of an army, unneccessary for anything else but a war, took place long before the treaty was signed or ratified. The defeat of the Spanish fleet and what was left of the Spanish army were legitimate military and naval objectives consistent with our declaration of war against Spain; but not a new war that went far beyond what the Congress had authorized in April, 1898. It ws clearly a classic example of a presidential war.

There was a time when when we didn't slip into such situations so easily. About 150 years ago the United States almost went to war against France. Everyone agrees today that it would have been a useless war, one that neither side really wanted, and a war fought for reasons that were never very clear, even to the parties who contributed the most to promoting the war fever at the time.

Practically all of the historians and biographers who have written about this episode in our history have reported that President Andrew Jackson's firm statesmanship was responsible for bringing the dispute with France to a satisfactory and amicable settlement. Moreover, they point out, that Jackson used this incident to teach the powers of Europe that this country was not a weak sister to be tampered with at will.

Jackson's first major scholarly biographer, despite the fact that he was contemptuous of Old Hickory's personal qualities, pointing out that his "ignorance and passions combined to render him, of all conceivable beings the most unfit for office;"[11] this same writer praised Jackson extravagantly for his handling of this case, calling his actions "a complete success," and citing the Duke of Wellington and the American people for their enthusiastic praise for his conduct.[12]

A noted American historian of this period wrote:

> It was a great victory for Jackson, and he deserved the renown for it; for no achievement in foreign diplomacy is, after all, so satisfactory as that which holds a wavering nation to its promises by a little plain speaking.[13]

And even Jackson's most recent biographer, who was critical of the old General in an introductory passage, wound up praising him also, concluding that what the President had succeeded in producing "was saner and more conducive to good diplomatic relations."

Nothing could be further from the truth .

Jackson like Jefferson was a great man and a great President. This controversy with France, however, was not one of his finest hours. He never really understood the problem, and his attempts to solve it by bluster and threats only made a bad situation worse. If it had not been for his arch enemy, Henry Clay, the distinguished Senator from Kentucky, this country might have gone to war against France in one of the most unnecessary and useless struggles in the history of the world.

France owed the United States a legitimate debt for Napoleon's outrageous action in seizing neutral American ships and holding them in French ports against their will until the cargoes rotted and spoiled. American Presidents and Secretaries of State had tried unsuccessfully for three decades to obtain compensation for these unlawful acts. Up until Jackson's term, no President or diplomat (including Albert Gallatin) had succeeded.

Jackson was determined to set this situation right. He asserted that he would "ask for nothing that is clearly not right and to submit to nothing that is wrong."He then proceded to violate his own standard by failing to understand the proper actions of the French King who tried to deal honorably with Jackson, whose reply was a threat of violent reprisal.

The President was fortunate in having a first rate Minister in France, William Cabell Rives of Virginia, who was able to succeed where others had failed because he established excellent relations with the French Court, and because France had just undergone one of its periodic revolutions and established its first constitutional monarchy.
The new French King, Louis Philippe, had traveled extensively in America and had a very friendly regard for this country. Once Rives had negotiated a settlement of the the indemnity, his advisers were anxious to obtain an appropriation from the legislative Chambers in order to begin retiring the debt. But the elected Chamber of Deputies was not as friendly towards the United States as Louis Philippe, and balked at appropriating the money for the payment of the debt despite the urging of the King and his advisers.

Jackson's Secretary of State urged the President to request the Congress to issue letters of marque and reprisal against French shipping(described by Arthur Schlesinger, jr. as a form of "limited war"), but he was talked out of this extreme measure by his Vice President (who was in the "loop"this time) and Attorney General who believed that such an action would be considered an insult to French honor and would lead to an immediate war against the United States. Since this country was in no position to go to war against a superior French navy, the President bided his time. But he made it very clear to the French representative in Washington that he expected the Chambers to act promptly on the matter.

What Andrew Jackson apparently failed to understand was that France was currently experiencing yet another chapter in its roller coaster road to a truly democratic revolution, and in the growing pains of the present transformation of its latest form of government - a constitutional monarchy - the elected legislative branch of that government was demonstrating its power over the non-elective Executive. This was an embarrassment for Louis Philippe and his foreign secretary who resigned over this issue, but all was not lost, for such inter-governmental jockeying for power is rarely permanent. Such nuances were lost on Jackson, however, who viewed this as an insult and acted accordingly.

Tempers ignited on both sides of the Atlantic over this issue as nothing since the XYZ affair in the previous century. Jackson persisted in numerous awkward efforts to pressure the French into paying the debt which was not a tremendously large sum of money (about 25,000,000 francs) most of which was owed to rather wealthy private exporters, but the Chamber of Deputies kept delaying a second vote on the appropriation. Finally the President exploded and in his annual message requested a grant of executive power from Congress to impose reprisals against the French. He also accused the French Government of an act of bad faith in not living up to its agreement.

When the President's message arrived in France it caused an immediate uproar. Jackson was denounced in the Paris newspapers and later in sessions of the Chambers by Frenchmen who considered their country's honor had been impugnedby these charges. The American Ambassador reported to his Secretary of State " I ought not conceal from you that the excitement is at present very great and that their pride is deeply wounded by what they call an attempt to coerce them by threats...."It looked like war between France and America was imminent. The British Foreign Secretary was informed that the French were "beefing up" their naval forces in the Caribbean by sending out 3 ships of the line and 4 frigates. Former President John Quincy Adams wrote"that if the two countries could be saved from war, it seems as if it could only be by a special interposition of providence;" and Supreme Court Justice Joseph Storey reported that the President was "exceedingly warm for war." [14]

It should be noted, however, that President Jackson was abiding by the letter and spirit of the Constitution in this crisis. He was not assuming that he could act alone on this problem. He requested of Congress that it grant him the power to introduce reprisals against France, not taking it upon himself to act without legislative authority. This was because if Andrew Jackson believed in anything, it was God, his country and the Constitution, probably in that order. Self educated and self made, Jackson was a true American hero, a General who had defeated a highly professional British army with a ragtag group of backwoodsmen at the Battle of New Orleans. He had killed a man in a duel, and had bee honored by his neighbors by election to almost every high national office available - Congressman, Senator and now President.

Finally, as President, Jackson won further acclaim by crushing the first incipient revolt against the unity and power of the national government, and in many other ways enhanced the office of the Presidency. But now, to work his will, he sought the cooperation of, if not an Imperial Congress, certainly one of great nobility. Among its members were three of the most important statesmen this country has produced: John Caldwell Calhoun, Daniel Webster and Henry Clay. No reprisal or war could take place without their essential support

Henry Clay was probably the most popular political figure in America. He was something of a national hero to many Americans, including Abraham Lincoln who greatly admired him. Clay was a quintessential political man - elected to the State Legislature at 26, and from that time on was elected and re-elected as a Congressman and Senator every time he ran for office. He was elected Speaker of the House of Representatives in his first term as a Congressman, and re-elected Speaker for three non-consecutive terms, the only man to ever achieve that recognition.

Clay wanted very badly to be President and probably would have made a brilliant Chief Executive, but misfortune plagued all of his campaigns. As a legislative leader, however, in both the House and the Senate he had no equal. He was more at home on the floor of both Houses than he was back in Ashland, his magnificent house in Lexington, Kentucky.

Henry Clay was Chairman of the Senate Committee of Foreign Affairs when the question of Jackson's proposed reprisal arose. After studying the diplomatic correspondence thoroughly, Clay came to the conclusion that Louis Philippe had acted honorably in this situation and had done everything in his power to persuade his legislature to appropriate money to pay the debt. In his correspondence he had assured the President of this and promised not to relent until he had succeeded. In short, the debt would be paid if Jackson would be patient with this fledgling democratic system.

The Senator presented this history persuasively. He understood so well the delaying tactics of this inter governmental warfare, having engaged in it himself for several decades. What made this situation different, however, was that the President was proposing a policy that could lead to a shooting war over a question that could be resolved peaceably. Clay was so persuasive on this issue that the President's proposal was turned down unanimously and war was avoided. But the problem was not yet solved.

Clay's report was received in Paris as favorably as the President's speech had met with disapproval. One paper stated "that it completely overthrows the President and his message," arresting his "warlike propensities." Another paper hoped the report might induce the Chamber of Deputies "to take a more favorable view of the claims, as the outrage on French honour...will be wiped off."

And this did happen. On the next vote, again postponed for some months, the Chamber voted to appropriate the money, but only if the President apologized for his insults. Jackson was incensed at this slap on the wrist, and adamantly refused to comply. In fact he drafted an even more harsh condemnation of French behavior than his earlier message and would have gone through with it had not several of his most trusted advisers intervened and modified it.

The question was finally settled through the intervention of a brilliant diplomat, Lord Palmerston, the British Foreign Secretary. Palmerston was able to factor out the emotional blocks in each position and act as a go between in settling the argument. He discovered a section of the President's most recent annual message which could be interpreted as a half-hearted apology, and he literally forced the French to accept this meaning.

But it was Clay's reasoning and the Senate's action which prevented the war, and when cooler heads prevailed, this tempest in a teapot was resolved. The details provide an insight into the conduct of 19th century American diplomacy but can't be reviwed here. What is missing from all of the biographical and historical accounts, however, is an accurate treatment of the roles Clay and the Senate played in this drama. Fulfilling its constitutional responsibilities, the legislative branch prevented the executive branch from committing a disastrous mistake. Without such a check on executive power, the circumstances could easily have led to a pointless presidential war.

Presidential warfare is not a problem restricted to the 19th century. Almost twenty years ago, an American President ordered a bombing attack on a neutral country without informing Congress, and certainly without receiving its authorization. The bombing continued for the next fourteen months, a period when 100,000 tons of bombs were dropped on Cambodia. The records of these bombing raids (there were 3,652) were destroyed in order that they would not be disclosed to Congress and the American people.[16]

The same President ordered an invasion of this neutral country, again without Congressional knowledge or approval. Before he was finished, over a half million tons of bombs were dropped on neutral Cambodia, destroying its towns and villages, its agriculture, its highways and small industries, and leaving only a shell of the former society. The bomb tonnage dropped on this neutral country was twice the total dropped on Japan during World War II. When the bombing stopped, the Khmer Rouge, who had been contained by the Cambodian army before the bombing raids, easily captured the country and took its revenge on its helpless citizens.

This dismal history does not speak well for the argument of advocates of an expanded role for the President without any Congressional interference. If greater presidential discretion and power can lead to debacles such as the brutal Philippine war, and the destruction of Cambodia, is it wise for the Republic to place at risk its values and its future in the hands of independent and unaccountable presidents who will not be forced to comply with restraints imposed on them by the Constitution?

History then is the determining factor in deciding between the constitutional argument and the defense of the growth of presidential war powers and the presidential warfare to which this expansion has led. One can agree or disagree with the Founding Fathers for philosophical or ideological reasons, but the debate should not be decided on such a basis. Both positions should be considered and tested by objective historical criteria, and determined by pragmatic results. I have to tried to do this in my own study and research, and I am finally convinced that the Founding Fathers were right. The utter failure of presidential warfare in the 19th and 20th centuries should provide ample warning of its dangers, and produce a very healthy skepticism of its value.

The bitter Cambodian experience, and not simply the Vietnam War, led to the passage of the War Powers Resolution in 1973. It was not a hasty piece of legislation, but passed after thorough consideration and lengthy debate in Committees and on the floor of both Houses over a period of three years. The final resolution in the Senate won the support of the liberal and conservative elements in both parties - from Senators McGovern and Kennedy to Stennis and Russell in the Democratic Party, and among the Republicans - from Javits and Weiker to Dole and Taft. The final vote on the Resolution overturned a veto by President Nixon, even though some of its supporters voted against the Conference Committee compromise because it wasn't strong enough.[17] Senator Thomas Eagleton was one of these, having been an original sponsor of the resolution. He argued:

> Yes I helped give birth to the Senate bill three years ago, but the child has been kidnapped. It is no longer the same child that went into conference. It has become a different baby, Mr. President. Because this bill does not go one inch in terms of restricting the unilateral powers of the President of the United States.

Eagleton concluded with the charge that the bill was "noble in concept but worthless in execution." And he was right. The compromises destroyed its potential effectiveness.[18]

The Senate bill had spelled out the only circumstances when the President could "introduce the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."These circumstances were: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces." Whatever effectiveness this resolution might have had was crippled when it was moved out of the operative body of the bill and placed in the non-operative Purpose and Policy introduction.[19]

Critics of the resolution, with justice, have pointed out how difficult it is, if not impossible, to construct such a list without leaving out some essential circumstances or individuals that should be included, eg. protecting American citizens, embassies, legations, consulates, planes, ships, etc. from terrorist attacks. It has always been clear, however, that the President has the constitutional power, and indeed the obligation to attempt to conduct such defensive or rescue operations.

Unfortunately, the resolution that finally emerged has been dismally ineffective in preventing presidents from taking independent action in the kinds of situations it was designed to eliminate. Three presidents have ignored its formal requirements, while cooperating in a limited way informally. To continue in this state of partial but unsatisfactory compliance is embarrassing to both branches and should be terminated. Congress must either enact mandatory requirements for consultation and possible authorization, or must eliminate any restrictions in this area. Half a presidential war is not good enough. To do less demeans the Congress's constitutional responsibilities and provides the President with a very unclear concept of what he can or cannot do.

Congress must recognize that a substantial part of the problem has been its own failure, its lack of will to play its proper constitutional role in checkmating the President. Frequently, it has not possessed adequate information to intervene in these situations. But information is power. Congress must obtain this information, now available only to the President, in order to make judgements regarding these critical decisions between war and peace.

Moreover, Congress has lacked the proper representative group for consulting with the President. President Ford complained that during his crisis situations, he could not locate various Congressional leaders with whom he wanted to consult.[20] Obviously a President cannot consult with 535 members of Congress.

The recent amendments offered by Senators Byrd, Mitchell, Nunn and Warner go a long way to improving this situation. They create joint representative committees to confer with the President in crisis situations, although they do not contain assurances that their members (or designated substitutes) will be available in Washington at all times for hastily called conferences.[21]

But in my opinion, the major weakness of the amendments is their failure to require Presidents to comply with the resolution. Section 3 (a) states that: "The President in every possible instance, shall consult with Congress before introducing United States Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances...." This escape clause will not insure presidential compliance with the intent of the War Powers Resolution - to make these decisions joint undertakings.

There is only one way to stop presidential warfare, a disaster which the Constitution outlawed: make congressional consultation and authorization mandatory.

Those who are opposed to Congress assuming such mandatory power, argue that "it will tie the President's hands in times of crisis." This is a false argument. Congress has always recognized the right of the President to act independently in the circumstances set forth above. It has never granted him the power to declare war or to deploy the armed forces in situations which make war inevitable without its authorization. In these cases, the President's hands should be tied before Congress has been consulted.

The example which is always produced to support presidential warfare is the role of Franklin D. Roosevelt in his skillful but unconstitutional use of the war powers in the period prior to our declaration of war against the axis powers in 1941. And yet no one has submitted hard evidence that if President Roosevelt had used his formidable persuasive powers to inform the Congress and the American people of the great danger to our country that the defeat of Great Britain and the loss of the British fleet in the Atlantic Ocean would bring about, they would have turned him down.

Some recommend voluntary compliance by the President, and argue that this is an issue that should be resolved cooperatively and politically between the two branches. But the opportunity for such cooperation has existed for almost 200 years. Many presidents have utilized it, but enough have not to have created a real problem. It is wishful thinking to believe that it would work for all presidents without a mandatory requirement to comply.

This is a society governed by laws, not men, athough men make laws. And even presidents must obey the law. This is what the Founding Fathers wanted, and I believe that history has demonstrated that they were right.

One proposal for resolving this problem has been advanced by Professor Harold Koh who teaches international law at the Yale Law School. Professor Koh also clerked for Justice Blackmun on the United States Supreme Court. Koh suggests how"Congress can reassert its authority over warmaking after fourteen years of failure."

Whether in the Tonkin Gulf, or the Persian Gulf, presidential warmaking costs money. We all recognize that under the appropriations clause of the Constitution,

> it is Congress, not the President, who holds the power of the purse. Following the examples of the Cooper-Church Amendment, the 1973 Eagleton Amendment regarding Cambodia and Laos, the 1983 Cranston-Eagleton-Stennis amendments to the War Powers Resolution, and more recently the Boland Amendment and Senator Nunn's Amendments to the Department of Defense Authorization Act, Congress could now amend the War Powers Resolution to declare that "no funds made available under any law may be obligated or expended for any presidential use of force not authorized by Congress under an amended War Powers Resolution."

That should do it. The question is: Will Congress have the will?

Notes

1. Debate on this subject has been so prolific that it would be next to impossible in this space to provide an inclusive list of articles on the subject. Several Congressional Hearings and Reports in relation to the consideration of a War Powers Resolution are perhaps the most convenient source of relevant documents:

Senate Committee on Foreign Relations, Documents Relating to the War Power of Congress, The President's Authority as Commander in Chief and the War in Indochina, 91st Congress, 2nd Session, 1970.

Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, Congress, the President, and the War Powers, Hearings, 91st Congress, 2nd Sess., June, July and August 1970.

Senate Committee on Foreign Relations, War Powers Legislation, Hearings, 92nd Congress, 1st Sess. March, April, May, July and October, 1971.

Senate Committee on Foreign Relations, War Powers Legislation, 1973, Hearings, 93rd Congress, 1st Sess., April,1973.

Subcommittee on National Security POlicy and Scientific Developments of the House Committee on Foreign Affairs, War Powers, Hearings, 93rd Congress, 1st Sess., March, 1973.

Senate Foreign Relations Committe, War Powers Resolution, Hearings, 95th Congress, July, 1977.

Symposium: "The War Powers Resolution," Loyola of Los Angeles Law Review 17(1984)3.

2. John Norton Moore, "The National Executive and the Use of the Armed Forces Abroad," delivered as an address on October 11, 1968 in the International Law Study series at the Naval War College and reprinted in The Vietnam War and International Law, Richard A. Falk, ed. (Princeton, N. J., 1962)2, p.809.

3. Moore.

4. James Madison, The Writings of, Gaillard Hunt, ed. (New York,1906)VI The Helvidius Letters, particularly Number I.
Thomas Jefferson, The Writings of, Paul Leicester Ford, ed.(New York,1893)VI, 316,

James D. Richardson, ed., Messages and Reports of the Presidents I(New York,1897), 315.

Alexander Hamilton, The Federalist, Jacob E. Cooke, ed. (New York,1961), No. 69

In referring here to contemporary constitutional law scholars, I refer to such individuals as: Charles Lofgren, Louis Henkin, Raoul Berger, C.C. Tansill, Henry Steele Commager, Alpheus Mason, Alfred H. Kelly, W. Taylor Reveley III, and recently deceased Francis D. Wormuth and Alexander M. Bickel.

5. See William M. Goldsmith, The Growth of Presidential Power (New York, 1974)I, 369-378.

6. Bibliographies to cover all of these Presidents would require space too extensive to include here. Each case will be described in my forthcoming book, Presidential Warfare, and most incidents can also be found in my three volume study of The Growth of Presidential Power (New York, 1974).

7. Quoted in Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis, 1961), 107.

8. James Madison, The Federalist (New York,1961) No. 51

9. There is no adequate, full scale study of the Spanish-American-Filipino War. The best available texts which tend to concentrate on the earlier phase of the war are: David F. Trask, The War With Spain in 1898 (New York, 1981); Walter Millis, The Martial Spirit (New York, 1931); French Ensor Chadwick, The Relations of the United States and Spain: The Spanish American War (New York, 1911); Margaret Leech, In the Days of McKinley (New York, 1959); Philip Foner, The Spanish Cuban American War :1895 1902 (New York, 1972); H. Wayne Morgan, William McKinley and His America (Syracuse, 1963), also by the same author America's Road to Empire (New York, 1967); Lewis L. Gould, The Spanish American War and President McKinley (Lawrence, Kansas, 1982); Frank Friedel, The Spendid Little War (Boston, 1958); Robert Dallek, 1898: McKinley's Decision: The United States Declares War on Spain (New York, 1969); Ernest R. May, Imperial Democracy (New York, 1973).

10. Stuart Creighton Miller, Benevolent Assimilation: The American Conquest of the Philippines (New Haven, 1982); Moorfield Storey and Marcial Lichauco, The Conquest of the Philippines : 1898 1925 (New York, 1926); Leon Wolf, Little Brown Brother (New YorK, 1961); Emilio Aguinaldo with Vicente Albano Pacis, A Second Look at America (New York, 1957); Henry Graf, ed. American Imperialism and the Philippine Insurrection (Boston, 1967); Thomas G. Patterson, ed. American Imperialism and Anti Imperialism (New York, 1973); Richard Miller, ed. American Imperialism in 1898 (New York, 1970); H. Wayne

Morgan, America s Road to Empire: The War With Spain and Overseas Expansion (New York, 1967); Robert L. Beisner, Twelve Against Empire: The Anti Imperialists, 1898 1900 (New York, 1968); Ernest L. May, American Imperialism: A Speculative Essay (New York, 1968); H. Wayne Morgan, ed., Making Peace With Spain: The Diary of Whitlaw Reid, September December, 1898 (Austin, Texas, 1965); Paolo E. Coletta, ed., Threshold To American Internationalism (New York, 1970); Gerald F. Linderman, The Mirror of War: American Society and the Spainish American War (Ann Arbor, Michigan, 1974); David Healy, US Expansion ism: The Imperialist Urge in the 1890 s (Madison, Wisconsin, 1970).

11. Quoted in Alfred A. Cave, Jacksonian Democracy and the Historians (Gainsville, Fla., 1964), 2.

12. James Parton, Life of Andrew Jackson, 3 vols. (New York, 1861)III, 579.

13. James Schouler, History of the United States of America Under the Constitution (New York, 1894)IV, 243 44.

14. Quoted in Richard M. McLemore, Franco - American Diplomatic Relations: 1816-1836 (see below), 140-41 and 157.

15. As I have indicated in the body of the paper, all of the biographies and historians who have described this incident have all but ignored Clay's critical role in this crisis. This would include James Parton, Life of Andrew Jackson, 3 vols. (New York, 1861); John Spencer Basett, The Life of Andrew Jackson, 2vols. (New York, 1916); and Marquis James, The Life of Andrew Jackson, 2 vols. (Indianapolis, Ind., 1933 and 1937). An interesting account does appear in Charles Sumner's study, Andrew Jackson: American Statesman, but although his account is more accurate than the others, he too fails to emphasize the significance of the constitutional check Clay and the Congress imposed upon the President who wanted to use his war powers by enacting forceful reprisals against the French. The account appearing in Robert Remeni's Andrew Jackson and the Course of American Democracy (New York, 1984) is by far the best and most complete version of all of the major biographies, but once again he downplays the importance of Clay s role. The most comprehensive treatment can be found in Richard Aubrey McLemore's Phd. dissertation which was later made into a book, Franco American Diplomatic Relations: 1816 1836 (Batan Rouge, La., 1941). The published letters of both Jackson and Clay were fruitful sources

By far the richest yeild was in the public record: The Andrew Jackson, William C. Rives, Martin Van Buren, and Henry Clay Papers in the Library of Congress; the Register of Debates, 23rd Congress, 2nd Session; Senate Documents, 23rd Congress, 2nd. Session,No. 40 (the Clay Foreign Policy Committee Report); and various issues of the National Intelligencer and the Globe; excerpts in French papers found in Gigliani s Messenger (1835-36).

16. See U. S. Congress, House of Representatives, Committee on the Judiciary, *Statement of Information, Book XI*, "*Bombing of Cambodia*,", Hearings before the Committee on the Judiciary, 93rd Congress,2nd Sess., May-June 1974; and William Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia* (New York, 1979).

17. *The War Powers Resolution: A Special Study of the Committee on Foreign* House of Representatives, April,1982, 152-3.

18 *The War Powers Resolution*, 152.

19. *The War Powers Resolution*, Appendix

20. Subcommittee on War Powers, Committee of Foreign Relations, United States Senate,100th Congress, 2nd Sess., 1988

21 Joint Resolution Concerning the War Powers of Congress and the President(r

22. "Presentation on War Powers Resolution, Conference on "Richard Nixon: A Retrospective on His Presidency;" Sixth Annual Presidential Conference, Hofstra University, Hempstead, New York, November 20,1987.

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CONGRESS VERSUS THE PRESIDENT: THE FORMULATION AND IMPLEMENTATION OF AMERICAN FOREIGN POLICY

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.
>
> —John Marshall
> March 7, 1800
> 6th Congress

One of the oldest conflicts in the American system of government is that between Congress and the President over the right to formulate and implement foreign policy. Is the President solely responsible for the conduct of external relations? Is the Congress an equal partner? Or does Congress have the right to shape U.S. policy by enacting legislation which proscribes a President's flexibility? These are not just debating points for historians and constitutional lawyers, but critical issues which need to be addressed if we are to see the successful exercise of American diplomacy in the 1980s. Our effectiveness in dealing with the problems ahead, especially U.S.-Soviet competition in the Third World, will depend to a significant degree on our ability to resolve the adversary relationship between the President and Congress.

The struggle for control of foreign policy came to the fore in the twentieth century, with America's reluctant entry into world affairs, two World Wars, and a smaller, but more complex, postwar bipolar world characterized by the increasing interdependence of nations. The first significant Congressional challenge to the Executive's foreign policy prerogative occurred during the interwar years. After the Senate rejected President Wilson's Versailles Treaty in 1920, Congress continued to assert itself in the formulation of foreign policy. By the 1930s, a strong Congress was able to prevent presidential initiative in the critical prewar years. The almost universal consensus today is that this Congressional intrusion had been a disaster and had inhibited the United States from playing a useful role in Europe that might have prevented World War II.

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Following the Japanese attack on Pearl Harbor and our entry into the Second World War, Congress and the President stood in agreement over the direction of American foreign and military policy. Congressional intervention all but ceased.

The post-World War II period was marked by a reasonable balance between Congress and the President in the foreign policy decision-making process. In fact, Presidential foreign policy initiatives were generally accepted and reinforced by bipartisan support on Capitol Hill. American foreign policy was fairly coherent and consistent through changing complexions of the body politic. The United States was perceived as a reliable ally and its leadership generally accepted with a high degree of confidence by the non-communist world. But the relative stability between Congress and the President began to erode in the early 1970s with Congressional disenchantment over the Vietnam War. By mid-decade the two branches were locked in a struggle for control of American foreign policy. To a certain extent Congress won, and the balance between Congress and the President has swung dangerously to the legislative side with unfavorable consequences for American foreign policy.

If the balance is not soon restored, American foreign policy will be unable to meet the critical challenges of the 1980s. We are entering an era of fast change and increasing volatility in world affairs. Political instability and regional conflict are on the rise, especially in the Third World. Developing nations in many parts of the world are being torn apart by civil wars between pro-West and Soviet-supported factions, subverted by externally supported insurrection, or subjected to radical or reactionary anti-Western pressures. The industrialized economies of the West are ever more dependent on a lifeline of resources from an increasingly vulnerable part of the world. The Soviet Union has pursued an aggressive interventionist policy on its periphery and abroad, supported by its emerging global force projection capability and its successful use of less direct means of projecting power.

We may well be in a situation today which is analogous to that of the late 1930s, when America's inability to play a more active role in world affairs helped permit the Axis to realize its objectives without serious challenge. During this period Congress tied the President's hands, with disastrous consequences. Now we are back in the same situation, and risk making the same mistakes. If the United States is prevented from playing an active role in countering Soviet and Soviet proxy involvement in the Third World, the 1990s could well find a world in which the resource-rich and strategically important developing nations are aligned with the Soviet Union.

II

What is the proper balance between Congress and the President in the formulation and implementation of foreign policy? Although the bulk of opinion argues for strong Executive authority in the conduct of external relations, the Constitution itself offers no clear definition as to where legislative authority ends and Presidential prerogative begins. The Constitution would appear to have vested war powers in both the Executive and Legislative branches. Although it conferred the power to declare war and raise and support the armed forces on Congress (Article I, Section 8), the Constitution also made the President Commander-in-Chief of the armed forces (Article II, Section 2). Nowhere in the Constitution is there unambiguous guidance as to which branch of government has the final authority to conduct external relations. Nonetheless, there is the strong implication that the formulation and implementation of foreign policy is a function of the Executive Branch, both as a practical necessity and as an essential concomitant of nationality.

John Jay argues this point in the *Federalist Papers* (Number 64, March 5, 1788):

> The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negociations usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negociation. For these the president will find no difficulty to provide, and should any circumstance occur which requires the advice and consent of the senate, he may at any time convene them.

The Supreme Court has forcefully upheld Executive authority in foreign relations. In 1935 Justice Sutherland, in the case of *U.S. v. Curtiss-Wright Export Corporation et al.* (299 U.S. 304), cited a series of previous Court decisions in arguing that the powers of "internal sovereignty" lay with the individual states, but those of "external sovereignty" were with the national government.

> [There are fundamental differences] between the powers of the federal government in respect to foreign or external affairs and those in respect to domestic or internal affairs. . . . Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.
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> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

In addition to the constitutional, judicial and historical arguments against Congressional intervention in foreign policy, there is an even more clear-cut issue of the efficacy of Congressional involvement in foreign policy. To the extent that Congress often represents competing regional and parochial interests, it is almost impossible for it to forge a unified national foreign policy strategy and to speak with one voice in negotiating with foreign powers. Because of the nature of the legislative process a law may be passed in response to a certain set of events, yet remain in effect long after the circumstances have changed. The great danger of Congressional intervention in foreign affairs is that enacted legislation becomes an institutional rigid "solution" to a temporary problem.

The President, along with the Vice President, is the only officer of government who is elected by and responsible to the nation as a whole. As such, only he possesses a national mandate. As head of the Executive Branch, the President can formulate a unified foreign policy, taking into consideration how each aspect of it will fit into an overall strategy. He and his advisers can formulate their strategy with the necessary confidentiality not only among themselves, but between the United States and foreign powers. The President has the information, professional personnel, operational experience, and national mandate to conduct a consistent long-range policy.

The legislative body, on the other hand, is elected to represent separate constituencies. Congress must of necessity take a tactical approach when enacting legislation, since the passage of laws is achieved by constantly shifting coalitions. This serves us well in the formulation of domestic policy, where we proceed by voting on one discrete piece of legislation at a time. Although many of us may have our own long-term strategies in mind as we vote on specific legislative matters, the overall effect is a body of legislation passed piece by piece by a changing majority of legislators. We build domestic policy one step at a time to the end that the final product of domestic legislation is reflected in a consensus of various coalitions. If we later find out we have made an error in a specific piece of domestic legislation, we can change it. For example, if we determine that we have underfunded housing subsidies we can increase them the next year. But the process by which generally accepted domestic policy is arrived at does not lend itself to the formulation of a long-term, coherent, foreign policy. Once we alienate a friendly government, perhaps through shortsighted legislation, it may take years for us to rebuild that relationship and recoup the loss.

A foreign policy should be an aggregate strategy, made up of separate bilateral and multilateral relationships that fit into a grander scheme designed to promote the long-term national interests. With a comprehensive design in mind, those who execute foreign policy can respond to changes in the international environment, substituting one tactic for another as it becomes necessary, but retaining the overall strategy.

In 1816, the Senate Foreign Relations Committee put the argument this way:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. . . . The Committee . . . think the interference of the Senate in the direction of foreign negotiations are calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Five hundred and thirty-five Congressmen with different philosophies, regional interests and objectives in mind cannot forge a unified foreign policy that reflects the interests of the United States as a whole. Nor can they negotiate with foreign powers, or meet the requirement for diplomatic confidentiality. They are also ill equipped to respond quickly and decisively to changes in the international scene. The shifting coalitions of Congress, which serve us so well in the formulation and implementation of domestic policy, are not well suited to the day-to-day conduct of external relations. An observer has compared the conduct of foreign relations to a geopolitical chess game. Chess is not a team sport.

III

The 1970s were marked by a rash of Congressionally initiated foreign policy legislation that limited the President's range of options on a number of foreign policy issues. The thrust of the legislation was to restrict the President's ability to dispatch troops abroad in a crisis, and to proscribe his authority in arms sales, trade, human rights, foreign assistance and intelligence operations. During this period, over 150 separate prohibitions and restrictions were enacted on Executive Branch authority to formulate and implement foreign policy. Not only was much of this legislation ill conceived, if not actually unconstitutional, it has served in a number of instances to be detrimental to the national security and foreign policy interests of the United States.

The President's freedom of action in building bilateral relationships was severely proscribed by the series of *Nelson-Bingham Amendments*, beginning with the 1974 Foreign Assistance Act (P.L. 93-559). This legislation required the President to give advance notice to Congress of any offer to sell to foreign countries defense articles and services valued at $25 million or more and empowered the Congress to disapprove such sales within 20 calendar days by concurrent resolution. In 1976, the Nelson-Bingham Amendment to the Arms Export Control Act (P. L. 94-329) tightened these restrictions to include advance notification of any sale of "major" defense equipment totaling over $7 million. Congress is now given 30 days in which to exercise its legislative veto.

The consequence of these laws is that for the past seven years every major arms sale agreement has been played out amidst an acrimonious national debate, blown out of all proportion to the intrinsic importance of the transaction in question. Often the merits of the sale and its long-term foreign policy consequences are ignored, since legislators are put into the position of posturing for domestic political considerations. The debate diverts the President, the Congress and the nation from focusing on vital internal matters. Finally, because arms sales debates command so much media attention, legislators are inclined to give impulsive reaction statements before they have an opportunity for informed deliberation. They thereby often commit themselves to positions that, on cool reflection, they find untenable but difficult to recant.

The recent debate over the sale of AWACS (Airborne Warning and Control System) surveillance aircraft to Saudi Arabia is a classic case in point. Under such circumstances, it becomes extremely difficult for elected legislators to ignore constitutent pressures and decide an issue on its merits. For example, Congressman Dan Rostenkowski (D-Ill.) said following the House vote to reject the AWACS sale that he voted against selling AWACS to Saudi Arabia for political reasons, despite his view that the sale should go through on its merits.

Such a situation raises the possibility that should the Congressional decision do ultimate violence to our national interest, the nation whose perceived interests have been sustained by successful lobbying will pay a price later. My colleague, Senator William Cohen (R-Maine), who opposed the sale on its merits, felt compelled to vote for it because he feared its defeat would precipitate an American backlash against Israel:

> If the sale is rejected, [Israel] . . . will be blamed for the dissolution of the peace process . . . when the crisis comes, . . . when everyone is pointing an accusatory finger looking for a scapegoat, I do not want to hear any voices in the United States say—if only they had not been so intransigent, if only they had agreed not to interfere, if only they had not brought this mess—this death—upon themselves.

In some cases Congress allows a sale to go through, but only after a series of trivial and humiliating restrictions are placed on the purchasing nation. This tends to negate whatever goodwill the sale was designed to achieve. For example, in 1975 the President agreed to sell HAWK surface-to-air mobile missiles to Jordan. After a national brouhaha filled with many insults to King Hussein and questions about the stability of his regime, the sale finally went through, but only in "compromise" form—we took the wheels off. Presumably, HAWK missiles without wheels would allow the Jordanians to use them in fixed positions to protect the capital and key military locations, but prevent them from moving the missiles to the front line to be used against Israel. King Hussein later asked then Secretary of State Henry Kissinger why Congress had insisted on such a trivial point. It was never a question of whether the HAWKS would be mobile or not—we knew the Jordanians would be able to buy the wheels on the international market if they decided to violate the terms of the sale. The end result was that rather than cement our friendly relations with Jordan, we succeeded in humiliating a longtime friend.

Such actions are not soon forgotten. In his recent visit to Washington, King Hussein indicated that Jordan is considering turning to the Soviet Union for its new air defense missiles. This attitude clearly stems in part from his unhappiness over Congressional restrictions on U.S. arms sales to Jordan. According to a State Department spokesman, the 1975 HAWK missile sale "still rankles" in Jordan.

The *Turkish Arms Embargo* was a case where Congress tied the President's hands in negotiations. After the Turkish invasion of Cyprus on July 19–20, 1974, the Administration became involved in negotiations aimed at reconciling our two NATO allies, Greece and Turkey. After two days, a cease-fire was achieved, with Turkey controlling 25 percent of Cyprus.

Yet Congress was moving on a path of its own. On August 2, the House introduced two measures demanding the immediate and total removal of Turkish troops from Cyprus. After the second Turkish assault on August 14, the Senate Foreign Relations Committee prompted a State Department inquiry into possible Turkish violations of U.S. arms restrictions.

At one point, Prime Minister Ecevit of Turkey privately communicated his willingness to settle on terms representing a significant improvement over the status quo. The Administration was concerned that Congressional action would make it harder for Turkey to follow a conciliatory policy and thus destroy any hopes of a negotiated settlement. In an attempt to discourage a Turkish embargo, the White House invited several of my colleagues to attend briefings on the possibility of negotiations. Even after being shown evidence that a negotiation likely to improve Greece's position was in the making, these Congressmen continued to call for an arms embargo; soon, all hopes for a negotiated settlement vanished. On September 16, Ecevit's moderate government collapsed, and on October 17, the Congress imposed a Turkish arms embargo on a "very, very reluctant" President Ford. The embargo began on February 5, 1975; by that time, Turkey controlled 40 percent of the island. On June 17, 1975, Turkey responded to the embargo by placing all U.S. bases and listening posts on provisional status. On July 24, 1975, the House rejected a motion to partially lift the embargo; two days later, Turkey announced it was shutting down all U.S. bases and posts on its territory.

Thus, instead of reaching an agreement with a moderate Turkish government that controlled one-quarter of Cyprus, the United States had severely strained relations with an angry Turkish government that controlled two-fifths of the island. Furthermore, the aid cutoff weakened Turkey militarily, jeopardizing the southern flank of NATO and putting at risk our strategic listening posts in that country.

In a society such as ours, with its heterogeneous mix of various national and ethnic groups, strong lobbies are inevitable. But to submit American foreign policy to inordinate influence by these groups—often emotionally charged—is to impair a President's ability to carry out a strategy which reflects the interests of our nation as a whole. The Nelson-Bingham Amendments and the Turkish Arms Embargo were two pieces of legislation conducive to such a situation.

A second major area where Congressional intervention contributed to foreign policy disasters was the series of anti-war amendments. Throughout the early 1970s Congress proposed a series of acts aimed at forcing the United States into early withdrawal from Southeast Asia and cutting off American aid to Vietnam, Laos and Cambodia. The *Cooper-Church Amendment*, which became law in early 1971, cut off funds for U.S. troops, advisers and air support in and over Cambodia. The *Eagleton Amendment* (1973) called for American withdrawal from Laos and Cambodia. The *McGovern-Hatfield Amendment* (1970–71) set deadlines for American withdrawal from Indochina. Even though these two latter anti-Vietnam amendments did not become law, the pattern was clear by the early 1970s. My Senate colleagues would introduce one amendment after another, making it clear to the North Vietnamese that we would eventually legislate ourselves out of Vietnam. The Administration lost both credibility and flexibility in the peace negotiations. By making it clear to the North Vietnamese that Congress would prevent the President from further pursuing the war, or from enforcing the eventual peace, Congress sent a clear signal to our enemies that they could win in the end. The North Vietnamese were encouraged to stall in the Paris Peace Talks, waiting for American domestic dissent to provide them with the victory their military forces had been unable to achieve. After the Paris Agreements, aid to South Vietnam was throttled.

Finally, on July 1, 1973, we destroyed any hope of enforcing the Paris Peace Accords. The *Fulbright Amendment* to the Second Supplemental Appropriations Act for FY 1973 prohibited the use of funds "to support directly or indirectly combat activities in . . . or over Cambodia, Laos, North Vietnam and South Vietnam." As I said in Congressional debate over the Eagleton Amendment, the forerunner to the Fulbright Amendment:

> It has tremendous significance because it marks the placing on the President of an . . . inhibition in the conduct of foreign relations, in the negotiating of

> agreement and treaties, and in the implementation and enforcement of those agreements once arrived at. . . . What we have in effect done in the Eagleton Amendment is said to [the North Vietnamese]: 'You may do whatever you please. Having concluded this agreement, we intend to walk away from it, and we don't care whether you violate those provisions or not.'

I believed then and still believe that our failure to enforce the Paris Accords was a principal contributor to Communist victory in Indochina and the resulting horrors we have seen since in Laos, Cambodia and Vietnam. Reasonable men may argue whether or not we were right in being in Vietnam in the first place. I remain convinced that we made many mistakes that led us there, and that our direct involvement was ill conceived. But to deny a President the military means to enforce a negotiated agreement guaranteed that all the sacrifices that came before it would be in vain. Just because a peace agreement is signed or a cease-fire agreed to is no guarantee that both sides will live up to it. After World War II we enforced the peace with Germany and Japan by occupation forces. We guaranteed the Korean cease-fire by the continued presence of U.N. troops at the Demilitarized Zone. The Fulbright Amendment prohibited our enforcing the Paris Accords. We bought a settlement in Vietnam with 50,000 American lives that gave South Vietnam, Cambodia and Laos a chance to survive—a chance that was thrown away when we refused to be guarantors to that settlement.

The *War Powers Act* (P.L. 93-148) is probably the most potentially damaging of the 1970s legislation, although we have yet to experience a crisis where its effects are felt. The War Powers Act (1973) grew out of Congress' frustration with the war in Vietnam and its desire to prevent such a situation from ever happening again. Although President Nixon vetoed the Act on October 24, 1973, terming it "unconstitutional," his veto was overridden two weeks later by the House and Senate.

The act provides that before American troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" the President is to consult with Congress "in every possible instance." The President must notify Congress and submit a report within 48 hours after armed forces are sent abroad, "setting forth the circumstances necessitating the introduction of U.S. forces" and the "estimated scope and duration of the hostilities or involvement." After this initial two-day period, the President has 60 days to withdraw those forces or receive Congressional authorization for an extension, or a declaration of war.

This act jeopardizes the President's ability to respond quickly, forcefully and if necessary in secret, to protect American interests abroad. This may even invite crises. Although the act does not specify whether the report to Congress must be unclassified, there remains the possibility that a confidential report would become public knowledge. In many cases the more urgent the requirement that a decision remain confidential, the greater the pressures for disclosure. Thus, by notifying Congress of the size, disposition and objectives of U.S. forces dispatched in a crisis, we run the risk that the report may get into the public domain. If this information becomes available to the enemy, he then knows exactly what he can expect from American forces and thus what risks he runs in countering American actions. This removes any element of surprise the U.S. forces might have enjoyed and eliminates any uncertainties the adversary might have as to American plans.

It is interesting to speculate on just how damaging the legislation could prove to be at some future point. For that matter, what if the Iranian rescue attempt had gone somewhat differently? On April 26, 1980, President Carter reported to Congress the use of armed forces in the unsuccessful attempt to rescue American hostages in Iran on April 24, in full compliance with the 48-hour notification requirement of the War Powers Act. In this case, the rescue operation was over by the time the report was submitted, so there was no longer a need for secrecy nor a need for Congress to consider whether forces should be authorized or withdrawn. But what if the rescue attempt had bogged down or been planned as a longer effort? No doubt the details would have gotten out almost immediately, leaving little doubt in the minds of the Iranians just what the Americans were up to. While the framers of the War Powers Act intended it to prevent another Vietnam, their legislation has the effect of severely limiting the President's ability to respond quickly, forcefully and in secret to a foreign crisis.

In addition to the questionable wisdom of the reporting and consulting requirements of the War Powers Act, there are also doubts as to whether the legislative veto contained in the act is constitutional. Section 5 of the Act allows Congress the right to terminate any use of force, at any time, that has not been specifically authorized by either a declaration of war or similar legislation, by a concurrent resolution passed by a simple majority of both Houses. The legislative veto contained in the War Powers Act would appear to be in violation of Article 1, Section 7 of the Constitution. This so-called presentation clause clearly stipulates that an act can become law only if it is passed by a majority of both Houses of Congress followed by the President's assent, or by a two-thirds vote in each Chamber to override the President's veto.

After the Indochina debacle, there was a raft of Vietnam-syndrome legislation that sought to prevent the President from getting us involved in "future Vietnams." The *Tunney Amendment* to the Defense Appropriations Act of 1976 (P.L. 94-212), which passed the Senate on December 19, 1975, prohibited the use of "funds appropriated in this Act for any activities involving Angola other than intelligence gathering."[1] My colleagues feared that President Ford's attempts to offer minimal assistance to the pro-West UNITA (National Union for the Total Independence of Angola) and FNLA (National Front for the Liberation of Angola) factions would somehow embroil us in "another Vietnam." The domestic debate over whether we should become involved in Angola sent a clear signal to the Soviets and their Cuban proxies. They knew that the risk of U.S. intervention was low, and the possibility of continued U.S. assistance to the pro-Western factions slim.

Although the Soviet-Cuban airlift halted temporarily in December with President Ford's stern warning to the Soviet Ambassador, the airlift resumed with a vengeance following passage of the Tunney Amendment on December 19, 1975. The number of Cubans in Angola doubled as they began flying in fresher troops for what was to become an all-out offensive against pro-Western forces. By January the Soviet Union had increased its military assistance to the MPLA (Popular Movement for the Liberation of Angola) and stationed Soviet warships in the vicinity of Angola. They began extensive ferrying operations for Cuban troops. It was clear that the United States had lost whatever leverage it might have had to persuade Soviet leaders to reduce Soviet and Cuban involvement in Angola.

With Angola the Soviet Union entered a new phase; never before had it or its surrogate Cuban army attempted such large-scale operations in Africa or anywhere else in the Third World. Their successful intervention in Angola bestowed on the Soviet Union and Cuba the image of dependable allies and supporters of radical movements in southern Africa. The United States by contrast was portrayed as having lost its taste for foreign involvement after Vietnam, and as being domestically divided over a foreign policy strategy. The moderate black African states lost confidence in America's willingness to stem the tide of Soviet involvement in the region.

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[1] The Clark Amendment to the Arms Export Control Act of 1976 (Sec. 404, P.L. 94-329), which became law on June 30, 1976, further tightened the restriction by prohibiting "assistance of any kind . . . for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola."

After being reduced to sporadic guerrilla engagements for over a year, in July 1977 the pro-West UNITA faction declared its intention to renew the fight. Following this announcement, the Soviets and Cubans increased their efforts. As of late 1979, there were some 19,000 Cuban troops, 6,000 Cuban civilian technicians and 400 to 500 Soviet advisors in Angola. Although the guerrilla war continues, the Clark Amendment prohibits the United States from offering any aid to the pro-Western faction. The Clark Amendment prevents us from responding to Soviet and Cuban involvement in Angola, and leaves open to them the mineral-rich, strategically important region of southern Africa.

Finally, two of the most damaging Congressional intrusions into national security policy were the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the so-called *Church Committee*) and the *Hughes-Ryan Amendment* to the Foreign Assistance Act (P.L. 93-189). As vice-chairman of the Church Committee (1975-76) I sought to limit the damage to our intelligence community, although to little avail. By conducting a public inquiry into the CIA we exposed not only its supposed blunders and malfeasance but also important information as to how the CIA is organized, how it gathers intelligence and what kinds of sources and methods it uses.

The Hughes-Ryan Amendment, which became law on December 30, 1974, prohibited any CIA activities abroad that are not directly related to intelligence gathering, "unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operations to the appropriate committees of Congress." By 1977 information about covert intelligence activities was available to eight Congressional committees, for a total of 200 members or roughly 40 percent of Congress.[2]

This, plus the Church Committee hearings, confirmed to our adversaries that clandestine operations would be severely curtailed in the future. It sent a signal to our adversaries that they could proceed with impunity in the "back alleys of the world." These actions also shook the confidence of those friendly states which had cooperated with us in intelligence gathering, and caused many of them to reassess their relationship with the U.S. intelligence community. They feared Congressional investigations of the CIA would expose their own intelligence sources and methods. In private conversations with officials of friendly intelligence agencies, I have been told that the Church Committee raised doubts about the wisdom of their cooperating with the United States in the future. This has also adversely affected our cooperation with countries that for political reasons take a publicly hostile attitude toward the United States, but who privately cooperate with us on some matters of mutual interest. They fear the publicity generated by a Congressional investigation would expose what is essentially a private relationship, and lead to unfavorable domestic political consequences for them. Finally, either through leaks or publicly released data, the Church Committee titillated the press with daily helpings of some of our nation's most treasured secrets.

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[2] In one of the few reversals of the 1970s legislation, in October 1980 the President signed into law an amendment to the National Security Act (P.L. 96-450), which stipulates that he must report covert operations to only two Congressional Committees, the House and Senate Select Committees on Intelligence.

IV

If we are to meet the foreign policy challenges facing us in the 1980s, we must restore the traditional balance between Congress and the President in the formulation and implementation of foreign policy. To do so, much of the legislation of the past decade should be repealed or amended.

Many in Congress are coming to this conclusion and are working toward a reversal of the imbalance. The 1980 modification of the Hughes-Ryan Amendment to require notification of covert actions to only the two Intelligence Committees is one such step, as is the Senate's October 22, 1981, vote to repeal the Clark Amendment. Further efforts in this direction are essential if we are to have the maximum flexibility required to respond to a fast-changing world.

In addition to reversing much of this legislation, we should also look at new legislation which may be appropriate. There are strong arguments in favor of creating an unspecified contingency fund for economic and military assistance. One of the consequences of the 1970s legislation was that such funds which had previously existed were either abolished or severely curtailed. Reestablishment of such funds would grant the President the flexibility he needs to be able to respond quickly to help new friends that emerge unexpectedly, or old friends who are suddenly endangered. While disbursement of these funds should be made with appropriate notification to Congress, the inevitable delays involved in waiting for new Congressional authorization should be avoided.

For example, when Zimbabwe became independent on April 18, 1980, the new government was strongly anti-Soviet, pro-West and in need of economic assistance. On the day he took office, President Mugabe invited the United States to be the first nation to establish diplomatic relations with and open an embassy in Zimbabwe. We responded with a pledge of economic assistance, but due to the lack of funds for such contingencies, were able to grant only $2 million. We had to wait almost ten months, until the next appropriations cycle could be completed, to grant Zimbabwe the amount of economic assistance it needed.

We face a similar situation in northern Africa today. In the confusion cast over the area in the wake of the Sadat assassination, Libyan President Qaddafi has heightened threats against the anti-Soviet government of Sudan. The Libyan army appears to be on an alerted posture. Were Libya to attack Sudan tomorrow, there is very little the United States could do right away to assist President Nimeiry.

As legislation now stands the President has certain limited flexibility to grant military assistance to respond quickly to unplanned situations. The Foreign Assistance Act of 1961, as amended, permits the President, in the interests of national security, to draw on U.S. military stocks, defense services, or military education and training, up to $50 million in any fiscal year for foreign use. In 1981 the Reagan Administration requested that new contingency funds totalling $350 million be established for emergency economic and military assistance. As of mid-November 1981 Congressional action on this request is still pending, although it appears that both Houses are moving to reduce significantly the size of these contingency funds.

In supporting such discretionary authority and appropriations, and urging the repeal of the excessively restrictive legislation of the 1970s, I am in effect proposing a return to the situation that prevailed in the 1950s and 1960s.

At that time the Congress did provide discretionary authority and substantial contingency funds for the use of Presidents Truman, Eisenhower, Kennedy and Johnson. Each of these Presidents employed his authority to act quickly and decisively in ways which, on balance, served the national interest—especially in new and unforeseen situations emerging in what we now call the Third World. The basic authority of the Congress to appropriate funds for the armed forces and foreign activities remained constant.

Indeed, the Congress from time to time expressed its views forcefully as to the desirability of support for nations that acted in ways prejudicial to American interests. (An early example of such legislation was the Hickenlooper Amendment, which for many years expressed Congress' general opposition to continue aid to countries that nationalized private American companies without adequate compensation.) The crucial difference is that such expressions of Congressional sentiment almost invariably contained a saving clause that permitted the President to go ahead if he certified to the Congress that the action was necessary for overriding national security reasons. This is a perfectly sound and reasonable practice, and one that avoids the immense complications and possible unconstitutionality of the legislative vetoes introduced by the various amendments of the 1970s.

In short, what I propose above is vastly more effective than the present situation, sounder from every constitutional standpoint, and fully in keeping with past precedents.

V

Finally, in reconsidering the legislation of the 1970s, it is useful to reexamine it and its causes in a more dispassionate light than that of the period. At the time, much of this legislation was considered a necessary response to counter the excesses of the presidency. Since the Vietnam War had never been formally declared by Congress, it was seen as the President's war. Watergate, along with the war, was considered to be the result of a Presidency grown too authoritarian. If the war were ever to end, and if future Vietnams were to be prevented, the President's foreign policy authority would have to be proscribed. As Arthur Schlesinger put it, the theory "that a foreign policy must be trusted to the executive went down in flames in Vietnam. . . . Vietnam discredited executive control of foreign relations as profoundly as Versailles and mandatory neutrality had discredited congressional control."[3]

If this legislation was motivated by an "Imperial Presidency," whose ultimate manifestation was an undeclared war, then the motivation is flawed. Blame for Vietnam can be laid at many doors: a series of American Presidents, and those in the civilian leadership who advocated gradual escalation and limited rules of engagement. But Congress was not blameless. The war in Vietnam, while undeclared by Congress in a formal sense, had de facto Congressional support. Beginning in the mid-1960s the Administration sent defense authorization and appropriations bills to Congress—legislation which clearly designated certain men and monies for the war effort. Year after year Congress acquiesced in the Vietnam War, by authorizing and appropriating resources for it. As former Senator J. William Fulbright remarked, "It was not a lack of power which prevented the Congress from ending the war in Indochina but a lack of will." With waning public support for a war which seemed to drag on forever, many in Congress and the media looked to a single explanation—for a scapegoat who could be held accountable for an unpopular war. Blame for the war in Vietnam was attributed to the usurpation of power by the President.

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[3] Arthur M. Schlesinger, Jr., *The Imperial Presidency*, Boston: Houghton Mifflin, 1973, pp. 282–83.

In the early 1970s Congress reversed itself and belatedly attempted to use its appropriation authority to end the war. While this was certainly within its prerogative, the timing was of questionable wisdom. Our efforts to disengage from Vietnam and to negotiate with the North Vietnamese were made more difficult by Congressional intervention. Congressional action made a settlement all the more difficult to achieve and, ultimately, impossible to enforce. The view that the Vietnam War discredited forever Executive control of foreign policy was an emotional reaction, driven by the passion of the moment. Because of it, Congress embarked on a course to limit not only President Nixon's flexibility, but also that of future Presidents. Congress prescribed a cure for a nonexistent disease. The lasting effect was that Congress institutionalized its foreign policy differences with the President by legislating permanent solutions for a temporary situation.

As Cyrus Vance said at the 1980 Harvard commencement, "Neither we nor the world can afford an American foreign policy which is hostage to the emotions of the moment." The authority to conduct external relations should not vacillate between Congress and the President as a result of failed or unpopular initiatives. The whole point of a written constitution and body of judicial opinion is to establish a consistent mechanism for apportioning authority. Whereas the Constitution confers on the Senate the duty of advice and consent in the making of treaties, on the Congress the power to appropriate monies for armed forces and to declare war, and special authority in the field of trade, it confers on Congress no other special rights in the field of external affairs.

The cumulative effect of this legislation is that, as the United States enters a period when the greatest flexibility is required of an American President to deal with fast-changing situations in the world, Congress has inhibited the President's freedom of action and denied him the tools necessary for the formulation and implementation of American foreign policy. We know that the Soviet Union maintains clandestine operations which are well organized, well disciplined, well financed, well trained and often well armed, in virtually every Third World country. They are in a position to exploit many restive political situations which they may or may not originate. To inhibit the United States in its ability to conduct covert operations, to provide military assistance to pro-West governments or groups, and to respond quickly to military crises is to concede an enormous advantage to the Soviet Union and its proxies.

It is my sincere hope that Congress will reexamine its role in the conduct of foreign policy and repeal or amend, as necessary, the legislation of the 1970s. The end towards which we should work is to do whatever is necessary to strengthen America's ability to formulate and implement a unified, coherent and cohesive foreign policy to face the challenges of the 1980s.

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SUPPOSE CONGRESS WANTED A WAR POWERS ACT THAT WORKED

JOHN HART ELY

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SUPPOSE CONGRESS WANTED A WAR POWERS ACT THAT WORKED*

*John Hart Ely***

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress . . . .
>
> – James Wilson[1]

> Perhaps not since the Volstead Act ushered in the Prohibition Era has a federal law been talked about more and respected less than the War Powers Resolution of 1973.
>
> – San Francisco Banner Daily Journal[2]

> If we chose to make it work, it will work, but we do not have within ourselves the gumption to make it work. It is workable if we choose to, but we do not choose to.
>
> – Senate Foreign Relations Committee
> Chair Claiborne Pell[3]

Congress is considering various amendments to the War Powers Resolution of 1973,[4] prominently including a "bipartisan proposal" to scuttle it. By some oversight they haven't invited me to testify, so I must content myself with this Article.

The War Powers Resolution was enacted at the end of the war in IndoChina, over President Nixon's veto, in response to a perception on the part of Congress that since 1950—when President Truman had sent our troops into Korea without congressional authorization—it had been dodging its constitutional duty to make the decision whether to commit American troops to combat. Instead, it had lain back, neither disapproving presidential military ventures nor very explicitly approv-

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[1] 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 528 (J. Elliot ed. 1866) [hereinafter Elliot's Debates].

[2] Roberts, War Resolution is Cited, Skirted—But Never Used, San Francisco Banner Daily J., Nov. 30, 1987, at 1, col. 6.

[3] 134 Cong. Rec. S7173 (daily ed. June 6, 1988).

[4] The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)). Pertinent sections appear in the Appendix to this Article.

ing them, trusting the President to take the lead and waiting to see how the war in question played politically. In 1973 it therefore decided it could not count on itself to decide such issues unless forced to, and the War Powers Resolution was designed to exert such force.

Section 4(a) of the Resolution requires the President to report to Congress within 48 hours of introducing United States forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and certain other situations. Section 5(b) provides:

> Within sixty calendar days after [such a] report is submitted or is required to be submitted . . . whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Section 8(a) elaborates on what constitutes a "specific authorization": it provides that authority to commit troops shall not be inferred from any provision of law or treaty that does not specifically refer to the War Powers Resolution. In addition, section 3 requires the President "in every possible instance" to "consult with Congress" before introducing troops into such situations, and section 5(c) provides that even before the 60-day period has run, Congress can direct the removal of the troops by concurrent resolution. (Concurrent resolutions do not require the President's signature.)

Like the Gramm-Rudman-Hollings Budget Control Act of 1985[5] and other recent "framework" legislation,[6] the War Powers Resolution is designed to force a decision regarding matters that Congress has in the past shown itself unwilling to face up to. Unlike Gramm-Rudman-Hollings, however, it does not push the tough decisions onto somebody else (such as the Comptroller General) but rather provides that once the Resolution is triggered by the commitment of troops, Congress itself has 60 days to make the critical decision on war and peace.

However, "[p]ost-Watergate congressional bravado had a way of sputtering out in the face of crisis,"[7] and thanks to a combination of presidential defiance, congressional irresolution, and judicial abstention the War Powers Resolution has not worked. Repeatedly—as in the last stages of the war in IndoChina, the attempt to free our hostages in Iran, and in Lebanon, Central America, Grenada, and Tripoli—the President either has not reported under section 4(a) or has failed to specify that what he is filing is a section 4(a)(1) "hostilities" report, thus avoiding the 60-day clock.[8] Congress has responded to this evasion only once, in connection with the Lebanon crisis, when after much hemming and hawing it negotiated a "compromise" recognizing the applicability of the War Powers Resolution (which recognition President Reagan immediately repudiated) and extending the period the troops could remain in Lebanon for 18 months.[9]

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[5] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99 177, 99 Stat. 1038 (codified at 2 U.S.C. §§ 901–922 (Supp. IV 1986)).

[6] The structure of the Congressional Budget and Impoundment Control Act o 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in scattered sections of 1, 2, 31 U.S.C.) is quite similar to that of the War Powers Resolution.

These various episodes need not be elaborated, as our activities in the Persian Gulf are fresh in our memories and provide such a clear example.[10] By mid-1988 we had some 31 ships patrolling the Gulf. On April 14 a mine blast off Qatar seriously damaged the U.S. frigate

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[7] A. Schlesinger, The Cycles of American History 291 (1986).

[8] See, e.g., Staff of House Comm. on Foreign Affairs, 97th Cong., 2d Sess., The War Powers Resolution 180–99, 238–46 (Comm. Print 1982) [hereinafter Committee on Foreign Affairs Study] (IndoChina and Iran); Note, The Future of the War Powers Resolution, 36 Stan. L. Rev. 1407, 1421–23 (1984) [hereinafter Stanford Note] (Central America); Rubner, The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada, 100 Pol. Sci. Q. 627 (1986); Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 99th Cong., 2d Sess., War Powers, Libya, and State-Sponsored Terrorism (Comm. Print 1986) [hereinafter Libya Hearings]. President Ford's report on the *Mayaguez* incident is the only one to have included a reference to section 4(a)(1), though even he indicated merely that he was "taking note" of the Resolution. (Also, the operation took less than 48 hours and thus was over before the report was filed.) Subcomm. on International Security and Scientific Affairs of the House Comm. on Foreign Affairs, 98th Cong., 1st Sess., The War Powers Resolution: Relevant Documents, Correspondence, Reports 45–46 (Comm. Print 1988) [hereinafter Documents].

[9] See generally Ides, Congress, Constitutional Responsibility and the War Power, 17 Loy. L.A.L. Rev. 599, 642–52 (1984). The degree to which the denouement actually represented a compromise is debatable.

> No presidential acknowledgement that the sixty-day time limit is binding, and no presidential acknowledgement that statutory authority is constitutionally required—but congressional consent to keep the marines in hostilities for eighteen months, with no guarantee that the President would respect even that longer time limit. . . . One wonders how Representative Zablocki emerged from these "tough negotiations" without agreeing to apologize for his sponsorship of the War Powers Resolution.

Glennon, The War Powers Resolution: Sad Record, Dismal Promise, 17 Loy. L.A.L. Rev. 657, 667 (1984) (footnote omitted).

[10] This is not necessarily to say the President's policy in the Gulf did not have beneficial results. As of this writing there is hope that the Iran-Iraq war will be settled, and it is arguable that our convoys contributed to that result. Some would say that possibility justifies our policy. My point is "only" that given the lack of congressional authorization, the War Powers Resolution (and for that matter the Constitution) was violated.

Samuel B. Roberts, injuring 10 crewmen. U.S. officials blamed Iran for laying new mines, and four days later, on April 18, our forces struck back, destroying the Sassan and Sirri oil platforms with gunfire and explosive charges. Two Iranian Phantom jets approached the ships near Sirri, but fled when the U.S. cruiser *Wainwright* fired anti-aircraft missiles at them. The 173-foot Iranian missile boat *Joshan* fired a missile at the *Wainwright*, but missed. The *Joshan* was then destroyed by missiles from the *Wainwright* and the U.S. frigate *Simpson*, and by bombs dropped by U.S. jets based on the carrier *Enterprise*. Meanwhile, armed Iranian speedboats attacked oil platforms belonging to the United Arab Emirates and a U.S.-flagged supply boat. President Reagan authorized an attack by U.S. planes, which sank one speedboat and damaged two others. Later in the day Iranian frigates fired at U.S. aircraft and warships. The *Sahand* was sunk by missiles from the U.S. destroyer *Joseph Strauss* and by aerial bombs. The *Sabalan* was also crippled by a U.S. bomb.[11]

On July 3 a regularly scheduled civilian Iranian airliner was mistaken for a warplane and shot down by a missile from the U.S. cruiser *Vincennes*, killing 290 people. Asked to distinguish an episode in 1983 when a Soviet jet downed a Korean airliner, killing 269, the Chairman of our Joint Chiefs of Staff responded:

> [T]he fundamental differences are, of course, that [the earlier incident did not occur in] a war zone, there was not combat in progress, there was not combat there normally . . . .[12]

Defending our action before the United Nations Security Council on July 15, Vice President Bush faulted Iranian officials for allowing the airliner to fly "over a warship engaged in battle," and a subsequent Defense Department investigation attributed the mistake to the stress of combat. (At the time it fired the fatal missile the *Vincennes* was engaged in battle with Iranian attack boats.)[13] Mr. Bush stood firm: "The Iranians shouldn't be sending an airliner over a combat zone. . . . A captain is under fire in combat."[14]

Despite all this the Administration persisted in its refusal to file a

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[11] Cong. Q., Apr. 23, 1988, at 1057–58.

[12] N.Y. Times, July 4, 1988, at 5, col. 5.

[13] N.Y. Times, Aug. 3, 1988, at A1, col. 6; N.Y. Times, Aug. 20, 1988, at 1, cols. 4–6, at 5, cols. 1–6.

[14] N.Y. Times, Aug. 4, 1988, at A6, cols. 1–3. It seems anticlimactic to add that our troops in the Persian Gulf have been receiving extra pay, for "imminent danger from wartime conditions," since August 25, 1987. (Under § 9(2)(B) of Congressman DeFazio's proposed amendments, H.R.J. Res. 462, 100th Cong., 2d Sess. (1988), hostile-fire pay would automatically trigger a presidential obligation to file a 4(a)(1) report. The risk is that this would serve only to discourage the provision of such pay in situations in which it previously would have been granted. Cf. text accompanying infra note 77. It might also be noted that our troops are currently eligible for imminent-danger pay in El Salvador, Colombia, Lebanon, Peru and the Sudan as well. Documents, supra note 8, at 98.) Were the situation not so tragic I would also note that Bob Hope did a Christmas Show for our troops in the Persian Gulf in 1987.

4(a)(1) report with Congress acknowledging an imminent danger of hostilities. (Its position seemed to be that we were at war but there was no danger of hostilities.) Congress's performance was no better. For example, Senator Adams' resolution to trigger section 4(a)(1) was defeated, 54–31, by a point of order on June 6. (Most of Adams' opponents essentially admitted that he was right that we were involved in hostilities, but indicated that they just did not want to invoke the Resolution.)[15]

One reason a number of the Senators indicated they were unwilling to invoke the War Powers Resolution was that legislation was in the process of being introduced by Senate Majority Leader Byrd, on behalf of himself and Senators Nunn, Warner, and Mitchell—Congressman Hamilton has since introduced the measure on the House side—to amend the Resolution so as to repeal its operative provisions.[16] Their proposed amendment specifies both a small group (the Speaker of the House, the President pro tempore of the Senate, and the majority and minority leaders of both houses) and a larger "permanent consultative group" (those six plus twelve other congressional VIPs) with whom presidential "consultation" under section 3 is to take place. That is surely a step in the right direction, as presidents since 1973 have complained that they were never sure exactly with whom they were supposed to consult. However, the Byrd amendments do not attempt to put teeth into the concept of "consultation," thus leaving open the possibility that it will continue to take the same form it has in the past, merely informing the congressional leadership of decisions already reached and respecting which implementation has often already begun.[17]

More importantly, this limited advance is to be achieved at the cost of the Resolution's central mechanism, the 60-day clock, which would be excised. No longer would there be a date beyond which troops, if not congressionally authorized, would have to be removed from the battlefield. Neither, for that matter, would Congress be able to remove such troops by concurrent resolution, as that provision is also to be repealed by the proposed amendments.

The 60-day clock should be removed, the amendments' sponsors explain, because it has proved "unworkable." And so it has—but why? Very simply, because the President has refused to obey the law, and Congress has not had the fortitude to call him on it. The spirit animating the amendments thus seems to be that expressed, pessimistically, by Senator Simon: "maybe realistically we ought to get rid of it because it is meaningless if we do not use it in [a Persian Gulf] kind of a situation."[18] *Congressional Quarterly* captured the situation well by reporting that "a major thrust" of the Byrd proposal would "be to make the War Powers Resolution less restrictive of prospective military commitments, in hopes that future presidents will acknowledge its validity."[19] Repeal *is* one way to increase compliance.

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[15] 134 Cong. Rec. S7165–78 (daily ed. June 6, 1988). A suit by members of the House of Representatives seeking an order instructing the President to report the Persian Gulf situation under section 4(a)(1) was dismissed, under the political question and equitable discretion doctrines, on December 18, 1987. Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987). (The case is discussed further in infra notes 49, 82, 88, 98 & 106 and text accompanying note 111.) At this writing the appeal is still pending. Conceivably the Court of Appeals is hoping the settlement of the Iran-Iraq war will moot the case.

[16] See, e.g., 134 Cong. Rec. S7167, S7169 (daily ed. June 6, 1988) (Senators Warner and McCain). The Byrd proposal is S. J. Res. 323, the Hamilton version H.R.J. Res. 601—both 100th Cong., 2d Sess. (1988).

[17] See infra note 63 and accompanying text.

In place of the 60-day clock (and the concurrent resolution provision) the Byrd amendments provide that Congress can pass a joint resolution requiring the President to disengage our troops from hostilities and cutting off funds for their continued support. That, however, is no substitute at all. A joint resolution or statute ending a war by cutting off its funding (each, of course, would have to be passed, by a two-thirds vote, over the President's veto) is a possibility that has universally been conceded to be constitutional throughout our history.[20] Mentioning it in the (new, "improved") War Powers Resolution does not add to its stature, or the likelihood of its invocation.

The amendments do give such a joint resolution procedural priority in Congress (though only if it has been approved by a majority of the 18-member "permanent consultative group"). Obviously that is not a bad thing, but it is hardly a substitute for the doomed provisions of the existing War Powers Resolution (proceedings under which, incidentally, also receive procedural priority—whether or not they have the approval of the leadership). Congress has not had the mettle to confront the President when he has violated section 4(a)(1) by refusing to file a "hostilities" report. All the procedural priority in the world is not going to get it to take the affirmative step of passing over the President's veto what amounts to a statute instructing him to terminate a war that, under the proposed amendments, he will have entered into with total legality. The Constitution contemplates that before American troops are exposed to the risk of death, the military engagement in question must be affirmatively approved by Congress.[21] Giving that body the "right" to end a President's war by passing a joint resolution over his veto hardly fulfills the constitutional plan.[22]

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[18] 134 Cong. Rec. S7172 (daily ed. June 6, 1988).

[19] Cong. Q., Apr. 23, 1988, at 1051.

[20] See infra note 69 and accompanying text.

[21] See infra notes 26–39 and accompanying text.

[22] Senator Byrd has described his proposal thus:

> The key to the revisions I am proposing lies in section 4 of the legislation. This section changes the presumption of the current War Powers Resolution, which is that U.S. Armed Forces must be withdrawn from situations of hostilities or imminent involvement in hostilities within 60 days unless Congress specifically

Shall we therefore regard the Byrd amendments as simply a bad trade—of the existing Resolution's requirement of congressional approval for the trappings of "consultation" that are to be accorded the leadership under the new scheme? Well, no, since it wouldn't really be a trade at all. Congress's performance in this area over the past 38 years demonstrates that it may prove only too happy to have the monkey of accountability taken off its back—to settle back into the pattern of letting the President get out front and then, when the war begins not to play so well, making various feints in the direction of ending it, complaining that it is being stymied by the possibility of a veto and that there isn't much it can do about a *fait accompli*.

I know that sounds cynical. Recent experience does tend to generate cynicism about the hardihood of Congress in this area. A thoroughgoing cynic would not bother to write this Article, however. For what I propose is to construe generously the claim of the congressional leadership that it wishes to amend the War Powers Resolution only because it has proved "unworkable" and to assume that they might be willing to entertain the possibility that it could be rendered "workable" by some means other than discarding its central provisions. Before we repeal it, we should see if it can't be repaired.

Part I of this Article suggests the elimination from the existing Resolution of a good deal of nonoperational "noise" that serves only to confuse its constitutional status and otherwise to encourage continued presidential defiance. Part II suggests specific strategies—centrally involving the insertion of the federal judiciary into the clock-starting process—for inducing Congress to face up to its constitutional duty to decide on war and peace. A suggested new War Powers Act appears in the Appendix.

I. Provisions that Don't Do Any Good and Only Give the President An Excuse to Flout the Resolution

A. *The Title*

The tendency seems to be for those who approve of the Resolution to call it the War Powers Act, while those who would denigrate it refer to it as the War-Powers Resolution. The latter, however, is its official title. I used to suppose it was chosen on some theory that "resolutions" are appropriate vehicles for congressional elucidation of the meaning of the Constitution. More recently I have been advised that "Resolution" sounded more weighty and distinguished to the House

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> authorizes their continued presence. Instead of mandating withdrawal as a result of congressional inaction through failure to provide specific authorization—the situation under current law—this legislation requires passage of a specific joint resolution requiring disengagement.

134 Cong. Rec. S6174 (daily ed. May 19, 1988). This, however, makes all the difference. See also infra text preceding note 80.

leadership than "Act." However reasonable that may have seemed at the time, the effect has been just the opposite, and people who should know better sometimes slip into suggesting that because this is a "mere resolution," it has less stature than a statute[23] (whereas in fact they are of equivalent legal status). Unfortunately, a joint resolution, which this is, sounds suspiciously like a concurrent resolution, which in turn begins to sound a little like a resolution that one house of Congress might pass commending its doorman. It probably should be called the War Powers Act.

B. *Section 8(d)*

Section 8(d), which provides that "[n]othing in this joint resolution . . . is intended to alter the constitutional authority of the Congress or the President" was obviously inserted as a hedge, to indicate that to the extent the Resolution's provisions stray across constitutional bounds, they are to be reined in. Such a hedge wasn't necessary, however. For despite occasional opinions to the contrary—Senator Helms, for example, recently opined that "once the War Powers Act hits the Supreme Court of the United States, they are going to throw it out just like a tub of lard"[24]—the Resolution's main provisions are plainly constitutional.[25]

One of the repeated discoveries of contemporary constitutional law writing is that the "original understanding" of the document's framers and ratifiers is often unclear. In this case, however, it is not. The power to declare war is vested in Congress.[26] The debates, and early practice, establish that this meant that all wars, whether declared or undeclared, had to be legislatively authorized.[27] Indeed, only one delegate to either the Philadelphia Convention or any of the state ratifying conventions, Pierce Butler, is recorded as suggesting that authority to decide on war and peace be vested in the President. Elbridge Gerry, backed by others, responded that he "never expected to hear in a republic a motion to empower the Executive alone to declare war,"[28] and Butler subsequently disowned his earlier view.[29] "The Executive," George Mason explained, was not "safely to be trusted" with such decisions, at least not alone.[30]

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[23] E.g., A. Thomas & A. Thomas, The War-Making Powers of the President 141 (1982) ("[T]he War Powers Resolution . . . does not have quite the same legal level as an ordinary statute passed through the usual congressional channels.").

[24] 134 Cong. Rec. S7175 (daily ed. June 6, 1988). (The syntactic ambiguity—is the tub of lard the Resolution or the Court?—may be attributable to the fact that Senator Helms is not a lawyer.) More sophisticated renditions of much the same viewpoint are Rostow, Great Cases Make Bad Law: The War Powers Act, 50 Tex. L. Rev. 833 (1972); Rostow, "Once More Into the Breach:" The War Powers Resolution Revisited, 21 Val. U.L. Rev. 1 (1986).

[25] Section 5(c) probably *would* be declared unconstitutional. See infra notes 48–53 and accompanying text. The grant of a 60- (or 90-) day "free pass" to the President is also constitutionally troublesome. But cf. text following infra note 51, infra text accompanying notes 58–62.

[26] U.S. Const. art. I, § 8, cl. 11. To Congress also are granted the powers to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the armed forces, to provide for calling forth, organizing and disciplining the militia, to grant letters of marque and reprisal (see infra note 27), and to make rules concerning captures. Id. cls. 11–16.

[27] See, e.g., A. Sofaer, War, Foreign Affairs and Constitutional Power, passim and 4, 56, 100–03, 119–24 378 (1976); A. Schlesinger, The Imperial Presidency 21 (1973). Clause 11's coupling of the war power with the marque and reprisal clause underscores

It is true that an early draft of the Constitution vested the power "to make war" in Congress and this was changed to the power "to declare war." This change was made for two reasons—first, to make clear that once hostilities were congressionally authorized, the President, as "Commander in Chief," would assume tactical control (without constant congressional interference)[31] of the way they were conducted;[32]

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the requirement of congressional authorization of military actions short of full-scale war. E.g., 3 J. Story, Commentaries on the Constitution of the United States § 1170 (1833); Lofgren, War-Making Under the Constitution: The Original Understanding, 81 Yale L.J. 672, 679–80, 695–97, 699–700 (1972); Lobel, Covert War and Congressional Authority: Hidden War and Forgotten Power, 134 U. Pa. L. Rev. 1035, 1046, 1060–61, 1065–69 (1986). On the undeclared wars of the period (and the universal assumption that they too had to be congressionally authorized), see, e.g., Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); E. Keynes, Undeclared War 94–98 (1982); Scigliano, The War Powers Resolution and the War Powers, *in* The Presidency in the Constitutional Order 124–25 (J. Bessette & J. Tulis eds. 1981); A. Sofaer, supra, at 139–47; J. Javits, Who Makes War 25–35 (1973).

[28] The Butler-Gerry interchange appears at 2 The Records of the Federal Convention 318 (M. Farrand ed. 1911) [hereinafter Farrand]. Cf. 1 id. at 64–65 (Charles Pinckney to effect that if "the Executive powers" were extended "to peace & war &c," that would "render the Executive a Monarchy, of the worst kind, towit an elective one."). The Philadelphia debates are usefully analyzed at Lofgren, supra note 27, at 675–83, and Bestor, Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined, 5 Seton Hall L. Rev. 527 (1974).

[29] 4 Elliot's Debates, supra note 1, at 263.

[30] 2 Farrand, supra note 28, at 319.

[31] In fact, both before and after the ratification of the Constitution, Congress has occasionally involved itself in wartime military decisions. See examples cited in Note, The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment, 40 Stan. L. Rev. 1543, 1549–50 (1988).

[32] Proponents of broad executive authority to involve the country in military hostilities rely most often on the Commander in Chief clause, but this is all it was meant to convey. In 1793 James Madison wrote that it is necessary carefully to distinguish the power that a Commander in Chief has "to *conduct a war*" from the power to decide "whether *a war ought* to be *commenced, continued,* or *concluded.*" 6 The Writings of James Madison 148 (G. Hunt ed. 1906) (emphasis in original). This accords with Alexander Hamilton's Plan of June 18, 1787, whereby the Senate was to be given "the sole power of declaring war" and the chief executive (styled the Governour) would have "direction of the war" but only "when authorized or begun." 1 Farrand, supra note 28, at 258, 292. Of the plan actually adopted Hamilton subsequently wrote:

> The President is to be commander-in-chief of the army and navy of the United

and second, to preserve to the President the power, without advance congressional authorization, to respond defensively to "repel sudden attacks."[33] The reason for this latter concern is obvious: it was feared that Congress would not have time to respond in such cases, and thus the President was given authority to act to preserve the Republic in the interim.

Congress can be convened faster now than it could in the late eighteenth century. However, the need for swift response has also become greater, and it remains the case that Congress cannot be convened (and intelligently consider the conflict in question) instantaneously. Thus, we should preserve for the President permission to act until there is time for Congress to do so. It probably is also the case that enemy actions not actually amounting to an attack on United States territory can more obviously threaten our national security now than they could when the Constitution was agreed to. A sound functional interpretation of the President's power to "repel sudden attacks" should probably thus permit him to take any military action necessary to preserve our national security when there is not time to consult Congress—but subject always to the core command underlying the constitutional accommodation, which certainly is not obsolete, that he come to Congress for approval as soon as possible and terminate military action in the event such approval is not forthcoming.

Though real life is never entirely neat and clean, this constitutional

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> States. [This] would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.

The Federalist No. 69, at 446 (A. Hamilton) (B. Wright ed. 1961) (emphasis in original). (This accords with the colonial usage of the term. E.g., Adler, The Constitution and Presidential Warmaking: The Enduring Debate, 103 Pol. Sci. Q. 1, 9–13 (1988); W. Reveley, War Powers of the President and Congress 57 (1981).) Wholly missing elsewhere in either the debates or the Federalist, A. Sofaer, supra note 27, at 36, 48, or in the ratification debates, W. Reveley, supra, at 103–04, is any broader construction of the term. The Federalists did not construe it broadly in an effort to build the power of the executive, Lofgren, supra note 27, at 686, and neither did the Antifederalists as part of their attack on the inordinate executive power allegedly created by the document they were seeking to defeat. Lofgren, On War-Making, Original Intent, and Ultra-Whiggery, 21 Val. U.L. Rev. 53, 65 (1986); W. Reveley, supra, at 102–03, 114.

[33] 2 Farrand, supra note 28, at 318–19. In addition to the Lofgren and Bestor discussions supra note 28, see W. Reveley, supra note 32, at 64, 83–84. This change was supported by delegates who subsequently refused to sign the Constitution on the ground that it gave too much power to the President. Comm. on Foreign Relations, National Commitments S. Rep. No. 797, 90th Cong., 1st Sess. 8 (Comm. Print 1967) [hereinafter National Commitments Report]; cf. W. Reveley, supra note 32, at 64 (G. Mason). It is also worth noting that articles 6 and 9 of the Articles of Confederation used the terms "declare," "determine on," and "engage in" interchangeably when referring to entry into war. Cf. Adler, supra note 32, at 6 ("[A]s early as 1552, the verb 'declare' had become synonymous with the verb 'commence'; they both meant the initiation of hostilities.'") (footnote omitted).

understanding was quite consistently honored from the framing until 1950.[34] And when certain Presidents did play fast and loose with con-

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[34] "[T]he practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances." National Commitments Report, supra note 33, at 23. Such claims of general compliance with a stated norm are difficult to document with anything approaching elegance. Trudging across acres of compliance is unbearingly boring for both writer and reader, and evaluating the apparent counterexamples often serves only to convey the mistaken impression that the counterexamples represent the norm. Cf. J. Ely, Democracy and Distrust 92* (1980). Arrays of support, mainly compliant statements by various Presidents throughout our history, can be found at, e.g., W. Reveley, supra note 32, at 277–85; Adler, supra note 32, at 17–26; Berger, War-Making by the President, 121 U. Pa. L. Rev. 29, passim and 61–65 (1972).

In search of verisimilitude, proponents of broad executive power often cite the "exact number" of congressionally unauthorized presidential military incursions in our history. (The number varies from advocate to advocate and, of course, with time.) Thus in 1966, defending the constitutionality of the war in Vietnam, the memorandum of the State Department Legal Adviser's Office stated (without citation or elucidation): "Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the 'undeclared war' with France (1798–1800)." Office of the Legal Adviser, U.S. Dep't of State, The Legality of United States Participation in the Defense of Viet Nam, reprinted in 75 Yale L.J. 1085, 1101 (1966). That's certainly a lot—a Vietnam precedent every 16 months throughout our history! The memorandum is also dead wrong about the example cited: the undeclared war with France was authorized by Congress clearly, repeatedly, and in advance, as everyone, including President Adams, believed it had to be. Supra note 27 and sources cited. It therefore may not surprise that on close analysis these "lists" tend to evaporate. See, e.g., the analysis at F. Wormuth & E. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law 140–49 (1986).

> [T]he majority of the nineteenth century uses of force . . . were minor undertakings, designed to protect American citizens or property, or to revenge a slight to national honor, and *most involved no combat, or even its likelihood, with the forces of another state. To use force abroad on a notable scale, the President of necessity would have had to request Congress to augment the standing Army and Navy.*

Reveley, Presidential War-Making: Constitutional Prerogative or Usurpation?, 55 Va. L. Rev. 1243, 1258 (1969) (footnotes omitted and emphasis supplied); see also Hearings on S. Res. 151 Relating to the United States Commitments to Foreign Powers Before the Comm. on Foreign Relations, 90th Cong., 1st Sess. 81 (1967) (testimony of Under Secretary of State Nicholas Katzenbach) [hereinafter National Commitments Hearings]. A large percentage of the episodes on these lists involved action by some military commander that had not been authorized by the President or, often, by any higher authority whatever. Surely the claim cannot be, though logic might suggest such an extension, that "history" has therefore established a constitutional prerogative on the part of military officers to initiate hostilities on their own motion.

In addition to their relative inconsequence, these engagements tended to fall into several fairly well-understood categories. Edwin Corwin summarized them as "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border." Corwin, The President's Power, *in* The President: Roles and Powers 361 (D. Haight & L. Johnston eds. 1965).

> The vast majority of the incidents involved landings to protect American property or lives abroad. Generally undertaken during periods of disorder or civil unrest when local authorities could no longer provide protection against ordi-

gressional prerogatives—as did Jefferson regarding the Barbary pirates, Polk at the start of the Mexican War, and Wilson and Roosevelt respectively in the events leading up to the First and Second World Wars—they obscured or covered up the actual facts, pledging public fealty to the constitutional need for congressional authorization of military action.[35] It is therefore difficult to cite the occasional nonconforming

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> nary outlawry, these landings were, at least superficially, intended to maintain strict neutrality between contesting political factions.

Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1788 (1968) (footnotes omitted); see also A. Schlesinger, supra note 27, at 50–51. Unfortunately if predictably, the exception for "savages" or "barbarous" people—which developed late, as our early actions against various Native American tribes were in general authorized—degenerated into what in retrospect appears to have been unadorned racism, and was used explicitly or implicitly to justify unauthorized incursions against such non-European peoples as the Chinese, and throughout Central America in the early twentieth century. See T. Eagleton, War and Presidential Power 46–58 (1974); *J.* Javits, supra note 27, at 52, 74, 94, 113–14, 144, 197–98. (Note that we *did* declare war on Spain; the contrast between our treatment of Mexico and Canada is also instructive. F. Wormuth & E. Firmage, supra, at 131. An alternate theory sometimes used to justify such adventures was that those we were proceeding against were in no position to fight back. Note, supra, at 1790. That seems no more palatable.) Now that we understand (or should) the unacceptability of treating non-Europeans as undeserving of the usual constitutional rules, it is clear that such campaigns should not serve as precedents. Precedent should be found, instead, in the way our forebears felt obliged to treat those they were prepared to recognize as full persons.

President Lincoln's actions at the outset of the Civil War are sometimes cited as precedent for presidential military ventures. Although Lincoln did engage in a number of unconstitutional acts during this period, e.g., A. Schlesinger, supra note 27, at 58, usurpation of the war power was not among them. The important fact is not that Congress retroactively authorized what Lincoln had done (since that shouldn't count) but rather that for constitutional purposes a domestic rebellion is quite different from a foreign war. Article II provides that the President "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and beyond that, though it shouldn't be necessary, congressional acts of 1795 and 1807 had empowered him to use the military to suppress insurrection against the government of the United States. The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).

[35] See generally A. Sofaer, supra note 27, passim and 378–79; Schlesinger, Introduction to id., at xx ; W. Reveley, supra note 32, at 122–23; Sofaer, The Presidency, War, and Foreign Affairs: Practice Under the Framers, Law & Contemp. Probs., Spring, 1976, at 12, 36–37; Adler, supra note 32, at 35; Javits, War Powers Reconsidered, 64 Foreign Aff. 130, 132 (1985). On Jefferson and the Barbary pirates, see A. Sofaer, supra note 27, at 208–24; see also J. Javits, supra note 27, at 46–49 (North African land campaign; Jefferson's stance vis-a-vis Congress equally deferential). On the beginnings of the Mexican War, see H. Cox, War, Foreign Affairs, and Constitutional Power: 1829–1901, 141–55 (1984); on the House of Representatives' censure of Polk, joined by Lincoln and John Quincy Adams, see Berger, supra note 34, at 65. "Both Presidents [Wilson and Franklin Roosevelt] were forced [*sic*] to resort to deception and flagrant disregard of Congress in military deployment decisions because they were unable to rally congressional backing for action essential to national security." Reveley, supra note 34, at 1262. On Wilson, see C. Berdahl, War Powers of the Executive in the United States 68–70 (1921). On Roosevelt, see 1 W. Manchester, The Glory and the Dream 268, 282–85 (1974); W. Stevenson, A Man Called Intrepid 155–58, 254 (1976); Bernstein, The Road to Watergate and Beyond: The Growth and Abuse of Executive

presidential actions of this period in support of some adverse possession-type theory that they had gradually altered the constitutional plan. Shifts of constitutional power, to the extent they are possible at all, must be accomplished in the open.

Korea was the watershed. President Truman, speaking most capaciously through Secretary of State Acheson, openly claimed the authority without congressional authorization to commit our troops to combat (and keep them there long after there was opportunity for congressional consideration), and hardly a peep was heard from Congress.[36] The consciousness informing the passage of the War Powers Resolution of 1973 was that the pattern thus set in 1950 had prevailed for the intervening 23 years. In fact most post-Korea military actions, preeminently including the war in Vietnam,[37] *had* been congressionally authorized—albeit not in the most responsible way, but rather by open-ended resolutions requested by the President essentially delegating him authority to do whatever he wanted in a given area of the world.[38] Even were the prevailing myth true, however, and had the President

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Authority Since 1940, Law & Contemp. Probs., Spring, 1976, at 58, 76–77. Still Roosevelt, like his predecessors, replied to the French in his 1940 "Utmost Sympathy Speech" that his statements carried no promise of military aid. "Only the Congress can make such commitments," he said. E. Corwin, The President: Office and Powers 1787–1957, at 246 (4th rev. ed. 1957).

[36] E.g., J. Goulden, Korea: The Untold Story of the War 85–86 (1982); M. Pusey, The Way We Go to War 87–95 (1969); T. Eagleton, supra note 34, at 69–72.

[37] The Joint Resolution to Promote the Maintainance of International Peace and Security in Southeast Asia ("Gulf of Tonkin Resolution") provided that "the Congress approves and supports the determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" and added that the United States was, therefore, "prepared, as the President determines, to take all necessary steps, including the use of armed force" to assist South Vietnam or any member or protocol state of SEATO requesting our assistance. H.R. J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964). While the debates contained a number of plaintive hopes that we would not get involved in a widespread land war in Southeast Asia, they were quite clear that if the President thought it was necessary, action that drastic was being authorized. The Resolution passed the House 416–0 and the Senate 88–2. 110 Cong. Rec. 18132, 18350, 18402–09, 18417, 18425–27, 18447, 18459 (1964).

When the Gulf of Tonkin Resolution was repealed in 1971 the legal situation clouded considerably. Many of those voting for the repeal did so to remove the legal basis for the war. On the other hand the Nixon Administration, avowing that it did not need the Resolution, had quite cannily supported the repeal, and Congress continued to vote appropriations for the war. It was to avoid such ambiguous situations that Congress enacted the War Powers Resolution, in particular section 8(a), which sets forth a bright-line test of authorization.

[38] See generally J. Sundquist, The Decline and Resurgence of Congress 114–18 (1981) (discussing Formosa, Middle East, Cuba, and Berlin resolutions). In fact President Eisenhower was unusually deferential to Congress on the question whether to expose troops to hostilities. (As a soldier, he had a more than theoretical understanding of why wars should not be entered into lightly.) See, e.g., Public Papers of the Presidents of the United States: Eisenhower, 1954, 306, 1075–77 (1960). This is not to say that there were not infractions between 1950 and 1973—there were (though none so

from 1950 to 1973 openly taken unto himself the authority to make decisions on war and peace, 23 years of deviance hardly seem sufficient so definitively to have redefined the constitutional arrangement as to render unconstitutional the War Powers Resolution's attempt to return to the prior understanding.[39]

The Constitution grants Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [congressional] Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*"[40] Sections 4(a)(1) and 5(b) of the War Powers Resolution give concrete contemporary meaning to the constitutional understanding written into the document and honored for a century and a half thereafter, and are constitutional.

So what is wrong with section 8(d)? What harm could there be in saying that nothing in the Resolution is intended to alter the constitutional authority of either Congress or the President? It's superfluous, but so what? Only this, and it is something: it gives the President a peg on which to hang his defiance. ("The Resolution itself says it isn't supposed to cut into my prerogatives, but if I followed 4(a)(1) and reported this to Congress that would cut into my prerogatives, so by not reporting I am actually only following the Resolution.")[41] Since 8(d) is not needed to preserve the constitutionality of what counts in the Resolution, Congress should probably get rid of it.

C. *Section 2(c)*

Section 2(c) provides:

> The constitutional powers of the President as Commander-in-

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egregious as Korea). The Dominican incursion of 1965 may have contributed as much as Vietnam to the (brief) resurgence of Congress.

[39] INS v. Chadha, 462 U.S. 919 (1983), appears to invalidate more than two hundred federal statutes dating back to the 1930s, many of them signed by the President. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring; Powell v. McCormack, 395 U.S. 486, 547 (1969) ("The relevancy of prior [practice] is limited largely to the insight [it] afford[s] in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.").

[40] U.S. Const. art. I, §8, cl. 18 (emphasis added). Enthusiasts of Justice Jackson's concurrence in *Youngstown*, 343 U.S. at 637, should have little trouble regarding the Resolution as a congressional exercise in mapping the "twilight zone," and therefore plainly constitutional and controlling under the logic of that opinion. (Others of us see the power to commit troops to combat, except in emergency situations, as assigned to the legislative process by the Constitution and thus not in need of rescue from any twilight zone.)

[41] Cf., e.g., Legal Opinion of Lloyd Cutler, Counsel to President Carter, War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980), reprinted in Documents, supra note 8, at 50; Statement of Abraham D. Sofaer, State Department Legal Adviser (Apr. 29, 1986), *in* Libya Hearings, supra note 8, at 12, 18.

> Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

It ended up in the Resolution as a result of a compromise between the Senate and House forces. The House's approach had been more procedural—not telling the President when he could and could not introduce forces into hostilities but rather instructing him that when he did, he had to report to Congress and withdraw if their use was not then approved. The Senate's more "substantive" approach is captured by the quoted language.[42]

Despite the inclusion of the Senate's language, it is the House approach that prevailed. The heart of the Resolution resides in the combination of sections 4(a)(1) and 5(b). Section 2(c) appears in a part of the Resolution entitled "Purpose and Policy," where all agree it is operational only to the extent the President chooses voluntarily to comply.[43] Unsurprisingly, therefore, Presidents have ignored it. Grenada, Tripoli, and the *Mayaguez* rescue operation are patent noncompliers, to name just three, and even such strong supporters of the Senate approach as Senators Javits and Eagleton admitted subsequent to passage that 2(c) had ended up too narrow.[44] This section too thus helps breed contempt for the entire Resolution, which suggests that repeal may be in order.

That is not the only possible response, however, and some commentators have suggested that the cure for the Resolution's anemia may lie in taking 2(c) out of the "Purpose and Policy" section and making it legally "binding."[45] I can certainly understand the impulse, but for two reasons this seems a bad idea.

The first is that 2(c) not only is too restrictive of necessary presidential authority, but is almost inevitably so. Virtually everyone agrees that it should have included the protection of American citizens as one of the justifications for presidential military action.[46] That omission could be remedied, but it would not do the trick. The President and his advisers would then only come up with a list of other situations that should have been covered (and proceed to intervene should they arise). Monroe Leigh, State Department Legal Adviser in the Ford Administration, testified:

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[42] See generally Committee on Foreign Affairs Study, supra note 8, at 62–153.

[43] See Note, A Defense of the War Powers Resolution, 93 Yale L. J. 1330, 1335 n.31 (1984) [hereinafter Yale Note] and sources cited; J. Sundquist, supra note 38, at 258 n.56.

[44] See sources cited infra note 46.

[45] E.g., Franck, After the Fall: The New Procedural Framework for Congressional Control Over the War Power, 71 Am. J. Int'l L. 605, 639 (1977); Glennon, The War Powers Resolution Ten Years Later: More Politics Than Law, 78 Am. J. Int'l L. 571, 580 (1984). See DeFazio proposal, supra note 14, §§ 3, 7 (permissible uses of armed forces described; judicial jurisdiction to enforce all provisions of Resolution).

[46] See, e.g., Scigliano, supra note 27, at 122; Glennon, supra note 9, at 662. Senator Eagleton's bill to remedy this never got anywhere. L. Fisher, Constitutional Conflicts Between Congress and the President 299 (1985).

> Besides the three situations listed in subsection 2(c) . . . , it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised.[47]

Neither is this enumeration recklessly open-ended, as it truly is impossible to predict and specify all the possible situations in which the President will need to act to protect the nation's security but will not have time to consult Congress. (I can't, for example, make the Cuban missile crisis of 1962 fit comfortably even on Leigh's list.) Indeed, if one were to insist on having such a "substantive" section, what it would most sensibly say is just this—that the President can use military force without prior congressional approval only when the national security is at stake and there is not time to consult Congress. That, however, would simply reiterate the command of the Constitution properly understood. Including it would therefore not only be redundant but also sacrifice the Resolution's contribution of giving more concrete meaning to the generalities of the original document. In other sections the Resolution may have succeeded in this quest. Here, however, complete advance specification seems impossible, which suggests that no President is likely to pay attention to any such list, which in turn serves only to decrease respect for the Resolution generally.

Even if a tolerable approximation of a satisfactory list could be constructed, however, it would remain a bad idea to attempt to make section 2(c) "operational." For even if it were moved out of the Purpose and Policy section, it would very likely remain unenforceable. Experience suggests that even if the list were expanded, the President would not be likely to obey it voluntarily: if Presidents won't acknowledge an imminent danger of hostilities in the Persian Gulf and similar situations, they are most unlikely to recognize any substantive limits on their authority. The same experience teaches that Congress cannot be counted on to enforce any such set of limits either. That seems to leave the courts, and of them we will have a good deal to say later on. This, however, does not seem the optimal place to expect them to take a stand. Judicial enforcement of an "operational" section 2(c) would take the form of a finding that the President had exceeded the legal justifications for intervention and a consequent order that he remove the troops. Such an order may not be unthinkable, but it is one that courts would understandably be very reluctant to enter. Judicial intervention seems much more likely in support of the House of Representatives' "procedural" approach. For if the order is simply that section 4(a)(1) has been satisfied and the clock has thus been started, the effect will be to "remand" to Congress the question whether the troops stay.

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[47] War Powers: A Test of Compliance, Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 90–91 (1975); see also Yale Note, supra note 43, at 1333–34 and sources cited.

Experience thus suggests that if there is to be enforcement of the War Powers Resolution the judiciary must become involved, and common sense suggests that judicial assistance is more likely to be forthcoming in support of the House approach. Since section 2(c) cannot plausibly be made enforceable, its continued presence does more harm than good, and it too should probably be repealed.

D. *Section 5(c)*

All "procedural" approaches are not created equal, and not all of those contained in the existing War Powers Resolution are equally susceptible to being made workable. Section 5(c) provides that within the 60-day period, Congress can by concurrent resolution direct the President to remove troops he has committed to hostilities.[48] A plausible argument can be made that this section was rendered invalid by the Supreme Court's 1983 decision in *INS v. Chadha*.[49] For this reason, it too provides an excuse to condemn the entire Resolution as "unconstitutional." Since Congress's proclivities in this area virtually insure that 5(c) never would have been invoked anyhow, it too should be removed.

In fact, section 5(c) does not appear to be unconstitutional. Even assuming that *Chadha* makes sense,[50] it seems distinguishable.[51] (Indeed it is a little bizarre to regard this congressional effort to reassert its constitutional authority to decide on war and peace as a violation of either the separation of powers or the system of checks and balances.) Section 5(c) does not fit the profile of a standard "legislative veto" wherein Congress has delegated certain powers to the executive branch and then attempted to pull them back by reserving a right to veto executive exercises of the delegation. Instead, it should be read in the context of sections 4(a)(1) and 5(b), as part of a *package* attempting in concrete terms to approximate the accommodation reached by the Constitution's framers, that the President could act militarily in an emergency but was obligated to cease and desist in the event Congress did not approve as soon as it had a reasonable opportunity to do so.

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[48] Once the hostilities in question have received "specific statutory authorization," 5(c) no longer applies. Cf. infra note 55.

[49] 462 U.S. 919 (1983). The unconstitutionality of 5(c) under *Chadha* has seemed obvious to many—so obvious to the congressional plaintiffs in Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), for example, that they conceded it even though 5(c) was not involved in their case! Id. at 335.

[50] *Chadha* is helpfully analyzed in Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L. J. 789.

[51] Others have attempted such a distinction. Dean Casper has correctly observed that accepting *Chadha*'s logic would mean that the President, "supported only by one-third plus one of the membership of *either* house," could start and sustain a war (at least until the clock has run). Casper, Constitutional Constraints on the Conduct of Foreign

Sixty days is essentially defined by the Resolution as the *outer limit* of the time Congress can reasonably be supposed to need to decide. (The additional 30 days for "unavoidable military necessity" is there to enable our troops to be withdrawn without getting killed.) However, it patently is not the notion of the Resolution that 60 days will always be necessary for such a decision. The scheme contemplates that sometime *within* that 60 days, whenever under the specific circumstances presented Congress *can* get its act together, it can either authorize continued military activity under 5(b) or indicate, under 5(c), that it is not

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and Defense Policy: A Nonjudicial Model, 43 U. Chi. L. Rev. 463, 484–85 (1976) (emphasis in original). But this is a universal result of *Chadha*—if Congress cannot veto the President's exercise of a delegation, it takes a repeal to stop him—which drives us back to the question whether the 60/90-day "free period" is truly a delegation. The common argument that *Chadha* is distinguishable because the power to wage war for 60 or 90 days without limit is actually inherently presidential and thus not Congress's to delegate, e.g., Stanford Note, supra note 8, at 1432, seems upside down, suggesting that *Chadha* may be applicable a fortiori. Professor Carter's (explicitly hesitant) argument that *Chadha*'s presentment requirement cannot be applicable because under the Constitution declarations of war (and other combat authorizations) are not vetoable by the President in the first place, Carter, The Constitutionality of the War Powers Resolution, 70 Va. L. Rev. 101, 129–32 (1984), displays no failure of logic: it is the premise that is questionable. Carter's source for the proposition that "scholars are divided" on the question whether declarations of war are vetoable is L. Henkin, Foreign Affairs and the Constitution 295 n.5 (1972), but Henkin, who does not endorse the Carter premise himself, cites only an 1896 speech on the Senate floor, by one Senator Morgan of Alabama, in support of it. But see C. Berdahl, supra note 35, at 95; Baldwin, The Share of the President of the United States in a Declaration of War, 12 Am. J. Int'l L. 1 (1918); U.S. Const. art. I, § 7, cl. 3:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Every declaration of war in our history has been signed by the President. See sources cited Lungren & Krotoski, The War Powers Resolution After the *Chadha* Decision, 17 Loy. L.A.L. Rev. 767, 786 n.84 (1984).

prepared to do so. Section 5(c) thus resembles only distantly the sort of legislative veto to which the *Chadha* litigation was addressed.

However, *Chadha* is "a work of mechanical simplicity" that suggests no inclination to distinguish among provisions that bear any resemblance to that involved in the case,[52] a reading buttressed by the sweeping references of the concurrence and dissent.[53] There is thus a significant possibility that in the event section 5(c) ever got to court, it would be invalidated. We need not shed many tears over this possibility, however, as experience suggests that Congress would be most unlikely ever to try to invoke it. If it won't acknowledge that hostilities exist in situations like the Persian Gulf and thereby start the clock for its further decision, it certainly isn't going to order the President to remove the troops cold turkey within 60 days of his having committed them.

Such an apparently useless and arguably unconstitutional provision is likely only to provide an excuse for denunciation and defiance of the entire Resolution,[54] and it too should be repealed.[55] In one sense this surely seems a pity, since we can understand the motivation that drove 5(c), a desire to avoid giving the President carte blanche to keep troops he has committed on his own motion in the field for the 60 or 90 days the clock is running. (Of course the clock hasn't been running, but that is a problem we will get to presently.)[56] Some of our concern on this score can be allayed by adoption of an alternative proposal, to shorten the 60-day period to 30 days.[57]

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[52] Ides, supra note 9, at 630 n.101.

[53] Justices Powell and White both indicate that they read the Court's opinion as invalidating all legislative veto provisions, 462 U.S. at 959 (Powell, J., concurring in judgment), 974 (White, J., dissenting), and Justice White specifically refers to section 5(c), id. at 970–71. Subsequent Court decisions are reading *Chadha* in this spirit. L. Tribe, American Constitutional Law § 4-3, at 217 (2d ed. 1988).

[54] Another reason it has been suggested that we need not be too upset over the probable unconstitutionality of 5(c) is that constitutional or not, the President would almost certainly heed a concurrent resolution calling for an end to hostilities. See Libya Hearings, supra note 8, at 133 (testimony of W. Taylor Reveley). That may be right, but *Chadha* is likely to give Congress yet another reason not to pass such a resolution.

[55] Should Congress decide to keep 5(c)—perhaps (fat chance) in order to pass a concurrent resolution and thus force a test case—other problems should be considered. Professor Glennon, writing before *Chadha*, suggested that 5(c) be "amended to apply the concurrent resolution termination procedure to situations in which the armed forces are used pursuant to specific statutory authority." Glennon, Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions, 60 Minn. L. Rev. 1, 37 (1975). However, such an extension manifestly could not be constitutionally defended on the theory elaborated in the text; indeed there is a danger that by blurring the rationale for 5(c) it could serve to sink the entire provision. Section 5(c) also does not apply in 4(a)(2) or 4(a)(3) situations or, indeed, in 4(a)(1) situations where there are not actual hostilities but only the imminent likelihood thereof. This last surely should be remedied if 5(c) is retained. I recommend elimination of 4(a)(2) and 4(a)(3), see infra text accompanying notes 77–78. Were they, and 5(c), retained, however, their relation too would be a candidate (though not such a clear one) for repair.

[56] See infra text accompanying notes 75–113.

E. *Shortening the "Free Period" to Thirty Days*

The only legitimate theory that supports giving the President 60 free days is that it approximates the time it will take Congress to gather its thoughts about whether the United States should become involved in the war in question. However, in considering whether that is an appropriate length of time, we are by hypothesis discussing a situation in which the President has started the clock by filing a 4(a)(1) report, or had it started for him. Realism thus demands that we think in terms of a 90-day clock. (Obviously the period will not be extended if the clock hasn't been started, but once it has, the President will very likely take advantage of the 30-day extension. The IndoChina war was dragged out *for years* on the theory that we were in the process of withdrawing our troops.) Ninety days, however, is an indefensibly long estimate of how long it should take Congress to decide whether the President's "emergency" response should be made more permanent. So is 60 days.[58] All the declarations of war in our history have been considered

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[57] See Libya Hearings, supra note 8, at 122 (testimony of Archibald Cox). Thirty days was the period specified in the Senate version of the War Powers Act. See Committee on Foreign Affairs Study, supra note 8, at 83.

[58] This can hardly come as a surprise, given that the 60/90 arrangement was a compromise between the Senate version's 30 days and the House's 120. Some in Congress objected to this feature at the time. See, e.g., Committee on Foreign Affairs Study, supra note 8, at 154. A few, notably Senator Eagleton, voted against the Resolution substantially on the ground that it gave the President 90 days to wage war at will, but others voted for it despite such scruples, regarding this as an opportunity to weaken President Nixon. Representative Abzug switched her vote in the belief that an override could "accelerate the demand for the impeachment of the President," and one Senator confided to Eagleton, "I heard your argument. I agree with you. I love the Constitution, but I hate Nixon more." T. Eagleton, supra note 34, at 215, 220.

An alternative would be to try to write the constitutional requirement into the Resolution essentially *in haec verba*, providing that if a reasonable period has passed (for the President to come to Congress and Congress to respond) and specific statutory authorization has not been forthcoming, hostilities are to be terminated. I don't see how this could work. Experience strongly suggests that the President would not be scrupulous about getting to Congress promptly, and that Congress would not prove effective in getting him to do so. It is true that the courts have been relatively successful in interpreting somewhat comparable commands, such as the requirement that police apply to a magistrate for a search warrant as soon as it is reasonably possible to do so. In our case, however, the facts are less compassed—those bearing both on the President's inevitable claim that the operation had to be commenced suddenly and in absolute secrecy, and on how fast Congress can react. (Since motives will be mixed, it will be next to impossible to separate admissible problems from faintheartedness.) It thus seems extremely unlikely that there would ever be a case in which the period selected would be less than 30 days. Moreover, the court's remedy in such a situation is unlikely to be a simple order that the President withdraw the troops. Instead, it would probably "remand" the issue to Congress for its prompt consideration, cf. infra text accompanying notes 110–113, and that would probably require the setting of an exact time limit! A central contribution of the War Powers Resolution was to translate the Constitution's generalities into and voted on almost immediately after the President's request. Yet it was demonstrably the judgment of the framers of the Constitution, as it should be ours, that the only wars we ought to be involved in are those it is quite apparent are justified.[59]

The fact that declarations of war have generally been immediately forthcoming is a knife that cuts both ways, however, and one might take solace in the 60- or 90-day period on the theory that although Congress will probably approve anything at first, passions may settle after two or three months.[60] To this there are two answers. First, it seems a very troubling theory on which to construct a free period for presidential war making. So viewed, the period ceases to be an estimate of how long it will take Congress to consider the matter and becomes, instead, a delegation of legislative power to the President more open-ended than any declaration of war (because it does not specify in any way—by geographical locale, enemy, or precipitating condition—what war it is the President is entitled to fight for up to 90 days), so open-ended in fact as to raise serious constitutional problems. Second, insofar as experience teaches that Congress is likely to support the President at the very outset of a war, it also teaches that it is likely to be years, not two or three months, before Congress sours: it took almost a decade in the case of IndoChina. The idea that pulling the financial plug on a war represents a failure to "support our boys in the field" doesn't really make sense, because an order to withdraw can always be accompanied by ample provision to protect the boys as the withdrawal is proceeding. But it does appear to convince Congressmen—or at least, and for present purposes this amounts to the same thing, it provides a convenient rationalization. There is thus little reason to suppose that Congress is going to be more inclined to pull the plug on a presidential war after two or three months than it would have been at the outset.

It is true that if the enemy knows the deal—that if the war is not approved by Congress within 30 days the troops will have to be with-

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numbers. Here the numbers were too generous, but the impulse toward precision was sound. Leaving requirements vague helps ensure that they will not be enforced.

Of course in some cases 30 days may *not* be enough for reasoned consideration. It is always within the power of Congress statutorily to authorize the continuation of hostilities for a limited period of time (thus giving itself more time to consider). Let us hope it doesn't become a habit, though even that would be an improvement over the present pattern, as it would evidence *some* consideration.

[59] See infra note 93 and accompanying text.

> [T]he power of declaring war is not only the highest sovereign prerogative; but . . . it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. . . . It should therefore be difficult in a republic to declare war; but not to make peace.

3 J. Story, supra note 27, § 1166; see also, e.g., 1 Farrand, supra note 28, at 316 (Madison); 1 Blackstone's Commentaries (St. George Tucker, app., at 269–72) (1803); W. Rawle, A View of the Constitution of the United States 109–11 (2d ed. 1829).

[60] Cf. Glennon, supra note 45, at 573.

drawn—they may be encouraged to "hold out" for that period.[61] However, in terms of carnage, 30 days of "holding out" is preferable to 60 or 90. And to the extent that the opponents of the War Powers Resolution would use the "holding out" phenomenon to argue against *any* deadline, there is plainly a sense in which they are right: if we don't let the President fight unauthorized wars for as long as he wants, that does indeed reduce his opportunity to pursue them to total victory. However, this attitude argues not simply against establishing a clock, but against enforcing the Constitution generally:[62] an inevitable byproduct of any sort of constitutional requirement of congressional approval is that the enemy also will know that approval is required. The only way around this is to make the President a dictator, but that wasn't, and shouldn't be, the idea.

II. Strengthening the Potentially Operational Provisions

A. *The Consultation Requirement*

Compliance with section 3—requiring the President to consult "with Congress" before committing troops to hostilities—has been better than compliance with the Resolution's other sections. Admittedly this isn't saying much: it means only that compliance has been sporadic.[63] (To give President Reagan his due, consultation before our April 18 activities in the Persian Gulf was apparently pretty good.) There is, nonetheless, much room for improvement.

Though this change should not be necessary, the Resolution should be amended to make clear that consultation requires genuine discussion, a seeking of advice and counsel, rather than a mere report of what is about to happen.[64] Another reason section 3 hasn't worked is that a requirement to consult "with Congress" is not very helpful on the subject of who is to be consulted. Logistical and security considerations preclude the idea that consultation can be had with the entire membership of Congress, so everyone has proceeded on the sensible supposition that it is "the relevant leadership" that must be involved. However, that itself is an unclear concept, and congressional jealousies have made diplomatic selection difficult. Moreover, at least so long as the relevant group has not been officially indicated, those the President decides he should consult may not be available.[65] Such problems of intra-Congress jealousy and unavailability should be allayed by a statutory designation of the leadership group with whom consultation is to be had. Although the Byrd proposal can be faulted on a number of fronts, the majority leader and his co-sponsors are certainly experts on who in the Congress should be consulted (and who can tactfully be left off the list). Their recommendations in that regard should probably be adopted.[66]

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[61] See President Nixon's Veto of War Powers Measure Overridden by the Congress, Oct. 24, 1973, 69 Dep't St. Bull. 662, 663 (1973).

[62] A related phenomenon, against which President Nixon also warned, id., is the danger that the President will escalate *our* military effort as the deadline approaches. However, by escalating the bombing of North Vietnam whenever he felt Congress's patience was wearing thin, e.g., Committee on Foreign Affairs Study, supra note 8, at 103–04, Nixon himself had demonstrated that such reactions do not necessarily depend on any clock but rather on the need for congressional acquiescence more generally.

[63] See R. Turner, The War Powers Resolution: Its Implementation in Theory and Practice 54–57 (Phnom Penh, Saigon), 59–64 (*Mayaguez*), 69–73 (Iran) (1983); T. Franck & E. Weisband, Foreign Policy by Congress 72–74 (1979) (*Mayaguez*, Iran); Vance, Striking the Balance: Congress and the President Under the War Powers Resolution, 133 U. Pa. L. Rev. 79, 88–90 (1984) (*Mayaguez*, Iran, Grenada); Rubner, supra note 8, at 630–36 (Grenada); Libya Hearings, supra note 8, at 117 (statement of A. Cox) (Tripoli).

[64] Senator Eagleton's proposed amendment to this effect, see N.Y. Times, May 22, 1975, at 1, col. 2, never got anywhere.

B. *Supposed New Teeth for Section 5(b)*

Section 5(b) provides that if the clock runs and Congress has not authorized continued hostilities, "the President shall terminate" the use of United States Armed Forces.[67] Several commentators have suggested that this command be augmented by a provision that once the clock has thus run, funds to support the troops be cut off.[68] While this should be redundant, it probably is a good idea anyhow, as virtually everyone, including apologists for broad presidential power in this area, agrees that Congress has constitutional authority to end a war by terminating its funding.[69] The addition of such a proviso would therefore render presidential obedience more likely. The serious problem, however, has plainly not lain in what happens when the clock runs out, but rather in getting the clock started, a problem to which I now turn.

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[65] See W. Reveley, supra note 32, at 254–55; P. Holt, The War Powers Resolution: The Role of Congress in U.S. Armed Intervention 34 (1978).

[66] If sections 4(a)(2) and 4(a)(3) are retained, but cf. text accompanying infra notes 77–78, the consultation requirement should probably be made applicable to them too.

[67] A few commentators have slid from the conclusion that 5(c) appears to be unconstitutional under *Chadha* to the conclusion that 5(b) is as well. E.g., Lungren & Krotoski, supra note 51. This is a mistake. The *Chadha* Court expressly stated that "other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power." INS v. Chadha, 462 U.S. 919, 955 n.19 (1983). As Professor Carter has pointed out, rather than constituting a legislative veto, section 5(b) is a sort of "sunset law," the functional equivalent of a statute providing that troops simply may not be committed to combat for more than 60 days (unless the statute is amended). Carter, supra note 51, at 133.

[68] E.g., Glennon, supra note 55; Vance, supra note 63, at 93; see also DeFazio proposal, supra note 14, § 3(c).

[69] E.g., War Powers Legislation, Hearings Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. (1971), reprinted in T. Franck & M. Glennon, Foreign Relations and National Security Law 599 (1987) (statement of William P. Rogers, Secretary of State, Nixon Administration); N.Y. Times, May 18, 1975, § 4, at 2, col. 3 (Roderick Hills, Counsel to President, Ford Administration); Libya Hearings, supra note 8, at 11 (statement of Abraham D. Sofaer, State Department Legal Adviser, Reagan Administration). That all admit it is constitutional does not necessarily mean that all will obey it, as the Reagan Administration's recent misadventures concerning the Boland Amendment demonstrate. It does, however, raise the odds.

C. *The Language of Section 4(a)(1)*

Section 4(a) of the Resolution provides:

> In the absence of a declaration of war, in any case in which United States Armed Forces are introduced —
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —
>
> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

Section 5(b)'s 60-day clock is started only by a report under section 4(a)(1): of sections 4(a)(2) and 4(a)(3) we will have more to say in the next section of this Article.

That the entire section is keyed to when troops are "introduced" is potentially troublesome, in that on its face the Resolution does not seem to require a report when the troops are already in place and hostilities (or their imminent likelihood) arise later. Raising this may be alarmism on my part, since everyone apparently has been assuming that this situation is covered: one does not, for example, find among the rationalizations for the failure to file a report in the Persian Gulf situation the argument that the troops came first and hostilities later. Just to be on the safe side, though, this loophole should be closed.

The requirement that imminent involvement in hostilities be "clearly indicated by the circumstances" seems too demanding. Section 4(a)(1) is often paraphrased as if the requirement of a "clear indication" were not present. Some language in the relevant House Report seems to support this loose reading.[70] However, the enacted language, when it is not ambiguous, must prevail, and "clear indication" has a moderately specific and demanding legal meaning.[71] That 4(a)(1) means what it says is also corroborated by the facts: (1) that sections 4(a)(2) and 4(a)(3), which *don't* start the clock, describe situations in which one would ordinarily suppose there is at least some danger of hostilities; and (2) that Congress itself, in the compromise it eventually reached with President Reagan over Lebanon, found that 4(a)(1) had been satisfied only on the day that four Marines were killed and 38 others wounded.[72] On the other hand, section 8(c) provides:

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[70] The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader

> For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, *or there exists an imminent threat* that such forces will become engaged, in hostilities.[73]

Here the requirement of "clear indication" is omitted. However, it seems irrational to start the clock on a lesser likelihood of danger of hostilities when our troops are accompanying another nation's army than when they are proceeding alone. Apparently, therefore, Congress was of two minds about whether to require a "clear indication." The language it enacted in section 4(a)(1), however, plainly does so. It should be amended, without requiring a "clear indication," simply to cover all situations in which there is an imminent danger of involvement in hostilities.[74]

> in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "*Imminent hostilities*" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

H.R. Rep. No. 287, 93d Cong., 1st Sess. 7 (1973), reprinted in 1973 U.S. Code Cong. & Admin. News 2346, 2351 (emphasis in original); see also id. at 5, 7, 9; 119 Cong. Rec. 33859 (daily ed. Oct. 12, 1973) (statement of Rep. Zablocki). I wouldn't recommend that any revision build on the quoted language, however: a clear potential of a clear and present danger is a little hard to get your mind around.

[71] See, e.g., Huguez v. United States, 406 F.2d 366, 374–79 (9th Cir. 1968).

[72] Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2(b), 97 Stat. 805, 805 (Oct. 12, 1983).

[73] Emphasis supplied.

[74] In some instances there may be a danger that publicly announcing that there is an imminent danger of hostilities will exacerbate the danger of bringing them about. Cf. R. Turner, supra note 63, at 90. (On other occasions it would probably have the opposite effect.) However, this too is an argument not against the War Powers Resolution specifically but against the Constitution more generally: however the process is structured, going to Congress for authorization will alert the world to the fact that the President thinks the situation is serious. In fact, making the standard less demanding should lessen the crisis atmosphere to the same degree.

D. *Getting the President to Start the Clock*

It would be best if the President could be counted on to start the clock himself: he knows the facts best, he knows them soonest, and both congressional debates and lawsuits consume valuable time. However, to the extent the President has deigned to report at all, he has avoided starting the clock by refusing to specify under which subsection of 4(a) he is reporting.[75] For this reason it has been suggested that the Resolution be amended to require him to specify the subsection under which he is filing his report.[76]

This seems unlikely to work. The only effect of such a requirement would probably be that the President would file his report under 4(a)(2) or 4(a)(3) and thus avoid starting the clock. (A 4(a)(1) situation is virtually certain also to be a 4(a)(2) or 4(a)(3) situation, so he will not be behaving dishonestly in such a situation, merely incompletely—"telling the truth but not the whole truth.") Moreover, the filing of such a specific report is likely to have the effect of converting him, in others' eyes, from a defiant noncomplier to a cooperative participant (who has more facts than anybody else and whose judgment is therefore likely to be deferred to).

In fact, should either Congress or the courts commence undertaking to start the clock when the President has not, he would be clever to respond by habitually reporting and (even without a requirement that he pick a subsection) specifying section 4(a)(2) or 4(a)(3). The fact that this is such an obvious ploy leads me to tender the mildly radical suggestion that sections 4(a)(2) and 4(a)(3) be eliminated from the Resolution: they simply have too much potential as "cop-counts" whereby the President can underreport the situation and thereby avoid starting the clock. (A smart prosecutor puts lesser offenses in the indictment only if she is hoping that the jury will compromise on one of them.) There is another reason for eliminating 4(a)(2) and 4(a)(3) as well. It appears that on occasion the executive branch, in order to avoid a congressional report entirely—this was back when the possibility of reporting was apparently given consideration—underequipped our troops in deploying them (so as to render them other than "equipped for combat").[77]

What would be lost by eliminating sections 4(a)(2) and 4(a)(3)? Not much, I think. Apparently they have roots in the desire of Senator Mansfield, like Senator Taft and others before him, to establish a congressional role in deciding whether the President should be permitted to augment, say, the NATO forces in Europe. A reporting requirement covering such commitments may slightly symbolize the thought that

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[75] See supra note 8 and accompanying text.

[76] E.g., Zablocki, War Powers Resolution: Its Past Record and Future Promise, 17 Loy. L.A.L. Rev. 579, 598 (1984); Glennon, supra note 9, at 665.

[77] R. Turner, supra note 63, at 111–12.

Congress also has a role in such decisions, but it doesn't mean anything operationally. Sections 4(a)(2) and 4(a)(3) are reporting requirements and nothing more: they do not trigger a requirement of congressional approval. Moreover, given that such troop movements generally are not (and could not be) kept secret, Congress doesn't need to have them reported. In theory sections 4(a)(2) and 4(a)(3) might make a difference in the case of a *classified* troop movement, but in such a situation I assume the President would tell the leaders of Congress anyhow. If he wouldn't, we would presumably be talking about the movement of troops to a staging area for a classified operation. Recall, however, that the requirement is that the report be filed within 48 hours of the reported-upon event. By that time we probably would have passed beyond the staging-area phase and into a situation that would plainly require a 4(a)(1) report. (It is also difficult to believe that even if the President had not taken the congressional leadership into his confidence, such an operation would not have leaked to them within 48 hours.)

Congress plainly did not think 4(a)(2) and 4(a)(3) were very critical, as the situations there described require neither consultation with Congress under section 3 nor approval of the operation under section 5(b). Because they provide the President with a clever means of avoiding the application of the Resolution's operationally significant provisions, and an incentive to underequip our troops as well, they should probably be repealed.[78]

E. *Who Starts the Clock When the President Won't?*

Most people in Congress seem to assume that it is up to them to start the clock when the President hasn't.[79] This was not contemplated by the Resolution, but then nothing relevant was. (Section 5(b) does provide that absent congressional authorization, the troops are to be withdrawn 60 days after a 4(a)(1) report is submitted "or [is] required to be submitted," but little thought and no provision was directed to the question by whom such "requirement" might be determined.) The problem is that it has become clear that we cannot rely on Congress to do so.

In the first place, any such congressional action would probably have to be by joint resolution vetoable by the President. Obviously the Resolution itself provides no guidance on the question whether this is so. However, *Chadha* seems to intervene. Unlike a resolution enacted pursuant to section 5(c), a clock-starting resolution cannot be regarded as an indication that Congress has had sufficient time to consider the wisdom of the military venture in question (thereby indicating that the President's constitutional emergency powers have been exhausted). In starting the clock, Congress would be indicating only that the situation is sufficiently serious to require its consideration. Indeed, the clock-starting situation seems rather typical of what the Court appears to have been thinking about in *Chadha*: Congress has delegated to the President authority to decide whether there exist hostilities or the imminent likelihood thereof, he has defaulted in making that decision, and thus Congress must withdraw the delegation and make the decision itself.

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[78] If 4(a)(2) and 4(a)(3) are retained, the reference to equipment should probably be eliminated—these are, after all, merely reporting requirements—and it should be made explicit that the President is to report under the "highest" applicable subsection.

[79] See Stanford Note, supra note 8, at 1441 n.185.

It also requires no great cynicism to suppose that given the opportunity the President would almost certainly veto such a joint resolution. Consistency will require him to do so, since by hypothesis he has not filed the hostilities report that Congress is now saying is required. Beyond the issue of vetoability is Congress's demonstrated disinclination to start the 4(a)(1) clock anyhow. A few members have apparently doubted that they currently have authority to do so, but most have assumed they do. And still the clock has not been started in situations as clear as the Persian Gulf.

If, therefore, the constitutional plan—congressional consideration of military ventures—is to work, it appears that Congress will have to be *forced* to such consideration. And given the momentum of the situation, we will not be able to achieve this by indicating that the war will continue unless Congress acts to stop it. In such situations, Congress has demonstrated, it will let the war go on (reserving unto itself the right to protest that it is really the President's war and there isn't a great deal it can do about it). The War Powers Resolution was thus wise in its assessment that if consideration is to be assured, the arrangement must be that the war cannot continue unless Congress clearly acts to authorize it. The Resolution's optimistic assumption was that the President would effectively force congressional consideration by filing a 4(a)(1) report. He hasn't done so, however, and Congress has demonstrated that in the heat of events it cannot be counted on to force its own accountability either. In our system that raises the possibility that the courts should be brought into the act.

F. *The Courts as Clock-Starters*

The general technique of judicial "remand" to Congress—when Congress has not been meeting its obligation to take an issue seriously—thus appears to make a good deal of sense in this context.[80] The War Powers Resolution should be amended to make clear that if the President does not start the clock, one or more members of Congress will have standing to bring suit to do so in the federal courts, which in such cases should decide the issue whether hostilities (or the imminent likelihood thereof) exist. In fact I'd argue that such a lawsuit is appropriate under the existing War Powers Resolution, because it is the only effective way of serving the Resolution's purpose of forcing Congress to consider whether military expeditions ought to be authorized. In any event an amendment could make the situation clear. In order to establish this proposition, however, we must confront some predictable objections sounding generally in justiciability.

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[80] Cf. J. Ely, supra note 34, at 131–34; A. Bickel, The Least Dangerous Branch 143–56 (1962); G. Calabresi, A Common Law for the Age of Statutes 91–119 (1982); Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957).

1. *The Political Question Doctrine*. — The "political question doctrine" is a little like the Holy Roman Empire. It doesn't have much to do with whether the question is "political" in any ordinary sense:

> [T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . .[81]

And it's not even clear that it is a "doctrine": even in its heyday it was never more than a congeries of excuses for not deciding issues otherwise properly before the court. Most have been eliminated by the Supreme Court,[82] but some may remain and warrant consideration.

It is sometimes said that a question is "political" if there is "a lack of judicially discoverable and manageable standards for resolving it."[83] The Court has come generally to recognize, however, that if the issue is otherwise properly before it, its first duty is to try to *fashion* manageable standards. Thus manageability is certainly a consideration, but principally at the stage of devising principles and remedies as opposed to the stage of deciding whether to decide the issue at all.[84] If, however, the question presented in our case were somehow whether the war in question was a good thing, whether its benefits outweighed its costs, we would all presumably respond that that is not a question a court should decide. Some might be tempted to say that this is because such a question cannot be rendered amenable to judicial evaluation.[85] We needn't debate that characterization, however, since there is an incontrovertible basis for treating the question as nonjusticiable: the Constitution commits it elsewhere. It commits it to Congress, and the problem is that Congress refuses to decide it. I am certainly not suggesting that the answer is therefore to turn the question over to the courts, only that the courts should be enlisted in inducing Congress to answer it.

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[81] INS v. Chadha, 462 U.S. 919, 942–43 (1983).

[82] The idea that courts should avoid orders evincing "lack of the respect due coordinate branches of government," Baker v. Carr, 369 U.S. 186, 217 (1962), had the potential for swallowing judicial review entirely, as did its companion notion that "multifarious pronouncements by various departments on one question" were to be avoided. Id. (See, e.g., Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985), noting that certain members of Congress had disputed the President's claim on the issue in dispute and reasoning, therefore, that a decision either way would mean that "one or both of the coordinate branches would be justifiably offended"; Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987), noting that since the members of Congress were divided on the issue in dispute, a judicial decision either way "necessarily would contradict legislative pronouncements on one side or the other of this issue," thus generating multifarious pronouncements.) By answering such arguments with the observation that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution," Powell v. McCormack, 395 U.S. 486, 549 (1969), the Court attempted to lay them to rest. See also *Chadha*, 462 U.S. at 942. Hopefully the lower courts will get the idea soon. Concerning the "potentially embarrassing confrontation" strain of the political question doctrine, also dead, see infra note 89 and accompanying text.

Though its apparent ambit was severely reduced by *Powell v. McCormack*, the doctrine survives that courts should not decide issues that have been textually committed elsewhere. Here the question would be whether the War Powers Resolution has assigned application of section 4(a)(1) exclusively to either the President (an untenable hypothesis in light of "or required to be submitted") or Congress (a debatable one in light of the lack of language or legislative history supporting it). In any event, an amendment could assign the issue to the courts in cases of presidential default.

Section 4(a)(1) asks not whether the war in question is justified, but rather whether we have reached the point of hostilities or the imminent likelihood thereof—an affirmative answer putting the ball in Congress's court. Certainly this is not a question that will generate automatic answers,[86] and it is not one respecting which judges are particularly expert. This, however, is the way our legal system habitually works. Judges and lawyers generally are not experts on *any* substantive area. Instead they make their decisions (in a variety of areas on which others are more expert than they) by listening to the relevant facts, and when appropriate the opinions of experts, and coming to a decision.

> Is it really more difficult to determine whether a group of soldiers, performing certain tasks in the midst of a civil war, are likely to get shot at, than to ascertain the probable economic impact of a given merger? Is there a basic difference between deciding whether a witness is lying when he or she testifies that certain military personnel have not participated in combat missions than when he or she testifies that a certain employer never mentioned race in considering applicants for a job? Is the task of judging the credibility of a colonel who claims that he never gave advice on specific military operations to a given foreign government inherently less tractable than that of deciding whether one company intended to get a free ride on the goodwill of another company in adopting a certain

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[83] *Baker*, 369 U.S. at 217.

[84] Cf. J. Ely, supra note 34, at 124–25.

[85] But cf., e.g., United Steelworkers v. United States, 361 U.S. 39 (1959); United States v. First City Nat'l Bank, 386 U.S. 361 (1967).

[86] See Stanford Note, supra note 8, at 1438 ("The phrase is not absolutely determinative, but it seems no more vague than innumerable other ambiguous statutes that courts regularly interpret . . . .").

> trademark?[87]

Indeed, courts are routinely called upon, without incident, to decide insurance cases in which the existence or non-existence of hostilities must be judicially determined for purposes of giving effect to a war risk clause.[88]

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[87] Brief for Appellants at 30, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (No. 82-2461), quoted in Stanford Note, supra note 8, at 1437 n.163.

[88] E.g., United States v. Standard Oil Co., 178 F.2d 488 (2d Cir. 1949), aff'd, 340 U.S. 54 (1950); Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co., 282 F. 976 (2d Cir. 1922), aff'd, 263 U.S. 487 (1924); Pan Am. World Airways, Inc. v. Aetna Casualty & Sur. Co., 368 F. Supp. 1098 (S.D.N.Y. 1973), aff'd, 505 F.2d 989 (2d Cir. 1974); Hawkins v. State Life Ins. Co., 366 F. Supp. 1031 (E.D. Tenn. 1972); Stanbery v. Aetna Life Ins. Co., 26 N.J. 498, 98 A.2d 134 (1953).

The conventional wisdom may suppose that the Court shies away from "foreign affairs" cases on political question grounds, but this is wrong. See Baker v. Carr, 369 U.S. 186, 211–13 (1962); Henkin, Viet-Nam in the Courts of the United States: "Political Questions", 63 Am. J. Int'l L. 284, 286 (1969) ("In regard to foreign affairs, I believe, the Supreme Court has never found a true 'political question.' "). But cf. Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion). This attitude is entirely in line with the rather plain intent of the Constitution, which lists among the heads of federal judicial jurisdiction cases arising under treaties, cases affecting ambassadors and other public ministers and consuls, cases in admiralty or maritime jurisdiction, and cases to which the United States and/or foreign nations are parties—and indicates further that treaties shall be the supreme law of the land "and the Judges in every State shall be bound thereby." U.S. Const. art. III, § 2, cl. 1; id. art. VI, cl. 2. Thus D'Amato, Velvel, Sager, Van Dyke, Freeman & Cummings, Brief for Constitutional Lawyers' Committee on Undeclared War as Amicus Curiae, *Massachusetts v. Laird*, 17 Wayne L. Rev. 67, 115 n.105 (1971) [hereinafter D'Amato], lists 18 Supreme Court decisions somehow involving the "war power," and in 1968 Professor Velvel was able to list 21 cases, dating back to the earliest days of the Republic, in which federal courts had decided the precise issue whether Congress had sufficiently authorized a military action the President was conducting. Velvel, The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, 16 U. Kan. L. Rev. 449, 480 n.138 (1968). (On the early Supreme Court cases, see E. Keynes, supra note 27, at 94–101.) It is true that during the war in IndoChina lower federal courts took to labelling this last a political question. E.g., Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971). However, in section 8 of the War Powers Resolution Congress has since enacted an entirely clear standard for deciding that question. Indeed, as Michael Ratner and David Cole have observed, *all* the reasons courts found challenges to the Vietnam war to raise political questions have been removed by the Resolution, which (a) specifies what counts as a war needing authorization, (b) specifies what counts as sufficient authorization, and (c) allows a court to require further authorization without declaring the war illegal or requiring troop withdrawal. Ratner & Cole, The Force of Law: Judicial Enforcement of the War Powers Resolution, 17 Loy. L.A.L. Rev. 715, 754 (1984).

The spectre might be raised that on occasion it will be impossible to tell whether we are engaged in hostilities without delving into military secrets. Two answers suggest themselves. The first would be that while it is entirely proper to keep our military plans secret once a war has been authorized, the evidence bearing on whether we are in fact at war cannot be classified, or the constitutional requirement of congressional authorization would be completely devoured. A second, and independent, answer would be that the burden of proving that we are engaged in hostilities is on the plaintiffs: if they can make their case, the supporting facts can't be much of a secret. As far as the government's case is concerned, "if U.S. military operations were actually no more extensive

Another strain of the political question doctrine—generally wrapped in the rhetoric of "potentially embarrassing confrontation"—is more prudential, residing in the judgment that the courts should not weaken their standing by issuing orders that are likely to be disobeyed. That the President will disobey an order of the Supreme Court seems less likely in 1988 than it might have 100 years ago. President Truman did, after all, remove the National Guard from the steel mills when ordered to do so in the middle of the Korean War; President Eisenhower used the Guard to enforce school desegregation orders with which he strongly disagreed; and President Nixon, also unhesitatingly, complied with the Court's order to make public tape recordings he must have known would mean the end of his presidency. The Court knows all this, and has altered the political question "doctrine" accordingly: in ordering the House of Representatives to reverse itself and seat Congressman Adam Clayton Powell, it dealt with the possibility of legislative disobedience by citing *itself* to the effect that disobedience is unthinkable![89] However, we need not linger on this point, for as we shall see, judicial enforcement of section 4(a)(1) is not likely to involve a direct confrontation between the Court and the President. Invocation of

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than had been publicly acknowledged, what was the danger in demonstrating that fact at trial?" Stanford Note, supra note 8, at 1437 n.164.

In fact, on rare occasion, the situation can be a little more complicated than these two answers acknowledge. It would work like this: part of the plaintiffs' case for the proposition that the United States is engaged in hostilities would consist of the presence during, say, a foreign civil war of a significant number of U.S. military "advisers." The government would then answer that those advisers have not been engaged in hostilities (and indeed, nice trick, are not even exposed to the imminent danger thereof) because in fact they are doing something else. Oh, and just what is that something else? That we can't tell you, the government answers, because to do so we would have to reveal military secrets. (The classified alibi—I know it sounds like the fantasy of a logician turned public defender, but this argument actually was made in the El Salvador litigation.) If this does come up, and it's plausible, there are ways of dealing with it: they are not entirely satisfactory from anyone's perspective, but they are certainly preferable to declaring the entire inquiry a political question. The first is to instruct counsel not to reveal the contents of the government's files to anyone. Should that prove unacceptable, and it may, the judge or a special master could review the evidence *in camera* and file a report shielding the classified material. (This technique has been used to explore allegations of illegal FBI informant infiltration. See Socialist Workers Party v. Attorney Gen. of the United States, 642 F. Supp. 1357, 1378 (S.D.N.Y. 1986).) In any event, the time to recognize and cope with an evidentiary privilege is when it is claimed and justified regarding a specific piece of information, not in order to remove an entire legal inquiry from the courts. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1513 (D.C. Cir. 1984) (en banc), complaint dismissed in light of intervening statute granting relief, 788 F.2d 762 (1986). Most claims that the criteria set forth in section 4(a)(1) have been met will not involve a plausible claim that military secrets are at risk. (In the Persian Gulf case, for example—Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987)—the congressional plaintiffs moved for summary judgment, since all their proof was based on government statements.)

[89] "In fact, the Court has noted that it is an 'inadmissable suggestion' that action might be taken in disregard of a judicial determination." Powell v. McCormack, 395 U.S. 486, 549 n.86 (1969) (citing McPherson v. Blacker, 146 U.S. 1, 24 (1892)).

4(a)(1) will, instead, remand the issue to Congress for decision.[90] Either Congress will approve the war in question, thereby serving the values of the Constitution and the War Powers Resolution, or it will disapprove it, rendering itself the Court's ally in the unlikely event the President proves recalcitrant.

Finally we must consider Dean Choper's argument—though I doubt that he would apply it when a statute directed otherwise—that "separation of powers" quarrels between Congress and the President should not be judicially resolved because the "put upon" branch can protect itself politically.[91] Plainly the Supreme Court has not adopted this theory—it has been deciding such issues at a fast and furious pace[92]—but there is some surface sense in it: absent a pretty specific direction to the contrary, courts should not intervene to take care of those who can take care of themselves. The reason the argument doesn't work here is that the prerogatives of Congress aren't what's really at stake. Oliver Ellsworth defended giving Congress the war power by saying, "It should be more easy to get out of war, than into it." George Mason seconded the motion by stating that he was "for clogging rather than facilitating war; but for facilitating peace."[93] Their concern was not with the prerogatives of Congress vis-a-vis the President. It was, instead, that a single individual should not be able to lead the nation precipitously into war and thus risk the lives of all of us, especially our young men.

> [T]he framers did not entrust the war power to Congress for the benefit of congressmen; they did so for the benefit of the citizenry. They believed that a decision for war should be taken by a broadly representative group after debate and deliberation; for that body to shirk its responsibility and transfer the power of decision to a single man was to acquiesce in tyranny.[94]

There is, therefore, no convincing reason for regarding judicial enforcement of section 4(a)(1) as presenting a "political question." Congress can nail this conclusion down by explicitly providing that judicial enforcement of that section is appropriate and expected.[95]

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[90] See infra text accompanying notes 110–13.

[91] See J. Choper, Judicial Review and the National Political Process, esp. at 295–96 (1980); see also Henkin, supra note 88, at 630. Justice Powell has suggested that the courts ought to stay out of such disputes up until the point where the President and Congress reach an impasse. Goldwater v. Carter, 444 U.S. 996, 997–1002 (1979) (Powell, J., concurring in judgment). That, however, is precisely the point at which Congress *can* be expected to take care of itself. (If the President defies a judgment of impeachment, the Court's intervention is unlikely to make much difference.) It is when Congress is ducking an issue it is constitutionally obligated to decide that intervention may be needed.

[92] E.g., Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983). For a list stretching back further, see D'Amato, supra note 88, at 115–16 & n.105.

[93] 2 Farrand, supra note 28, at 319; see also supra note 59.

[94] F. Wormuth & E. Firmage, supra note 34, at 214.

2. *Standing.* — Servicemen under orders to report to the war zone would clearly have standing to bring suit.[96] This, however, is clearly inadequate. Expecting such persons to step forward as plaintiffs demands courage and incentive that rarely exist in members of the armed forces (whose success depends on eliminating independent thinking, at least in enlisted personnel). Moreover, such a suit is likely to come too late to do much good in compelling consideration of an unauthorized war.

In moments of rhetorical excess, I know I talk as if no one in Congress cares about presidential usurpation of the war power. This is an exaggeration: a number of members of Congress have demonstrated that they do care, and my point really is that they are a distinct minority. There is no doubt that if members of Congress were granted standing to challenge violations of the Resolution, some plaintiffs would be forthcoming in appropriate cases. And while it is true that their prerogatives are not to the ultimate point—keeping the nation out of ill-considered wars is—their prerogatives do give them an interest that is differentiated from that of the rest of us. Moreover, they are likely to be better informed than the general public about what is going on, and therefore well situated to get to court quickly when the President has failed in his duty to comply with section 4(a)(1).

Even without an explicit statutory provision, this appears to be a situation in which the courts would grant standing to members of Congress.[97] We are not talking here about a member of Congress's seeking in court information that in some general way bears upon her general right to function as an effective legislator[98] or complaining that the President has wronged her by misinterpreting a statute for which she had voted.[99] Instead, as has been true in the cases in which members of Congress *have* been granted standing, she will be complaining about the preclusion of a specific vote (here on the merits of the war in question) by a presidential violation of law (here the refusal to file a 4(a)(1) report).[100]

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[95] See Banco Nacional de Cuba v. Farr, 383 F.2d 166, 171–72, 182–83 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968); Franck & Bob, The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case, 79 Am. J. Int'l L. 912, 957–59 (1985). Congressional power to provide for judicial enforcement probably does not exist regarding the "core" political question whose decision is committed elsewhere by the Constitution, but that characterization is not even arguable here. The question whether to authorize a war is committed to Congress. The question whether it has done so, or whether instead the executive is acting without authorization, is of familiar judicial contour.

[96] E.g., Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).

[97] From the beginning the Supreme Court has stood ready to entertain "separation of powers" controversies at the behest of a private litigant whose interests will be affected by the outcome, even in cases where everyone understood that the private litigants were mere place holders in an underlying struggle between Congress and the President. See, e.g., Myers v. United States, 272 U.S. 52 (1926); F. Frankfurter & J. Landis, The Business of the Supreme Court 311–12 (1928); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1041 (1968). Against that background the historical reluctance to let representatives of the contending branches represent their own interests in court has never made sense, e.g., Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1367–68 (1973), and the trend is distinctly in the other direction. See P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 80 (3d ed. 1988) and sources cited. The line of cases into which ours fits

> To be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity; and the plaintiff must point to an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown.[101]

Again, however, just to nail things down, Congress should provide that one or more of its members is empowered to bring suit to enforce section 4(a)(1): the cases make it quite clear that this would suffice.[102]

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comfortably, permitting members of Congress to sue when an illegal act by the President has precluded a specific vote on their part, is in line with this trend.

[98] See Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977). In what seems a transparent attempt to avoid calling attention to the fact that a 4(a)(1) report starts the 60-day clock, the congressional plaintiffs in the Persian Gulf case alleged only that the President's failure to file such a report had deprived them of "information, analysis, and [presidential] judgments . . . needed to carry out their official duties and responsibilities." Joint Appendix at 29–30, Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987). This appears to have been a mite too clever. It rendered *Harrington* a relevant precedent on the standing issue and played into the equitable discretion doctrine as well, by generating the answer that if that was all the plaintiffs needed, they had only to ask. "Here plaintiffs do not even have to persuade their fellow legislators to pass another law; all they have to do is utilize the normal Congressional processes for getting information from the executive branch." Brief for Appellee at 14, Lowry v. Reagan, No. 87-5426 (D.C. Cir. filed Feb. 8, 1988). Had plaintiffs been more forthcoming about the principal point of the requested 4(a)(1) report, they could have rendered standing clear (on the theory that the President's noncompliance was precluding the required congressional vote on whether the war should continue) and gone far to block the equitable discretion maneuver as well (by making it obvious that what was being sought could not be obtained by a simple request for further information).

[99] Note, The Justiciability of Congressional-Plaintiff Suits, 82 Colum. L. Rev. 526, 542–44 (1982) [hereinafter Columbia Note].

[100] See Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Synar v. United States, 626 F. Supp. 1374, 1381 (D.D.C.), aff'd on other grounds sub nom. Bowsher v. Synar, 478 U.S. 714 (1986); Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976), summ. aff'd sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C.), stay denied, 482 F.2d 669 (D.C. Cir. 1973); Harrington v. Bush, 553 F.2d 190, 202, 211 (D.C. Cir. 1977) (dictum).

[101] Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.) (en banc), judgment vacated on other grounds, 444 U.S. 996 (1979); see also Columbia Note, supra note 99, at 548 ("[U]nilateral executive actions involving the waging of war . . . may encroach upon the constitutionally mandated powers of Congress and may effectively nullify a legislator's right to vote on such matters.") (footnote omitted).

[102] See, e.g., TVA v. Hill, 437 U.S. 153, 164 & n.15 (1978); Trafficante v.

3. *Equitable Discretion.* — In recent years the Court of Appeals for the District of Columbia Circuit has been moving—albeit in fits and starts[103]—to substitute for the concept of congressional standing a doctrine of "equitable discretion" that bars the courthouse doors to congressional plaintiffs in situations where the relief sought could be achieved by a majority vote of the plaintiffs' colleagues.[104]

This doctrine appears to straddle two rationales. Each is questionable to begin with, and neither has plausible application to a suit to invoke section 4(a)(1). The first rationale is that by coming to court instead of taking their case to Congress the plaintiffs have chosen the wrong forum, attempting to circumvent the prescribed procedure.[105] This rationale doesn't make a lot of sense generally: what the plaintiffs are seeking in court is not an opportunity to repeat the political arguments that failed in Congress but rather a decision on a question of law. (If they're not, they should be thrown out on *that* ground.) Nor does the rationale fit our case. If the plaintiffs are correct, the President is

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Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*, 59 N.Y.U. L. Rev. 1, 34 & n.180, 54–55 (1984); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 313 (1984); L. Tribe, supra note 53, § 3–15, at 112. It is true that a statutory grant of standing was not honored in McClure v. Carter, 513 F. Supp. 265 (D. Idaho), summarily aff'd sub nom. McClure v. Reagan, 454 U.S. 1025 (1981). However, the statute involved in *McClure* empowered Congressmen as well as Senators to challenge the allegedly illegal confirmation of federal judges, and thus could not plausibly be characterized as one to preserve legislators' votes. *McClure*, 513 F. Supp. at 271. In addition, the legislation was framed so that the appointment of only *one judge*, Abner Mikva of the D.C. Circuit, would be thus challengeable—by a suit in any Congressman's home district at that! Id. at 267–68. Bills of attainder against respected federal judges stand little chance in federal court.

[103] Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), vacated as moot sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987), granting standing to members of Congress to challenge an attempted intersession pocket veto, was decided four years after Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981), the fountainhead "equitable discretion" case. (Congress could have mooted the issue in *Barnes* simply by passing the statute in question again more than 10 days before the end of the second session.)

[104] In addition to *Riegle*, see Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2034 (1988); McGowan, Congressmen in Court: The New Plaintiffs, 15 Ga. L. Rev. 241 (1981). But cf. Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988).

> We are fully mindful, however, that this circuit's recently minted doctrine of equitable discretion has not even been addressed, much less endorsed, by the Supreme Court. Moreover, several members of this court have previously expressed concern over whether equitable discretion represents "a viable doctrine upon which to determine the fate of constitutional litigation." . . . Those concerns, which all members of this panel share, continue to trouble us. As a panel, however, we are of course bound faithfully to follow and apply the law of our circuit.

Id. at 214 (quoting *Melcher*, 836 F.2d at 565 (Edwards, J., concurring)). Concerning Lowry v. Reagan, 676 F. Supp. 333, 338 (D.D.C. 1987), see supra note 98.

[105] E.g., McGowan, supra note 104, at 251.

already under a statutory duty to file a 4(a)(1) report, a duty he has shirked. The idea that they are somehow cheating if they do not secure the passage (over his veto) of *another* statute requiring him to comply, or complying for him, is elusive at best.[106] It is not even entirely clear that Congress has authority under the Resolution to start the clock or order the President to do so.[107]

We had therefore better try the other rationale. It is one sounding in ripeness, to the effect that if Congress would only change the law the way the plaintiffs want it to, the legal issue would vanish and the court would not have to expend its capital deciding the case.[108] The initial problem with this rationale is that every issue courts decide would go away if only the legislature would change the law. The imagined distinguishing factor here, I suppose, is that the plaintiffs are *members* of the legislature and thus in a position to bring the change about. There are two answers to this. The first is that courts do not generally require self-help before hearing legal challenges, and it is not clear why this situation should be different. The second is that it is unrealistic to suppose that in many cases where a group of congressional plaintiffs has troubled to bring a lawsuit, they are well situated to effect the requested change legislatively. Surely this second, "ripeness" rationale is inapplicable to our case. Not only is Congress's proclivity to hide on issues of war and peace legendary, but beyond that, in order to get past *Chadha*, any resolution triggering 4(a)(1) would have to be vetoable by the President. And vetoed it certainly would be. And if by some complete miracle Congress were to pass it over the President's veto, what reason is there to suppose he would follow it more faithfully than he follows the War Powers Resolution (which, after all, has already given him the same direction)? This is simply not an issue with any realistic chance of being resolved legislatively if the courts refrain from hearing it.[109]

Indeed, this seems the least plausible context imaginable for a court to turn aside a congressional plaintiff with an admonition to "go persuade your colleagues." Undergirding the War Powers Resolution was a recognition that most members of Congress, left to their own initiative, would dodge decisions of war and peace. The idea, therefore, was that the clock would be started by events and persons external to Congress, which then would essentially be forced to decide the issue. In fact the President has not performed his duty of starting the clock, and consequently—we are supposing—one or more members of

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[106] See also Brief for Appellants at 13, Lowry v. Reagan, No. 87-5426 (D.C. Cir. filed Jan. 6, 1988) ("[U]nder the district court's ruling, Congress must pass another law, over a certain Presidential veto, in order to enforce the existing law, which was itself passed over a Presidential veto.")

[107] See supra text following note 79.

[108] E.g., McGowan, supra note 104, at 260.

[109] Judge McGowan made clear that in applying the equitable discretion doctrine (which he essentially created) he would factor in the likelihood of legislative success. E.g., id. at 266.

Congress has had to come to court in an attempt to do so. In such circumstances it is no answer for the court to respond: "You shouldn't be here. You should go convince your colleagues to be self-starters." The entire basis of the Resolution was a realization that they wouldn't.

The most important point for present purposes, however, has been left until last: the cases are explicit that this equitable discretion doctrine can readily be overridden by statute.[110]

4. *The Judicial Remedy.* — There are three alternatives here. The court could (1) order the President to start the clock; (2) determine the day on which we arrived at a situation of hostilities or the imminent likelihood thereof, declare the clock to have started on that day, determine whether 60 (or 30) days have passed, and if they have, order the President to withdraw the troops; or (3) decide whether we are currently in a state of hostilities or the imminent likelihood thereof, and if we are, start the clock. The third is the preferable alternative.

The first alternative, ordering the President to start the clock, seems to be the usual suggestion. For example, the congressional plaintiffs in the Persian Gulf lawsuit, *Lowry v. Reagan*, sought an order requiring the President to file a 4(a)(1) report "within 48 hours of the Court's judgment."[111] However, such an order would invite disobedience and, given the alternative of the court's starting the clock, it would do so unnecessarily. It thus seems a needlessly risky status degradation ceremony, a little like ordering the President to apologize.

The second alternative—determining when the standard set forth in section 4(a)(1) was met and retroactively starting the clock from that moment, then ordering the troops out if 60 (or 30) days have since elapsed—also turns out to be a bad idea, for four reasons. First, the question whether we are in a situation of hostilities or the imminent likelihood thereof is difficult enough to answer in the present tense. It greatly complicates matters to turn it into a historical inquiry, wherein the exact moment when hostilities became imminent must be retroactively determined.

> [I]t is possible to watch the sky from morning to midnight, or move along the spectrum from infrared to ultraviolet, without ever being able to put your finger on the precise point where a qualitative change takes place; no one can say, "It is exactly *here* that twilight becomes night," or blue becomes violet, or innocence guilt. One can go a long way into a situation thus without finding the word or gesture upon which initial responsibility can handily be fixed — . . . .[112]

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[110] Synar v. United States, 626 F. Supp. 1374, 1382 (D.D.C. 1986); Moore v. United States House of Representatives, 733 F.2d 946, 954 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985).

[111] See Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 11–12, Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (No. 87-2196).

[112] J. Barth, The End of the Road 100 (Bantam 1969). Thus in Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert.

Second, such a retroactive judgment more directly questions the President's good faith than one to the effect that we have now arrived at a situation of imminent danger of hostilities, and thus is more likely to risk resistance on his part. (A judgment to the effect that the President has been in violation of the law for some months is quite an indictment, whereas a holding that we are *now* in a 4(a)(1) situation is susceptible to the construction that the President himself might well have been on the verge of reaching the same conclusion.) Third, because it is likely to involve an order to the President to remove the troops forthwith (without an intervening period of congressional consideration), this alternative, like the first, quite directly risks presidential disobedience. Unlike the first, however, it does not do so needlessly, since following the second rather than the third alternative would mean (assuming the President promptly obeyed) that the troops would be withdrawn sooner. However, while Presidents do not ordinarily disobey the Court, it must be that one reason they don't is that the Court has been careful to shape its orders so as to minimize the possibility. Finally, and most convincingly, though this second alternative may seem on the surface to come as close as any to the existing language of the Resolution, it doesn't fit its purpose at all. The point was not to eliminate war altogether, or to close down those wars respecting which a procedural error had been made at the outset, but rather to assure that we would become permanently entangled only in those wars that Congress had been induced to think about and had clearly authorized. The second alternative entirely eliminates the period of congressional consideration and thus hardly fits the point of the Resolution.[113]

The third alternative, simply starting the clock, would give Congress its 60 (or 30) day period to consider the action in question. It also minimizes the chances of presidential disobedience, in that at the end of the period, either the action will have been authorized or the courts will have acquired the most powerful ally possible in the unlikely event the President is inclined to persist on pursuing his war. Should it ever come to the choice of a judicial remedy, therefore, the existing Resolution should be thus construed, and at all events the Resolution should be amended to make it clear that this is the appropriate course.

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denied, 467 U.S. 1251 (1984), plaintiffs requested the second alternative, with this judicial reaction:

> [I]n order to determine the application of the 60-day provision, the Court would be required to decide at exactly what point in time U.S. forces had been introduced into hostilities or imminent hostilities, and whether that situation continues to exist. This inquiry would be even more inappropriate for the judiciary.

Id. at 898.

[113] Cf. *Crockett*, 558 F. Supp. at 901.

G. *Section 8(a)*

Section 8(a) provides:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —
>
> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or
>
> (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

This section may appear to raise the question how one Congress (in this case the Ninety-third) can bind its successors. It is not difficult to envision some future Congress's enacting, say, an appropriations act, part of whose proceeds they know are to be used to finance some otherwise unauthorized presidential military venture. When opponents protest that one need only look to section 8(a) of the War Powers Resolution to see that this does not count as sufficient authorization, one can certainly anticipate the executive branch's responding that the appropriations act came later, and an earlier statute does not trump a later one.[114]

This argument doesn't work. What the War Powers Resolution gave us was a strong rule of construction, telling us how to read the intent of later Congresses. What the Ninety-third Congress was saying, in effect, was this:

> We know that we have incentives to be ambiguous in this area, and that is very costly in terms of the lives of our young men and the risk to the rest of us. We are therefore hereby providing an unambiguous set of conventions whereby you will be able to tell in the future whether or not we intend the authorization that is constitutionally required. When we do intend such authorization, we will make specific reference to this Resolution. Without such reference, do not construe us as authorizing the war in question.
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> It is true that the "we" in question will not necessarily be

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[114] State Department Legal Adviser Sofaer makes much this argument at Libya Hearings, supra note 8, at 46.

> the same people who have enacted this Resolution. However, our successors will certainly be well aware of this Resolution and the conventions it establishes, and thus, until the Resolution is repealed, they also should be presumed not to have intended to authorize a war unless they have referred to it.
>
> History, and particularly Vietnam, teaches that what is needed is a "bright line test" for construing our intention. Others might work as well—such as a requirement of a declaration of war, or a special seal on the document alleged to constitute authorization—but this is the one we are choosing.

If subsequent Congresses don't like this they can repeal the Resolution. Until they do, however, the conventions it establishes should control.

Section 8(a)(2), providing that no treaty "heretofore or hereafter ratified" can authorize a war unless it is implemented by legislation referencing the War Powers Resolution—a sort of "little Bricker Amendment"[115]—is at least potentially inconsistent with section 8(d)(1), which provides that "nothing in this joint resolution . . . is intended to alter . . . the provisions of existing treaties." In fact it appears that we are not currently party to any treaty that purports to authorize military action without the intervening approval of Congress,[116] but the inconsistency should be resolved nonetheless. The quoted provision of section 8(d)(1) should be eliminated, as it seems pretty clear that it is 8(a)(2) that is in line with the prevailing purpose of the Resolution.

Also mind-twisting is section 8(a)(1)'s provision that a law "in effect before the date of the enactment of" the War Powers Resolution can constitute the required authorization, but only if it specifically refers to the War Powers Resolution. Rather than play games with this, let us simply recommend that Congress eliminate the reference to preexisting laws. That too is plainly in accord with the Resolution's purpose.

III. CONCLUSION

Is there any reason to suppose that any of this will come about? In large measure the tale of the War Powers Resolution of 1973 has been a tale of congressional spinelessness. Can we expect Congress to enact a meaningful War Powers Act? As of this writing there is so much talk in Congress of a (disguised) repeal that it is hard to be terribly optimistic. However, the general idea—that Congress, like Ulysses binding himself to the mast, might take steps to bind itself to accountability for future wars—is not by any means unthinkable. That, in fact, is precisely what Congress attempted to do in 1973. Unfortunately it did not sufficiently plan for presidential defiance. However, this Article has demonstrated that that defect can be repaired, if Congress still has the will to be held accountable.

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[115] Section 2 of the (never ratified) Bricker Amendment provided that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." See G. Gunther, Constitutional Law 226–27 (11th ed. 1985).

[116] See, e.g., National Commitments Hearings, supra note 34, at 97 (statement of Nicholas Katzenbach); Vance, supra note 63, at 87. See generally Glennon, United States Mutual Security Treaties: The Commitment Myth, 24 Colum. J. Transnat'l L. 509 (1986).

When we get down to cases, though, and a court does start the clock, can we expect Congress actually to follow through and face the issue whether the war in question should be continued? Admittedly the matter is not entirely free from doubt. There has to come a point, however, when Congress will want to stop looking ineffectual: avoiding enforcement of a second version of the War Powers Act would threaten to tarnish its image to what should be an unacceptable degree. Moreover, while Congress has shown a tendency by its indecision to let wars continue, I am unaware of any case of its *ending* one by indecision and, with Secretary Vance, think it most improbable that it would do so.[117] That, of course, is the assumption underlying the War Powers Resolution, though it has proved tricky actually setting it up so that the war will end unless Congress decides. Finally, remember that we will be injecting the judiciary into the process, and that rhetoric is the courts' most powerful weapon. It should be well within the capacity of most federal judges (certainly it is within the Supreme Court's capacity) to write an opinion explaining that the Constitution entrusts decisions on war and peace to Congress, and that because the conflagration in question meets the statutory criteria, it has become Congress's constitutional duty to decide whether it should continue—an opinion that Congress simply could not ignore.[118]

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[117] Vance, supra note 63, at 86.

[118] In the event 30 days passes and Congress has not acted to authorize the war, the proposed statute would cut off funding. Experience and prior rhetoric strongly suggest that the President would respect this. In the unlikely event of defiance on the part of the President (and complicity by everyone else associated with the budget process) impeachment would seem the appropriate response. If, however, Congress chooses not to respond to such flagrant illegality, the case might well end up back in court. Plainly the court cannot at that point announce that it was all a joke, but prudence need not be wholly jettisoned either. Though the subject is obviously one that would require a good deal of in-context analysis, a declaratory judgment (to the effect that the war has not been authorized and thus the President is acting illegally) would in such an unlikely situation probably be the most sensible remedy, since it is hard to see what an injunction would add. (Who would enforce it, and with what? The marshalls are hardly going to be able to go collect the troops and bring them home from the front.) And should the President still persist in his disobedience and the Congress in its refusal to react, we will all be in very deep water, and certainly will have passed beyond the point where judicial action is very relevant.

This catechism, however, has long since taken on the aspect of responding to a child who keeps asking "But what if they don't?" Nothing useful in legal theory is accom-

At last we might ask whether there is any point to the entire exercise. Is there any reason to suppose, given their respective performances, that Congress will prove wiser on issues of war and peace than the President? Actually I think that our history does support, if slightly, the framers' judgment that Congress tends to be more responsible in this area than the executive (if only because it is necessarily more deliberate).[119] To answer the question on its own (comparative) terms, however, is to miss the point. The constitutional strategy was to require more than one set of keys to open the Pandora's box of war. As usual, Alex Bickel said it well: "Singly, either the President or Congress can fall into bad errors . . . . So they can together too, but that is somewhat less likely, and in any event, together they are all we've got."[120]

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plished by discussions of gross improbabilities, cf. J. Ely, supra note 34, at 182–83, or by trying to design a judicial fix for Armageddon. It is hardly an indictment of the statute here suggested that it doesn't provide a foolproof recipe for a situation where the President of the United States is prepared openly to defy both congressional statute and judicial order, and the Congress of the United States refuses to do anything about it. (Obviously we should try to minimize the chances of such an impasse's developing, but that is what the discussion of remedy has been about.)

I certainly do not mean here to have described the way the system typically should work. If it is always or even often necessary to go to court to get the President and Congress to do their jobs, we will have failed. What is contemplated, instead, is an educational process. Once everyone gets the idea that the courts stand ready to start the clock, it should follow that the President will begin doing so without the need of a lawsuit, and that Congress will then readily assume its constitutional duty to decide on war and peace.

It is a familiar point that Congress (like the rest of us) frequently acts to solve yesterday's problem, and a sometime allegation that that is what it did here—moving to preclude protracted "unauthorized" wars like that in IndoChina while doing nothing to prevent what may now seem the greater danger, the quick, "surgical" strike like Grenada or Tripoli. Cf. Wicker, A Law That's Failed, N.Y. Times, Jan. 7, 1988, at A27, cols. 1–3 (characterizing views of Harold Koh). It is, in the first place, far from clear that such blitzkrieg strikes are our greatest problem even as of 1988—witness the Persian Gulf. It is true the Resolution hasn't done anything to control such strikes. But even if it had generally proved effective as legislation, that would hardly come as a surprise. Blitzkrieg strikes are effectively beyond the reach of *any* set of legal restraints—though compliance with the consultation provision would probably help. Here, as often—for conspicuous example in connection with the use of nuclear weapons—we must depend on the good faith of the President of the United States. Again, however, we can hope that he is trainable, that the example set by effective enforcement of the Resolution as it pertains to longer conflicts will help reestablish the constitutional norm that he is not a law unto himself in this area any more than any other. If police officers, and even racial bigots, can be conditioned by the rule of law to operate within fetters they initially condemned as impossibly constricting, can't we expect as much of the President and Congress?

[119] See also W. Reveley, supra note 32, at 121–22. See, e.g., 6 J. Madison, Writings 174, 312–13 (G. Hunt ed. 1906); C. Bowen, Miracle at Philadelphia 59 (1966) (B. Franklin).

[120] Libya Hearings, supra note 8, at 88 (quoted by J. Brian Atwood).

APPENDIX

THE WAR POWERS RESOLUTION	THE WAR POWERS ACT (*proposed*)
SHORT TITLE	SHORT TITLE
Section 1. This joint resolution may be cited as the "War Powers Resolution".	Section 1. This Act may be cited as the "War Powers Act".
PURPOSE AND POLICY	PURPOSE AND POLICY
Sec. 2.(a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.	Sec. 2. It is the purpose of this Act to fulfill the purpose of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or situations where there is an imminent danger of hostilities, and to the continued presence of United States forces in such situations.
(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.	[eliminated]

(c) The constitutional powers the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.	[eliminated]
CONSULTATION	CONSULTATION
Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.	Sec. 3.(a) Before introducing United States Armed Forces into hostilities or a situation where there is an imminent danger thereof, or retaining them in a location where hostilities or the imminent danger thereof has developed, the President shall in every possible instance consult with the representatives of Congress designated in subsections (b) and (c) of this section, discussing the situation fully and seeking their advice and counsel. So long as such a situation persists he shall consult regularly with said representatives, discussing the situation fully and seeking their advice and counsel.
	Secs. 3(b) and 3(c) [defining Permanent Consultative Group. Use sections 3(b) and 3(c) of "Byrd proposal," S.J. Res. 323, 100th Cong., 2d Sess.]

REPORTING	REPORTING
Sec. 4.(a) In the absence of a declaration of war, in any case in which the United States Armed Forces are introduced — (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; The President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —	Sec. 4.(a) In the absence of a declaration of war, in any case in which the United States Armed Forces are introduced into hostilities or a situation where there is an imminent danger thereof, or retained in a location where hostilities or the imminent danger thereof has developed, the President shall within 48 hours submit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —
(A) the circumstances necessitating the introduction of United States Armed Forces;	(A) the circumstances necessitating the introduction of United States Armed Forces;
(B) the constitutional and legislative authority under which such introduction took place; and	(B) the constitutional and legislative authority under which such introduction took place; and
(C) the estimated scope and duration of the hostilities or involvement.	(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.	(b) [same as existing 4(b)]
(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.	[4(c) superfluous in light of proposed 3(b) and 3(c)]

CONGRESSIONAL ACTION	CONGRESSIONAL ACTION; JUDICIAL REVIEW
Sec. 5.(a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.	Sec. 5.(a) [same as existing section 5(a), substituting "4(a)" for "4(a)(1)"]

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(b) Any Member of Congress may bring an action in the United States District Court for the District of Columbia to enforce section 4(a) of this Act in the event the President has not complied therewith. Such action shall not be dismissed by the court on the ground that the plaintiff lacks standing or the case presents a political question, or as an exercise of the court's equitable discretion. In the event the court finds that the criteria set forth in section 4(a) have been satisfied, it shall enter a declaratory judgment to that effect. A decision either entering or declining to enter such a judgment shall be directly appealable to the United States Supreme Court.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.	(c) Within thirty calendar days after a report is submitted by the President under section 4(a) or a judgment declaring that the criteria of section 4(a) have been met is entered under section 5(b), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted or judgment entered, unless the Congress has declared war or has enacted a specific authorization for such use of United States Armed Forces, or is physically unable to meet as a result of an armed attack upon the United States. No funds appropriated or otherwise made available under any law may be obligated or expended for any activity which would have the purpose or effect of violating this subsection.
Congressional Priority Procedures for Joint Resolution or Bill	Congressional Priority Procedures for Joint Resolution or Bill
Sec. 6. [not reprinted]	[existing provisions to be replicated, as adjusted for thirty-day clock]
Congressional Priority Procedures for Concurrent Resolution	
Sec. 7. [not reprinted]	[eliminated in light of elimination of existing section 5(c)]

Interpretation of Joint Resolution	Interpretation of this Act
Sec. 8.(a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —	Sec. 7.(a) Authority to introduce United States Armed Forces into hostilities or into situations where there is an imminent danger of hostilities, or to retain them in a situation where hostilities or the imminent danger thereof has developed, shall not be inferred —
(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or	(1) from any provision of law, including any provision contained in any appropriation Act, unless such provision specifically authorizes such introduction or retention and states that it is intended to constitute specific statutory authorization within the meaning of this Act; or
(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.	(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing such introduction or retention, and stating that it is intended to constitute specific statutory authorization within the meaning of this Act.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.	(b) [same as existing section 8(b), substituting "Act" for "joint resolution"]
(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.	(c) [same as existing section 8(c), substituting "Act" for "joint resolution"]
(d) Nothing in this joint resolution —	[eliminated]

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or	
(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.	
SEPARABILITY CLAUSE	SEPARABILITY CLAUSE
Sec. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.	Sec. 8. [same as existing section 9, substituting "Act" for "joint resolution"]

RESPONSES OF J. TERRY EMERSON TO QUESTIONS ASKED BY SENATOR PELL

At earlier war powers hearings, Senator Pell asked if witnesses would comment on the suggestion that "no nation is going to honor a treaty if it hurts its own national interest."

In my view, the thesis stated by Senator Pell is exactly correct. I believe Senator Pell is in the company of our nation's first Secretary of State, Thomas Jefferson, and has the support of the earliest writers on international law.

On April 28, 1793, Thomas Jefferson wrote a masterful opinion for President George Washington responding to the question whether the United States have a right to renounce their Revolutionary War treaties with France in light of the overthrow of King Louis Capet (XVI) and creation of the first French Republic.

In his advisory opinion, Jefferson concluded that treaties are not annulled by mere changes in government officials or even the forms of government, but he added that the existence of a serious danger would absolve the United States from the treaties.

In Jefferson's words:

> There are circumstances however which sometimes excuse the non-performance of contracts between man & man; so are there also between nation & nation. When performance, for instance, becomes impossible, non-performance is not immoral. So if performance becomes self-destructive to the party, the law of self-preservation overrules the laws of obligations to others. VI The Writings of Thomas Jefferson 221 (Ford ed. 1895).

Thus, Jefferson argued that the treaties were still binding, but subject to the "right which exists at all times of liberating ourselves when an adherence to the treaties would be ruinous or destructive to the society...."

In support of his opinion Jefferson marshalled the views of Grotius, Puffendorf and Wolf, all known to the Framers of the U.S. Constitution. Washington adhered to Jefferson's opinion and rejected the contrary advice of Alexander Hamilton. However, Washington exercised the release authority discussed by Jefferson when the President interpreted the Treaty of Commerce to prohibit France from fitting out privateers in our ports and the defense guarantee of the French West India islands as being inapplicable.

This introduces further evidence of the accuracy of Senator Pell's thesis. Not only might the United States denounce a treaty as being impossible to perform or dangerous to implement, but treaties may be interpreted so as not to apply to disagreeable situations. Moreover, the United States may determine that a treaty is suspended temporarily because of changed conditions not of our own making or that the United States is no longer bound by a treaty because the other party has committed a significant breach.

A further question must be asked. Who is the competent authority in the United States to make these decisions for the nation?

My personal research indicates that 56 treaties have been terminated by the United States since the Republic was formed in 1789. Of these, 49 treaties were terminated with the express or statutory approval or ratification of the Legislative Branch and three others were overturned by inconsistent legislation.

Only four treaties were denounced by the United States without any supporting treaty or statute, three of them resulting from a fundamental change of conditions not a result of Presidential action. One other treaty, the Mutual Defense Treaty with the Republic of China on Taiwan, was abrogated in connection with the President's recognition power.

Accordingly, I conclude that the general rule, with only rare exceptions, under U.S. Constitutional practice is that the Legislative and Executive Branches will participate jointly in making the decision not to honor a treaty if it hurts our own national interest. In other words, in judging ourselves whether Jefferson's concept of the right of self-liberation from a treaty is to be invoked, the separation of powers doctrine requires that some form of legislative concurrence is usually necessary to terminate a formal treaty on behalf of the United States.

J.Terry Emerson
Attorney at Law

RESPONSES OF ABRAHAM SOFAER TO QUESTIONS ASKED BY SENATOR BIDEN

Q. 1. In what circumstances, if any, other than those listed in section 2(c), does the Administration believe that the President has the constitutional authority to introduce the armed forces into hostilities without prior statutory authorization?

A. The Administration believes that it is neither possible nor wise to attempt an exhaustive listing of all situations that might arise in which the President's independent power as Commander-in-Chief to commit U.S. forces would be applicable. Furthermore, the phrase "without prior statutory authorization" is unclear. Statutory authority can be found in a variety of legislative actions short of the type of specific and explicit requirements of Section 8 of the War Powers Resolution.

Keeping these caveats in mind, the Administration is convinced that Section 2(c) fails to list all the circumstances in which the President may lawfully introduce U.S. Armed Forces into hostilities. Among the circumstances not listed in Section 2(c) are the protection or rescue from attack, including terrorist attack, of U.S. nationals; protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

Q. 2. Under the circumstances extant on the date of this letter, does the Administration believe that the President would have the constitutional authority to introduce the armed forces into hostilities to overthrow the Government of Nicaragua without prior statutory authorization?

A. The President has made clear that he has no intention under present circumstances of introducing United States armed forces into hostilities in Nicaragua for any purpose whatsoever. We respectfully suggest that it would be neither constructive nor responsible to address hypothetically whether the President would have the constitutional authority to do so.

Q. 3. Does the Administration believe that the reporting requirement of section 4(a)(1) is constitutional?

A. We have never challenged the constitutionality of the reporting requirements of the War Powers Resolution, and have in fact gone to great lengths through briefings, testimony, reports and so forth to ensure that Congress is fully informed of our policies and of the actions that we have undertaken in the pursuit of our policies. Extreme situations could possibly arise in which the President might, in the interests of protecting national security, personally invoke the principle of executive privilege and decline to report within the 48-hour period, but I know of no such situation that has arisen in the past.

Q. 4. Does the Administration believe that any situation has arisen during its term of office in which that requirement [i.e., the reporting requirement], as applied, would have been unconstitutional?

A. No.

Q. 5. Does the Administration believe that any event that has occurred in the Persian Gulf has required a report under section 4(a)(1) of the Resolution?

Q.6. Have any of the Administration's communications to Congress concerning the Persian Gulf constituted reports under section 4(a)(1) of the Resolution?

Q.7. Have any such reports constituted reports under sections 4(a)(2) or 4(a)(3) of the Resolution?

A. Consistent with the practice of all Presidents since 1973, this Administration has taken no position regarding whether events in the Gulf require a report under specific subsections of section 4(a) of the Resolution. This has facilitated the President's ability to proceed in a spirit of mutual cooperation with Congress and to ensure that Congress continues to be fully informed.

Indeed, as the Department of Justice stated in the recent case of Lowry v. Reagan, the "President has provided Congress with written communications following each use of U.S. military force in the Gulf, which in their totality contain information that far exceeds the requirements of Section 4(a)(1) of the War Powers Resolution." Further information regarding our activities in the Gulf has been provided through extensive briefings, testimony, letters and in other ways. The Resolution does not require the President to specify the subsection under which a report is filed. In the event, however, that circumstances at any time existed that would have triggered any specific subsection of Section 4(a), the reports submitted by the President in every instance satisfied the requirements of those subsections.

Q. 8. Does the Administration believe that section 5(b) is constitutional?

Q. 9. Does the Administration believe that section 5(c) is constitutional?

A. The Administration's views on these issues are contained in the State Department Legal Adviser's statement to the Committee.

Q. 10. Does the Administration believe that section 8(a)(1) is constitutional?

Q. 11. Does the Administration believe that section 8(a)(2) is constitutional?

The Administration regards Section 8 as ineffective to the extent it attempts to bind future Congresses as to the manner in which they are entitled to approve military actions, and to the extent it attempts to bind future Presidents and courts as to the standards by which to determine whether military actions have been approved. It seems inconceivable that Congress could avoid its responsibility for approving a military action merely because it fails to state in specific terms its intention to satisfy the Resolution's requirements.

Q. 12. If the Administration believes that any provision of the Resolution is unconstitutional, does it believe that the President possesses the constitutional authority to disregard that provision prior to the ruling of a court that such provision is invalid?

A. Each branch of our government has an independent responsibility to uphold the Constitution of the United States. The President is sworn to uphold both the Constitution and the laws of the United States. Certainly, in our system, where the courts have ruled on the rights of parties properly before it, the parties have an obligation to comply with the ruling. That is of course true whether it is an executive official or a legislative official or any other party whose rights the courts have adjudicated. Exceptions have been proposed by Presidents in the past, but generally in the most extraordinary circumstances.

In the absence of final judicial resolution, however, the President has not only the right but the duty to consider whether a refusal to abide by a particular statutory provision is required to fulfill his constitutional responsibilities. Not every disagreement with Congress should lead a President to disregard a law that the President believes is unconstitutional. The normal practice, in fact, is to comply until the courts decide otherwise.

But in certain areas -- especially where the President has independent responsibilities that relate to protecting the national security -- the President will be held responsible by the people for failing to fulfill his duties under the Constitution. In the specific context of war powers, the President typically could not wait for a resolution of the issue by the courts, which are unlikely to pass on disputes under the Resolution. The Constitution entrusts war powers issues to the two political branches.

While this is a complex and delicate subject, the Committee should be aware of Attorney General Civiletti's statement in 1980 that "the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other." In such cases, according to the Attorney General, enforcement of the unconstitutional acts "would constitute an abdication of the responsibility of the Executive Branch, as an equal and coordinate branch of Government with the Legislative Branch, to preserve the integrity of its functions against constitutional encroachment."

Q. 13. Does the Administration believe that a statutorily-imposed time limit on the use of the armed forces in hostilities, such as the 18-month limit set forth in the "Lebanon War Powers Resolution" is constitutional?

A. The President may properly accept such a time limit, if he finds it consistent with U.S. national security interests. But Congress cannot impose such a limit where it would have the effect of constraining in a particular case the President's constitutional authority as Commander-in-Chief. The constitutionality of such a time limit would depend on the particular circumstances surrounding a proposed use of U.S. armed forces when the period expired. Thus, in signing the Multinational Force in Lebanon Resolution, the President stated that he did:

> not and cannot cede any of the authority vested in me under the Constitution as Commander in Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces.

Q. 14. Does the Administration believe that section 7 of H.J. Res. 462, introduced by Rep. Peter Fazio, is constitutional?

A. Section 7 of H.J. Res. 462 gives "[a]ny Member of Congress" standing to challenge alleged violations of any joint resolution adopted under the War Powers Resolution, and orders the courts not to rely on the political question doctrine or any other principle of nonjusticiability in refusing to resolve the merits of such a lawsuit.

Limits on standing and justiciability have a prudential component and a constitutionally-based component. Congress has the power to eliminate the prudential component although, for reasons set forth at greater length in the testimony of the State Department Legal Adviser, it would be extremely unwise for Congress to do this. The prudential limits on standing and justiciability protect the Constitution's separation of powers. Elimination of these restraints would serve neither Congress nor the country, but would force the courts into the center of political crises that they have long and wisely left to the political branches.

Congress lacks power, moreover, to affect the constitutionally-based aspects of the law of standing and justiciability (including the political question doctrine). Insofar as it purports to eliminate these elements of the law, section 7 is appears to be unconstitutional. The Article III limitation on standing bars suits by individual legislators seeking to compel the President to obey or enforce the laws. The effort to create such standing in H.J. Res. 462 thus would order the courts to exceed the limits of their constitutional power.

Q. 15. **Does the** Administration believe that S.J. Res. 323, **introduced by** Sen. Robert Byrd, is constitutional?

A. Constitutional aspects of S.J. Res. 323 are addressed in the testimony of the State Department Legal Adviser.

Q. 16. Does the Administration favor the repeal of the War Powers Resolution?

Q. 17. Does the Administration suggest any amendment to the Resolution.

A. The Administration favors the repeal of the Resolution. At a minimum, the Resolution should be amended to repeal Sections 2(c), 5(b), 5(c), and 8(a).

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United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

November 3, 1988

Professor Louis Henkin
Columbia University
School of Law
435 West 116th Street
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Dear Professor Henkin:

After your testimony, one of the witnesses to appear before the Subcommittee said as follows: "Reliance on the Steel Seizure Case is normally one of the characteristics of a lawyer who does not understand the special nature of foreign affairs under the Constitution." I am writing to ask whether you view that case as relevant to the constitutionality of the War Powers Resolution. Is it, more generally, a "foreign affairs case"?

Your answer will greatly assist the Subcommittee in formulating its recommendations, since it is important that we be clear upon the extent to which Congress may rely upon this case in legislating in the area of foreign affairs.

Because we wish to print the hearings promptly, and hope to include your views on this matter, I would greatly appreciate your getting a response to us, care of John Ritch of the Foreign Relations Committee staff, as soon as possible.

Sincerely,

Joe Biden

Joseph R. Biden, Jr.
Chairman
Special Subcommittee on War Powers

RESPONSES OF LOUIS HENKIN TO QUESTIONS ASKED BY SENATOR BIDEN

Dear Senator Biden,

I have your letter inviting me to comment on the following statement quoted from testimony before your Subcommittee:

> "Reliance on the Steel Seizure Case is normally one of the characteristics of a lawyer who does not understand the special nature of foreign affairs under the Constitution."

I am not confident that I understand the full purport of that statement, but I know no basis for it.

Youngstown Street & Tube was not said to be a "foreign affairs case," but the dissenting Justices clearly treated it as such, and the majority and concurring opinions said nothing to the contrary. The majority opinion declared that actions of a legislative character are reserved to Congress exclusively, and there is nothing in that opinion to suggest that the principle applies only to domestic affairs and not to foreign affairs. Surely, what the Court held would invalidate executive acts of a legislative character that regulated foreign commerce, declared war, or enacted laws that are necessary and proper to carry out the foreign affairs powers of the U.S.

[illegible] York, N.Y. 10027

Citations to, and invocations of, Youngstown Sheet & Tube generally address Justice Jackson's concurring opinion, and particularly his typology for dealing with the respective powers of Congress and the President. 343 U.S. at 635-38. There is no basis for a suggestion that Justice Jackson did not intend that typology to apply to foreign affairs. Justice Jackson supports this first category with reference to a leading foreign affairs case. His second category, where the powers of Congress and the President are concurrent or uncertain, was clearly intended to apply to foreign affairs; indeed, it is difficult to find any thing to which it applies other than foreign affairs. Justice Jackson's references to the Executive Power clause (343 U.S. at 640-41) also clearly had foreign affairs in mind. In fact Jackson's opinion is saturated throughout with references and citations to foreign affairs matters and cases.

Sincerely,

Louis Henkin

Louis Henkin

RESPONSES OF PROF. MICHAEL J. GLENNON TO QUESTIONS ASKED BY SENATOR BIDEN

As indicated in my testimony, this general issue was addressed by the Supreme Court in Dames & Moore v. Regan, 453 U.S. 654 (1981), in which then-Justice William Rehnquist, speaking for a unanimous Supreme Court, applied Justice Jackson's tripartite analysis from the Steel Seizure Case, 343 U.S. 579 (1952). Dames & Moore involved the validity of an executive agreement with Iran, which, inter alia, nullified certain attachments and liens on Iranian assets in the United States and suspended certain claims against Iran. While acknowledging, as did Justice Jackson himself, that the three categories represented a "somewhat over-simplified grouping," Justice Rehnquist nonetheless viewed Jackson's analysis as bringing together "as much combination of analysis and common sense as there is in this area...." Accordingly, Justice Rehnquist upheld the agreement, finding that it fell into Jackson's first category -- congressional approval -- and was thus (he proceeded to quote Jackson) "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." At the same time, Rehnquist recognized that a given presidential act might fall within the realm of congressional disapproval, and, again, quoted Jackson: "in this category, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'"

Before Dames & Moore, it had occasionally been argued that the Steel Seizure Case did not pertain to the scope of the President's foreign affairs powers because the seizure of the steel mills occurred within the territory of the United States or because the seizure violated the Just Compensation Clause. It is difficult to believe that the outcome in Steel Seizure would have been different had the American-owned steel plants seized by the Executive been located in, say, Canada, rather then in the United States. Nor did Jackson decline to reach the commander-in-chief claim because individual rights were violated. Indeed, his opinion turned neither upon the locus of conduct or property affected by the executive act nor upon the putative violation of individual rights but, rather, upon the Truman administration's argument that a continuing supply of steel was necessary to prosecute the war in Korea and that the power to seize and operate the steel mills flowed from the President's constitutional power as commander-in-chief. That claim provided Jackson the opportunity for an extended and highly illuminating discussion of the contours of that "cryptic" constitutional provision. Similarly, in Dames & Moore the dispute was again treated by the Court as implicating the President's power "in the field of international relations" -- notwithstanding the domestic locus of the conduct and property affected by the Executive's nullification and suspension orders. Each case thus involved the validity of an executive act that had international effects even though "domestic" private conduct and property also were affected by that act.

In short, the two cases in which Jackson's analysis has been applied, first by him and then by the entire United States Supreme Court, involved the conduct of the Korean War and settlement of the Iran hostage crisis. It takes no great insight to realize that these were foreign affairs cases. As such, they bear upon the validity of the War Powers Resolution.

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Thomas M. Franck
Director

November 15, 1988

Senator Joseph R. Biden, Jr.
Chairman
Special Subcommittee on War Powers
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510-6225

ATT'N: John Ritch

Dear Senator Biden:

It is one of the characteristics of those constitutional lawyers who see their professional interests as inextricable from those of the Executive Branch to insist that the Constitution creates a distinct and special set of rules that apply to something called the "foreign relations power."

It is the opinion of these lawyers that concepts of free speech, the right to petition Congress, property rights and the distribution of powers between the Executive and Congress, which are explicitly established by the black letter text of the Constitution, must yield to a phantom right, nowhere to be found in the Constitution's text, called the "foreign relations power." Naturally, this argument locates the phantom power squarely in the lap of the Executive Branch.

The Steel Seizure case, and Jackson's separate opinion in particular, establishes a sound model for resolving the inevitable conflicts between explicit enumerated powers of the Congress and of the Presidency. This model is equally applicable to conflicts arising in the domestic and the international context. The Constitution does not distinguish between them and neither does the case which, incidentally, like so much else, has both domestic and international aspects which are essentially inextricable.

Thank you for posing this interesting question. I hope my response is useful. Should you wish it, I would be glad to provide citations to support these propositions.

Yours sincerely,

Thomas Franck

Thomas M. Franck
Murry and Ida Becker Professor of Law

THE
UNIVERSITY
OF UTAH

November 15, 1988

Joseph R. Biden, Jr., Chairman
Special Subcommittee on War Powers
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510-6225

Dear Senator Biden:

In your letter of November 3, you requested that I respond to a statement by one of the witnesses to appear before your Subcommittee following my own testimony. The statement -- "Reliance on the *Steel Seizure* case is normally one of the characteristics of a lawyer who does not understand the special nature of foreign affairs under the Constitution" -- is a curious one, indeed. Leaving aside the pretentious nature of the statement, it reminds me of the roundly criticized dicta of Justice Sutherland, in *United States v. Curtiss-Wright*: that the President of the United States possesses some extra-constitutional power, directly inherited from English monarchy, to conduct foreign relations, apart from any empowerment in the Constitution of the United States. Strange doctrine indeed in a Republic.

The holding in *Curtiss-Wright*, of course, is perfectly defensible. There, the President acted under a joint resolution of Congress. The holding in *Curtiss-Wright*, therefore, comes clearly within the first category of Justice Jackson in the *Steel Seizure* case. That is, when Congress empowers the President to act, the President is acting most clearly and most defensibly within his powers in the conduct of American foreign relations. **Of course** the *Steel Seizure* case is an appropriate source of reliance in outlining the nature of presidential and congressional power in the conduct of foreign relations.

Justice Black, in delivering the opinion of the Court, stated the constitutional doctrine most purely in denying any inherent power in the presidency that would countenance the seizure of the steel mills, although we were at war (albeit undeclared). This was a domestic act, of course, taking place in the United States; but the purpose of the presidential act, as defended unsuccessfully before the Court, was for the nation's steel mills to continue operation in a time of war. The usual arguments for presidential power, based on the Commander-in-Chief clause and the Executive clause, were invoked to justify President Truman's act.

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Justice Jackson's concurring opinion is perhaps the most often cited portion of this case. Briefly, Jackson analyzed presidential power as falling into three categories: (1) when the President is acting under a statute from Congress; (2) when the Chief Executive is operating without congressional consent or opposition, but on presidential prerogatives granted only by some text of the Constitution; and finally (3) when the President is acting in opposition to the Congress (the actual facts of the *Steel Seizure* case).

What possible source could there be in republican constitutional government empowering presidential action other than the Constitution of the United States? Of course, the "gloss" of history will help us interpret the legality of presidential acts, as Felix Frankfurter's concurring opinion in the *Steel Seizure* case makes clear. Nevertheless, the assertion of greater presidential power when acting in foreign relations is entirely unsupported by the text of the United States Constitution.

It is a dangerous doctrine, indeed, to infer some extra-constitutional power in the President when acting as Commander-in-Chief in the conduct of foreign relations. This notion is directly rebutted by the *Steel Seizure* case. The fact that President Truman's acts were directed at the seizure of a steel mill within this country seems to me to be beside the point. Clearly, the attempted seizure of the steel mills was done within the context and motivated by the fact that we were at war. The Supreme Court gave a definitive and entirely correct "No" to this act. In my opinion, the idea of "inherent" power, whether that power be directed internally or toward our relations with other states, is repugnant to republican constitutional government.

The alternative philosophy to my own, as presented in dicta by Justice Sutherland in *Curtiss-Wright*, that the Chief Executive inherits from the English monarchy, or from any other source, some extra-constitutional capacity, is a curiously Tory position to be voiced within a democratic state.

As you requested, I have edited my oral testimony before your Subcommittee and I am enclosing a copy. I am also enclosing a revised draft of my formal written testimony. I would appreciate it very much if this version, rather than the copy I left with you, could be included in the record. Thank you.

Sincerely,

Edwin B. Firmage

EBF:jmm
Encls: (2)

October 7, 1988

RESPONSES OF PROF. RONALD D. ROTUNDA TO QUESTIONS ASKED BY SENATOR HELMS

The Honorable Jesse Helms
United States Senator
United States Senate
Committee on Foreign Relations
Washington, D.C. 20510-6225

Re: Special Subcommittee on War Powers, Hearings on the War Powers Resolution on September 20, 1988

Dear Senator Helms:

After my appearance you sent me and the other members of our panel some written questions that you requested we answer. I am enclosing my responses.

First, are we talking law or politics when we discuss the War Powers Resolution?

> I believe that we are talking politics. Courts have no legal standards by which to judge, for example, when hostilities become "imminent" enough into to bring into play the War Powers Resolution. There is a natural tendency in our society to try to convert political issues into clean, easily decided legal questions. As Felix Frankfurter astutely noted in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594-95 (1952): "Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle -- preferable forever -- a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: `At the first sound of a new argument over the United States Constitution and its interpretation the hearts of American leap with a fearful joy. The blood stirs powerfully in their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in

the slips, straining upon the start.'" But Frankfurter warned: "The path for this Court, it bears repetition, lies in the opposite direction."

As I mentioned during the hearing, the War Powers Act is not really an attempt by Congress to reassert its powers; rather, it is, in effect, an attempt by Congress to delegate powers to the Courts. Justice Jackson, also in the Youngstown case (343 U.S. at 654) warned that the "only Congress itself can prevent power from slipping through its fingers." (emphasis added).

Second, does the Commander-in-Chief Power (Art. II, §2, cl.1) allow the President to use force to defend and protection our national security interests and can Congress circumscribe that force when used for such ends?

History supports broad Presidential power in this area. There is very little case law directly on point, because historically the President has used his powers to defend our national security interests with Congressional acquiescence and without legal challenge (or, if there has been a legal challenge, the courts have refused to decide the issue.) To the extent that there is case law, it supports a broad presidential power. Chief Justice Marshall, in The Nereide, 13 U.S. (9 Cr.) 388, 422 - 23, 3 L.Ed. 769, 780 (1815), said: "[T]he court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics." Of course, if Congress, by use of its spending power, does not, for example, appropriate money to build a submarine, then obviously the President will not have the use of that submarine.

Third, is the War Powers Resolution in Conflict with the Commander-in-Chief Power?

The War Powers Resolution has several constitutional problems (including the Commander-in-Chief problem). Professor Thomas Franck of our panel noted various constitutional problems in his testimony.

Fourth, does Curtiss-Wright cast a constitutional shadow on the War Powers Resolution?

It certainly does.

In your fifth and sixth questions, you properly note that the Framers of our Constitution spent little time discussing the war powers, and it has only been recently that Congress has tried to assert a major role in foreign policy decisions. I certainly agree. Indeed, in Edward S. Corwin's famous book, The President: Office and Powers, 1787 -1984 (5th Rev. ed. by R. Bland, T. Hindson, & J. Peltason, 1984), it is stated: "Historically, Congress has shown no real desire to be a genuine and responsible partner in the process of making a viable foreign policy. There is no reason that the [War Powers] resolution will make it such a partner." (id. at 300-01). I also agree with your observation that Congress does have important powers it can use to check the President and the entire Executive Branch -- the spending power, the power to investigate and publicize. Our Constitutional system, however, specifically rejects a parliamentary system.

I hope that my responses have been helpful.

Sincerely,

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RESPONSES OF MORTON H. HALPERIN TO QUESTIONS ASKED BY SENATOR HELMS

MEMORANDUM

TO: Senate Foreign Relations Committee

FR: Morton H. Halperin, Allan Adler, and Gary M. Stern

RE: Questions for the Legal Panel regarding war powers posed by Senator Helms

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This memorandum answers the six questions posed by Senator Jesse Helms to the legal panel that testified before the Special Subcommittee on War Powers of the Senate Foreign Relations Committee on September 20, 1988.

1. "Is the basic problem with the War Powers Resolution political or constitutional? In other words, are talking law or talking politics when we discuss war powers?"

Answer:

The war powers enumerated and implied in the Constitution encompass both legal and political elements. It is not enough to say that war is a political issue and cannot, therefore, be dealt with through legal procedure. The Constitution itself is a legal document that set up certain rules and procedures that guide our country's political process. Congress's very function is to effectuate the general principles of the Constitution into a workable scheme so that the political process can work as intended. The War Powers Resolution does just that; it must be seen as a legal framework designed to guide the political branches during a war time situation. The fact that the President and the Congress have failed to comply with the War Powers Resolution does not undermine its legitimacy.

2. "Does the Commander-in-Chief Power, which is derived from Article II, Section II, of the United States Constitution, allow the President to use force in defending or protecting the national security interests of the United States? Can

that use of force be circumscribed in any way, when used for those particular ends?"

Answer:

The Commander-in-Chief power allows the President to use force only pursuant to the war power. The war power, Article I, Section 8, allows the President to use force unilaterally only in times of extreme national emergency, such as to defend the territory of the United States, to defend United States troops stationed abroad, or to rescue United States persons held captive abroad. All other military engagements require specific authorization from Congress.

The Commander-in-Chief power makes the President the chief military officer; it gives the President full authority to direct and control the armed forces once they have been engaged pursuant to an authorization consistent with the constitutional war power as described above.

Furthermore, the Senator's question presents an internal inconsistency. It defines "national security interests" as a "particular end." The term "national security," however, is too broad and vague to derive such specific meaning as Senator Helms intended. The national security interests of the United States encompass much more than simply the military or territorial security; it includes our economic, cultural, and political security as well. Thus, it is wholly unreasonable, and indeed unconstitutional, to ascribe to the President the unilateral power to use force any time he or she perceives a threat to the "national security" of the United States.

3. "Is the War Powers Act in constitutional conflict with the Commander-in-Chief power?"

Answer:

No. The War Powers Resolution is wholly consistent with the constitutional structure created by the Framers. That structure requires that, except in emergency and rescue situations, Congress must authorize any decision to use military force. Once authorized, or pursuant to emergency action, the President, as Commander-in-Chief, has the power to command the armed forces as he sees fit without in order to achieve the goals that the authorization mandated.

4. "If Curtiss-Wright is still good law, and the Department of State Legal Adviser assured me that it is, then does this

decision not cast a constitutional shadow on the War Powers Resolution? Doesn't the War Powers Resolution interfere in the presidential conduct of foreign relations.?"

Answer:

United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936), is indeed good law. What it says is that pursuant to congressional authorization, the President has discretionary power to act in ways that are broader than he could in a domestic matter. Curtiss-Wright is thus a case about Congress's power to delegate authority to the President and not about the President's unilateral power or about limits on the power of Congress to constrain the President.

In a passage that was ancillary to the legal ruling of the Court and is thus non-binding, Justice Sutherland asserted that there exists a

> plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution. 299 U.S. at 319-20.

Many persons have asserted that this passage gives the President exclusive power in all matters of foreign affairs. That conclusion is simply false. In the first place, Justice Sutherland states explicitly that the President's power is subordinate to "applicable provisions of the Constitution." The most applicable provision for our concerns is the one in Article I, Section 8 that states that "The Congress shall have power . . . to declare war." Thus, Curtiss-Wright clearly stands for the proposition that the President is subordinate to Congress in matters concerning the initiation of war.

Secondly, while Curtiss-Wright may give the President power "that does not require as a basis for its exercise an act of Congress," under no circumstances whatsoever does it give the President power to act contrary to or in violation of an act of Congress. Justice Jackson noted in the Steel Seizure case that at most Curtiss-Wright "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring) (emphasis added).

Accordingly, the Curtiss-Wright decision casts no constitutional shadow over the War Powers Resolution. On the contrary, the War Powers Resolution confirms the original intent of the Framers, as well as the constitutional interpretation of Justice Sutherland in Curtiss-Wright and Justice Jackson in Youngstown Sheet & Tube. The War Powers Resolution sets up a procedure that when followed by the President puts him on the highest constitutional footing, and when violated by the President puts "his power at its lowest ebb." Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (quoting Jackson, J., concurring, in Youngstown Sheet & Tube v. Sawyer, 343 U.S. at 638).

The War Powers Resolution concerns only the power to engage U.S. armed forces in hostile situations. Therefore, it does not affect the President's foreign affairs power in all other matters not involving the use of military force.

5. "The Founding Fathers spent very little time discussing the war powers. They knew what they meant. It did not seem to be a serious political issue until we allowed ourselves to get kicked around in Vietnam. Why did it take nearly 200 years for the Congress to start asserting a major role in foreign policy decisions involving the use of force? If the Founder's intent is so clear to present-day critics of the President, why wasn't that intent clear to their own generation or to the ones immediately following them?"

Answer:

The Founding Fathers did indeed know what they meant about the war powers when they drafted the Constitution. They meant to keep from the President the type of exclusive military power that the King of England possessed in the late 18th century. They meant that Congress should have the power to determine when the country shall go to war in all but emergency situations, such as "to repel sudden attacks."

Admittedly, Congress has been reluctant to assert its own constitutionally authorized power in this area. But neither its own acquiescence nor presidential usurpation eviscerates the plain meaning of the Constitution. The fact that it may have taken Congress nearly 200 years to wake up and assert its own war powers does not undermine the legitimacy of the law. After all, it took Congress nearly 150 years to understand and utilize fully its interstate commerce power.

6. "As I read and understand the Constitution, the appropriations power--and the congressional oversight power--are the substantial means by which the Congress participates in foreign policy determinations involving the use of American forces. Surely, we can turn off the

financial tap. Surely, we can investigate and interrogate. To go any further is to create a parliamentary-type system, which may be what my colleagues want to do. The American people, however, had something to say about parliamentary systems in 1776. What are your thoughts on this?"

Answer:

The appropriations and oversight powers of the Congress are important elements of Congress's overall power in decisions involving the use of force, but they are by no means the only, or even the primary, elements. In addition to these two powers, article I, section 8 of the Constitution specifically enumerates to Congress the power to "provide for the common defense"; "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years"; "to provide and maintain a navy"; "to make rules for the government and regulation of the land and naval forces"; "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions"; "to provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress"; and, of course, "to declare war, grant letter of marque and reprisal, and make rules concerning captures on land and water."

All of these powers collectively comprise Congress's war power and compel its role in any decision to use military force. Of course, the Constitution also gives the President powers in this area. Together, the President and Congress share the war power and must always work together on any decision to initiate military action. The War Powers Resolution is simply a procedural device to effectuate such decisions. While the law may be flawed in certain respects, its basic intent and purpose is both constitutional and politically practical. Any effort to amend the War Powers Resolution should strive only to make its original intent more workable.

RESPONSES OF ROBERT F. TURNER TO QUESTIONS ASKED BY SENATOR PRESSLER

Questions for the Record from Senator Pressler for Robert F. Turner:

1. Chairman Biden asked you whether the President had independent power under the Constitution to send armed forces into Nicaragua or the Philippines without further approval from Congress. I had a sense that you did not finish your response to these questions. Would you like to say anything further on the issue for the record?

These are very difficult questions to answer "yes" or "no," because they involve factual situations about which honorable people may disagree. They are also very sensitive issues, because assurances given to Congress that it will have a constitutional check on executive action may at the same time reduce the effectiveness of American efforts to deter armed international aggression and increase the likelihood of Congress being called upon to authorize the use of armed force.

The two hypotheticals are fundamentally different. Under international law, the United States does not have a legal right to use or threaten the use of armed force against the Philippines because that Government will not agree to terms we can accept on continued American access to Subic Bay or Clark Field. Should the President decide that it were desirable to "break the law" by "invading" the Philippines—a prospect I find so unlikely as to be almost inconceivable—under our Constitution he would first need to obtain the formal approval of both houses of Congress. Even a formal "declaration of war" would not make the aggression any more "legal" under international law. Since article VI of the Constitution provides, *inter alia*, that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," both the President and Congress would in my view be "lawbreakers" were they to launch such an aggressive war.

The Nicaragua situation is more complex. Although Chairman Biden might disagree, there is in my view overwhelming evidence that Nicaragua has been engaged in armed aggression against its neighbors in flagrant violation of article 2(4) of the U.N. Charter and other provisions of international law. (For my views on this subject, see R. Turner, *Nicaragua v. United States: A Look at the Facts*, 1987.) Congress has determined as a matter of law that Nicaragua "[h]as committed and refuses to cease aggression in the formed of armed subversion against its neighbors in violation of the Charter of the United Nations . . . ." (International Security and Development Cooperation Act of 1985, sec. 722(c)(2)(vi), Pub. L. 99-83, 99 Stat. 149.) Article 51 of the U.N. Charter permits the use of necessary and proportional armed force by victims of armed aggression and by other states acting at the request of such victims. El Salvador has issued a sworn affidavit saying that it is the victim of armed aggression from Nicaragua and has asked the United States for assistance.

Article 3(1) of the Inter-American Treaty of Reciprocal Assistance (Rio Pact), which, like the U.N. Charter, is a part of the "supreme Law of the Land" pursuant to article VI of our Constitution, provides that the Parties "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States . . ." Although article 18 of the Charter of the Organization of American States prohibits intervention "directly or indirectly, for any reason whatever, in the internal or external affairs of any other State," article 22 expressly provides that "[m]easures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in articles 18 and 20." At the Ninth Meeting of Consultation of Ministers of Foreign Affairs of the OAS in July, 1954, the OAS took the position that armed force could be used "in either individual or collective form" in response to Cuban intervention in Venezuela—which was clearly of lesser magnitude than Nicaraguan intervention has been in El Salvador.

The President's duty to see that the "laws" (including Treaties) are "faithfully executed," combined with his power as "Commander in Chief" and his general "executive" power under article II, section 1, of the Constitution, would certainly support the taking of some actions against Nicaragua under such circumstances without requiring prior congressional authorization. As your next question anticipates, it is arguable that the President could go so far as to send in thousands of U.S. combat troops to help bring an end to the aggression. Except in the most extreme case, I would *strongly* urge the President to consult carefully with Congress and obtain formal approval prior to such a decision. However, I am not prepared to tell Nicaragua (or any other international aggressor) that if their aggression increased the American President would be powerless to respond effectively under the U.S. Constitution.

2. Did I understand you to say at one point that the President might "arguably" be able to use armed force in defense of a treaty partner without first having to obtain formal approval of both houses of Congress?

Yes, I did make such a statement. However, I should stress that for policy reasons I would not personally embrace such an argument. I think it is very important for the President to consult closely with the Congress and—except in the most extreme emergency—to seek affirmative statutory advanced approval from Congress of any major commitment of U.S. combat forces to large scale and sustained hostilities abroad (even in situations where such approval might not be clearly required by the Constitution).

The legal argument runs like this. It is clear from the records of the Federal Convention of 1787 that one of the reasons James Madison moved to change the draft language empowering Congress "to make war" to the more restricted power "to declare war" was to "leav[e] . . . the Executive the power to repel sudden attacks." (See page 52 of my prepared testimony, text at note 173.) Chief Justice John Marshall said in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), that "[o]ur Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself, without the aid of any legislative provision." Even Professor Henkin—normally a strong advocate of legislative powers in foreign affairs—has observed: "It has often been said, too, that the United States cannot declare war by treaty; only by resolution of Congress, though it is not clear why that power is denied to the treaty-makers when other enumerated powers of Congress are not." (L. Henkin, *Foreign Affairs and the Constitution* 159-60 (1972)). Certainly Henkin is correct in observing that many of the other foreign affairs powers vested in Congress by article I, section 8, of the Constitution are routinely regulated as well by treaty.

But in the case of an armed attack against a treaty partner, the case for the President is actually stronger. Perhaps a distinction should be drawn between agreements like the NATO Treaty and the Rio Pact on the one hand, and arguably more limited commitments like the now-defunct SEATO Treaty. The NATO Treaty provides in article 5:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Similarly, article 3(1) of the Rio Pact provides:

> **The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.**

In contrast, the SEATO Treaty provided in article IV:

> **Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it would in that even act to meet the common danger *in accordance with its constitutional processes.*** [Emphasis added.]

As I explained in my prepared testimony (pages 15-16, text at note 36), the Senate sponsors of the Gulf of Tonkin Resolution thought they were satisfying the "constitutional processes" requirement of the SEATO Treaty in enacting their joint resolution. The conventional wisdom is that such treaties—and, arguably, NATO and the Rio Pact, too—do not authorize the President to commit U.S. armed forces to "war" without first obtaining the approval of Congress.

There is legislative history pertaining to such treaties which arguably supports both sides. When the NATO Treaty was before this Committee in 1949, Secretary of State Acheson was asked whether the treaty could place the United States in a state of war and responded: "Under our Constitution, the Congress alone has the power to declare war." Four years earlier, however, Senator Arthur Vandenberg (who chaired this Committee when the NATO Treaty was approved) proposed in a speech in Detroit "that American shall sign up now with all her major allies, to join in a hard-and-fast treaty, solemnly ratified by the Senate of the United States, which pledges our constant armed cooperation, instantly and peremptorily available through the President of the United States without further reference to the Congress, to keep Germany and Japan out of piracy for keeps." (91 *Cong. Rec. App.* A 490 (1945).

The legal argument which could be made is as follows: (1) By the Constitution the President is obligated to see that the "laws"—including "treaties," which under article VI are a part of the "supreme Law of the Land"—are "faithfully executed." (2) Although the affirmative approval of both houses of Congress is necessary to "declare war," it is clear that the Founding Fathers intended to leave the President free to "repel sudden attacks" (presumably, attacks "against the United States"). (3) By treaty solemnly ratified with the advice and consent of the Senate, as a matter of "law" an armed attack against certain treaty partners is to be considered an attack against the United States. (4) Even if such a treaty makes reference to acting "in accordance with its constitutional processes," the President is empowered to respond "offensively" to such an attack because, under our Constitution, no "declaration of war" is necessary in response to an attack on the United States by a foreign aggressor.

Now, before members go out and seek to "clarify" this ambiguity, I would stress that it is not my preferred interpretation of the Constitution or of our treaty obligations. With the exception of President Truman in Korea, American presidents have not asserted a power to commit U.S. armed forces to sustained large-scale hostilities abroad in the absence of statutory approval. In my very strong view, any effort by Congress to "clarify" this issue will serve to further weaken America's ability to deter aggression and would further increase the likelihood of war.

The fact is the nation has conflicting objectives in such situations. On the one hand, we don't want our presidents to be completely free to go around the world launching adventurist "wars" to deplete our resources and expend the lives of our young men and women. At the same time, we do want potential foreign aggressors to take us seriously and to fear that armed aggression—particularly against those nations we have through our solemn treaty process pledged our efforts to defend from aggression—will lead to an *effective* American response. History suggests that efforts by Congress to tie the President's hands in full view of the world in such circumstances makes aggression more rather than less likely (witness such measures as the "neutrality acts" of the 1930's, and the more recent "Clark Amendment" which was followed by the deployment of upward of 50,000 Cuban soldiers to Angola). Despite some misinformation and ignorance about what really occurred in Vietnam, the "system" "ain't really broke." The kind of "war" the Founding Fathers were seeking to constrain has now (thank God) been outlawed by the U.N. Charter, and presidents have not exhibited a strong desire to initiate aggressive "wars" in recent years against the will of Congress (or, for that matter, with the approval of Congress). Thus, at present, the deed to further tie the President's hands seems far less critical than the need to deter international aggression.

With respect to NATO, furthermore, the legal issue is largely academic. In reality, U.S. forces are deployed in such a manner as to persuade the Soviet Union and the Warsaw Pact that virtually any likely major attack on Western Europe will inevitably involve an attack on U.S. armed forces based in Europe—and even the War Powers Resolution recognizes in section 2(c)(3) that "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised . . . pursuant to . . . attack upon the United States . . . or its armed forces."

My own preference—which, as I said, is motivated as much by policy as by legal considerations—was summed up well by Alexander Hamilton in a May 17, 1798, letter to James McHenry: "In so delicate a case, in one which involves so important a consequence as that of war—my opinion is that no doubtful authority ought to be exercised by the President." But at the same time, I would do nothing to reassure foreign aggressors that the American President lacks the constitutional power to respond effectively to armed international aggression. If you do, you will take one further step toward encouraging aggression and making long-term world peace less likely.

3. Mr. Glennon seemed to rely very heavily upon the concurring opinion of Justice Robert Jackson in the case of *Youngstown v. Sawyer* (the so-called "Steel Seizure case"). You suggested that it was not a "foreign affairs" case. Would you like to comment further on that case?

Reliance on the Steel Seizure Case is normally one of the characteristics of a lawyer who does not understand the special nature of foreign affairs under the Constitution. At issue was whether the President in time of international crisis (the Korean conflict) could seize the private property of U.S. citizens not only without authorization from Congress but contrary to a clearly established legislative regulatory scheme. The case was decided by a six to three vote, with six separate opinions supporting the holding. Speaking for the court majority, Justice Black explained that "theater of war" was an "expanding concept," but the Court could not with faithfulness to our constitutional system hold that the Commander in chief of the Armed Forces has the ultimate power as such to *take possession of private property* in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." (343 U.S. 579, 587 (1952)(emphasis added)).

The Constitution places special value on private property. The Fifth Amendment, for example, states that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." Domestic cases involving private property are quite different from disputes over the powers of the President and Congress in dealing with foreign governments. Virtually every first year law student is required to study Justice Jackson's concurring opinion in the Steel Seizure Case as the classic description of *domestic* separation of powers. But even Justice Jackson emphasized the distinction between using power inside the United States (in the absence of a rebellion) and commanding the force of the nation in dealing with the external world. He wrote:

> **We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain *his exclusive function to command the instruments of national force,* at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.**

Id. at 645 (emphasis added).

Thus, Mr. Glennon is in error when he seeks to use the Jackson concurring opinion to argue that Congress may usurp the Commander in Chief power by passing laws instructing the President where he may and may not deploy the nation's armed forces. Jackson clearly recognized that the "command" of the nation's military forces—a term which certainly must include the power to decide where and how they are deployed to defend the nation against aggression and protect other national interests—is by the Constitution vested *exclusively* in the President.

In volume one of his *A Commentary on the Constitution of the United States*, Professor Swartz noted:

> **In the Case of Steel Seizure . . . , the power exerted by the Government touched the internal economy of the country. It was, in Justice Jackson's neat phrase, "turned inward, not because of rebellion, but because of a lawful economic struggle between industry and labor." A different situation is presented where governmental authority is turned against the outside world for the security of our society.**

1 B. Swartz, *A Commentary on the Constitution of the United States* 96 (1963).

Professor Louis Henkin, who testified earlier before this subcommittee and is generally viewed as an advocate of legislative power, has similarly written in *Foreign Affairs and the Constitution* (p. 341 n.11): "*Youngstown* has not been considered a 'foreign affairs' case. The President claimed to be acting within 'the aggregate of his constitutional powers,' but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power . . . ."

This distinction has also been recognized by the judicial branch. In *Atlee v. Laird,* 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom. Atlee v. Richardson,* 411 U.S. 911 (1973), a federal district court stated:

> **Several important factors must be considered in order to understand the impact of this decision [*Youngstown*]. . . . [A]lthough the executive had argued that the seizures were related to the war power, in essence the President was obtruding into the field of labor relations, an area traditionally assigned to the Congress. Even thought the nationalization and the Court's injunction of the President's action might have had some, although indirect, effect on the foreign relations of this country, such import, if any, would have been clearly minimal compared to the drastic change which nationalization by the President would otherwise have brought about in the free enterprise system.**
>
> Contrasting the *Steel Seizure* case with *Curtiss-Wright*, for example, clearly reveals the different set of considerations raised by foreign relations cases. . . . The Constitution commits to the President all the foreign policy powers of this country with the exception that the Senate must approve treaties.

Id. at 701-02.

At least four members of the Supreme Court have recognized the "domestic" nature of the Steel Seizure Case. Justice (now Chief Justice) Rehnquist, in a concurring opinion joined by Chief Justice Burger and Justices Stewart and Stevens, wrote in the case of *Goldwater v. Carter*:

> The present case differs in several important respects from *Youngstown Sheet & Tube Co. v. Sawyer* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs.

444 U.S. 996, 10004-05 (1979).

Thus, when Mr. Glennon seeks support in Justice Jackson's concurring opinion in *Youngstown* to argue that Congress has a general legislative power to regulate foreign affairs (or, in this instance, to direct how the President may exercise the Commander in Chief power), his confidence is simply misplaced. With all due respect, he simply does not understand this area of the law.

4. Senator Adams argued that the power to "declare war" means the power "to decide upon war and peace," and thus it is proper for Congress to at least have a veto over presidential decisions to commit U.S. forces to situations in which hostilities are reasonably likely to occur. Do you find this argument persuasive? If not, explain why.

I do not question the Senator's good faith in embracing what at first glance might seem like a very reasonable position; but he is mistaken. As Hamilton noted (see my prepared testimony, p. 46, text accompanying note 158), "the power of the Legislature to declare war" was an "exception . . . out of the general 'executive power' vested in the President," and thus was intended "to be construed strictly, and ought to be extended no further than is essential to [its] execution." Jefferson and Madison took a similar view on interpreting "exceptions" to the general grant of "executive" power—and Jefferson at least clearly viewed the congressional "veto" over a "declaration of war" to be such an exception.

What the Founding Fathers were seeking to do was to insert a "check" against Executive adventurism in the form of "war." The President was given unconstrained discretion to deploy whatever military force Congress created to defend the nation and protect its interests, *except* that if he concluded it were desirable to launch an aggressive or offensive "war" (the kind of hostilities for which a "declaration of war" would have been appropriate), he was required first to obtain the affirmative approval of both houses of Congress. This was a very important, but also very limited, check on the Commander in Chief power. The debates that the *Federalist Papers* are replete with references to the inability of legislative bodies to manage military affairs, and the theory embraced by Senator Adams would lead precisely to that end.

Once it is established that Congress may override the President's decision regarding any military deployment which might increase the likelihood of a "war" resulting from foreign attack (which is clearly what he is talking about in the Persian Gulf situation, since the President has neither "declared war" nor committed an "act of war" against any other State), virtually *every* military deployment would be subject to congressional control. In retrospect, it is clear that a significant factor in the North Korean decision to invade South Korea in 1950 was the *withdrawal* of American forces from South Korea the previous year. As you may recall, it was in part because of that experience that Congressman Paul Findley denounced President Kennedy in 1961 for *refusing* to send combat troops to protect South Vietnam (see my prepared testimony, p. 13, text accompanying note 31). By Senator Adam's theory, if Congress concluded that not sending combat troops to Vietnam would increase the likelihood of "war," it would be able to compel the President to send such forces to Vietnam. (And, arguably, since certain types of forces, armaments, and deployments would be more likely to deter aggression and "keep the peace" than others, Congress could also make the final decision on which units to send and on which hill each platoon should be deployed—particularly in areas where the United States might have a treaty obligation to come to the defense of a victim of foreign aggression.)

The Founding Fathers did not vest Congress with the power "to decide upon war or peace." Congress was given instead a "veto" over a decision by the President, when the nation is at peace, to transform it into a state of "war" by attacking a foreign state (or by "declaring war.") As much as they might have liked to have included a power of Congress to "veto" a decision by a foreign country to place the United States in a state of "war" either by attacking us or declaring war against us, they were not so foolish as to believe that was possible. Statutes like the neutrality acts of the late 1930's, the War Powers Resolution, and the Clark Amendment barring U.S. assistance in Angola, illustrate that the Congress can indirectly make aggression more attractive to an enemy by neutralizing the President's ability to deter; but no enactment by the U.S. Congress can with any certainty *prevent* a foreign aggressor from launching a war against either the United States or its most important allies.

Beyond the limitation on launching an offensive war, the President's power as Commander in Chief to deploy the nation's military force as in his discretionary judgement will best secure peace for the nation is *exclusive* and may not be limited in any way by Congress. This is a vitally important power which by miscalculation—whether resulting from a failure to deploy or from a decision to deploy—can lead to war through a foreign attack. But the President was thought by the Founding Fathers better able to make such decisions, and he was given the power in article II, section 2, of the Constitution. Congress may only modify that arrangement by participating in the amendment of the Constitution.

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